

ALTERNATIVE AND HYPOTHETICAL PLEADINGS

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After a system of law passes its formative period, it becomes necessary for it to relinquish many formalities which afford a battleground for attorneys at the expense of their clients, but which do not aid in settling disputes on the merits of the issues involved. Notwithstanding this necessity, there is always an active opposition on the part of some members of the legal profession against any change, whether it be advantageous or otherwise. "The fear of dishonoring the law of pleading by making it no art, has led to the retention of many a rule preventing the determination of causes upon their merits, and serving no useful purpose other than to give to the law of pleading the appearance of artistic symmetry."¹ The ends of justice, however, must prevail over the artistic requirements of the adjective law. One need but glance through the history of procedure in Anglo-American law, and the uselessness of many formalities will immediately become apparent. For it is a fact that the legal system is now functioning at least as effectively without those formalisms which in the recent past were regarded as the *sine qua non* of proper litigation, moreover avoiding many disputes over matters extraneous to the questions at issue. In fact, so great has been the progress in the simplification of the adjective law,² that it is unnecessary to expostulate further on this general topic; one must rather turn to specific problems. One of these problems requiring attention is the state of the law concerning alternative and hypothetical pleadings. Both have been regarded with disfavor by the courts. At common law both were considered demurrable on the ground of uncertainty, and while the rule has been greatly relaxed with reference to the former, it is still practically unchanged with reference to the latter.

ALTERNATIVE PLEADINGS

The objection that alternative pleadings are uncertain, and hence demurrable, may be answered by the propositions: first, that it is not at all evident that the presence of the disjunctive is a mark of uncertainty, and second, that in many cases the ends of justice can best be attained by allowing pleadings in the alternative. Certainty in pleading is necessary in order to apprise the adversary of the issues involved, that he may be prepared to defend his cause. If that is the reason for the requirement of certainty, then it must be construed as a requirement not of absolute certainty (if there is such certainty in general matters

¹ Scott, *Fundamentals of Procedure in Actions at Law* (1922) 145.

² "It is gradually coming to be seen that the procedural law does not exist as an end in itself, but as a means of determining and enforcing with reasonable speed and at reasonable cost the substantive right of the parties." *Ibid.* 165-166.

of litigation), but of certainty sufficient for the purposes of the particular case. The test whether an alternative pleading is good or bad should not be some general imaginary uncertainty associated with the word "or," but whether the adversary is *actually* able to understand the pleading and make answer. Thus if an indictment recites a forcible entry into "two closes of meadow, or pasture," the disjunctive does not in any way work to the prejudice of the defendant, there is nothing uncertain as to the essential elements of the indictment, and there is no reason why it should be held bad. Yet, the court held it void for uncertainty.³ So also it was held that a complaint alleging that the defendant "*scripsit, fecit et publicavit, seu scribi fecit et publicari causavit,*" was bad for uncertainty.⁴ The court in that connection said that "writing and causing to be wrote are two different acts." That undoubtedly is true, but it is also true that the difference has no effect on the issues involved, nor to the liability of the defendant. Furthermore, the evidence would surely cure the defect, if that is a defect requiring correction. Again, if the plaintiff charges the defendant with neglect by which a note, on which suit is brought, "was lost or destroyed," he undoubtedly states a definite cause of action, but in *Stone v. Graves*⁵ the court held the allegation bad on demurrer. In *Commonwealth v. Abell*,⁶ an action for breach of covenant, the plaintiff alleged that the defendant "either converted the slave to his own use or negligently suffered her to escape," and the court held that the pleading was bad, because "The main object of pleading is to apprise the adversary of the charge made, or the point of defense relied on; and to which he is notified to direct his attention." Clearly, in this case there is nothing uncertain, and the defendant can plead to the two alternatives just as well as he could have pleaded had they been stated separately. Another reason assigned by the court for holding the alternative pleading bad, is that the measure of damages might be different for the one and the other charge. Whether as a general rule that is a valid reason for holding some alternative pleadings void is in itself questionable. At any rate, the rule has no application in the cases at hand. In *Jamison v. King*⁷ the court in discussing the allegation made alternatively said: "Defendants were entitled to a distinct statement of facts by plaintiff claimed to exist; and it is no answer to an objection to averments made alternatively, to say that if either of the averments is true, the plaintiff has alleged a cause of action."

Nor are these decisions entirely a matter of past centuries. In *Macurda v. Lewiston Journal Co.*,⁸ the plaintiff alleged among other

³ *Spear's Case* (1632, K. B.) 2 Roll. Abr. 81.

⁴ *King v. Brereton* (1725, K. B.) 8 Mod. 328, 330.

⁵ (1843) 8 Mo. 148.

⁶ (1831) 29 Ky. 476, 480.

⁷ (1875) 50 Calif. 132, 136.

⁸ (1908) 104 Me. 554, 555, 72 Atl. 490.

things that the defendant "did compose, print, publish, and circulate, or caused [the libel] to be composed, printed, published, and circulated." The court ruled that the pleading was bad on general demurrer. Also in *Cohn v. Graber*⁹ the complaint alleged that the damages were caused through the carelessness of the defendant in that "he caused or allowed and permitted the sprinkler system on the premises to become, be and remain out of repair and in a defective and imperfect condition . . ." and the court ruled that since the allegation was in the alternative, it resulted in no allegation whatever.

It may fairly be said that in none of these cases is there any uncertainty which would have prejudiced the defendant had he answered or demurred to each of the alternatives as if they were separately stated. He could as well have defended his case without putting the plaintiff to the task of amending his pleading. And if the defendant is laboring under the delusion that it helps his case to put the plaintiff to as much inconvenience as possible, the courts, in the interests of justice, should not encourage such types of litigation.

But there is still another side to the problem of certainty, which is often overlooked, and that is the degree of certainty on the part of the pleader himself. Here again, if we take into account matters of psychology and environment, we cannot require absolute certainty. In fact, where there exists a high degree of certainty, the parties in most cases settle out of court. The courts must recognize the fact that there is bound to be some uncertainty on the part of the pleader. His certainty as to each of the alternatives may be affected in numerous ways and by numerous factors; by his psychological processes, by the physical environment at the time of the event, by lapse of time, by the circumstances of the case, and finally by the uncertainty of the law. Especially do the last two types of factors afford good grounds for alternative pleadings. The pleader may not be in possession of the facts because they are not available to him. The facts may be entirely in the control of his adversary. An allegation in the alternative may compel the latter to bring to light sufficient facts which would determine whether he is liable in one way or another, or perhaps both. Again, we must recognize the fact that, while we claim that the law is a definite and determined system and that given a group of facts you can always "find" the rule of law, actually a debate on the part of legal talent is necessary to formulate the rule, after which it rests with the court to decide for the plaintiff or the defendant. So far as the parties themselves are concerned it is *presumed*, contrary to fact, that they know the law. The best they can do, however, is to apply for advice to the lawyers; that is as far as they can go in defending their rights in this complicated social structure. And if there is an honest doubt on the part of counsel whether he should proceed on one theory or on another,

⁹ (1922, 1st Dept.) 200 App. Div. 264, 194 N. Y. Supp. 233.

he has no choice but to plead in the alternative. To deprive him of this privilege would mean to punish the client for living in a complex world, to divest him of the right to litigate his cause with reasonable certainty, in effect to prevent him from stating the truth, and to cause him rather to speculate on the judicial machinery. In most of these cases the pleader is compelled to make his statements in the alternative rather than state them separately, and from the standpoint of his position there is greater certainty in the alternative statement. Certainty on the part of the pleader is by no means an unimportant element in pleading, especially if we consider the fact that in many jurisdictions the allegations must be accompanied by an affidavit. The pleader may not be able to swear as to the truth of either of the alternatives taken separately, but he may be able to take an oath on both in the alternative. Of course he may state the allegation separately on information and belief, only to encounter still further difficulties in pleading, for in only a few jurisdictions are such pleadings permissible, and in those in only a limited class of cases, as for example, where the pleader by the nature of his position or office cannot have direct knowledge of the facts.

Another possible solution that may be suggested is to make the pleader state his allegation in separate alternative counts. If the pleader wishes to allege two distinct causes of action or two distinct pleas in the alternative, the general rule should apply, i. e. he should state them in separate counts. Just what constitutes a single cause of action has been the subject of much controversy. The various definitions of the term, and their historical development have been discussed by Sunderland in his article on *Joinder of Actions*,¹⁰ hence we shall omit the consideration of the same from our present discussion. Suppose A alleges that B injured him while negligently operating his automobile, and wishes to claim both compensatory and punitive damages. If we take a narrow construction of the term "cause of action," we should come to the conclusion that there are involved two separate and distinct causes of action, which should be pleaded in separate counts. The difficulty begins when the pleader wishes to allege the facts of one cause of action or of one plea in the alternative. At common law and under the Statute of 4 Anne¹¹ the pleader could state his allegations in as many counts as he saw fit in order to meet the possible results of evidence. The evils resulting from this type of pleading require no comment in this connection. The rule under most of the codes at present is that restatements of the same cause of action or plea in different counts are not permitted, unless it would be clearly inequitable to confine the pleader to a single count. Undoubtedly, if pleading in the alternative is not allowed, and by the nature of the case the pleader is compelled to make his allegations in the alternative, there is sufficient reason for his pleading the same cause of action or plea

¹⁰ (1920) 18 MICH. L. REV. 571.

¹¹ (1705) 4 Anne, c. 16, sec. 1.

in two or more different counts. Hence, if we adopt the view that B, in injuring A, invaded a single primary right and therefore gave rise to a single cause of action, A should nevertheless be allowed to plead his cause of action with alternative grounds of relief. And so it was held in a number of cases.¹²

Assuming that the pleader may make his averments in a number of counts, it still does not follow that he may or should be compelled to do so.¹³ To adopt such an arbitrary rule in the case of alternative pleading would be to presume first, that pleading in the alternative is a fault, and second, that the alternative pleadings in separate counts will then meet the objections. That alternative pleading *per se* is not a defect has already been demonstrated. The remedy, if there is need for one, is not satisfactory, for the objections raised against alternative pleadings on the ground of uncertainty may with equal force be maintained against alternative counts. The opponent may claim that he is still at a disadvantage because he is not informed on which of the alternative counts the pleader relies. If the pleader omits the alternative "or," then he encounters the difficulties already discussed. If anything, this proposition, to compel the pleader to state his allegations in separate alternative counts, illustrates the fact that the objections to alternative pleadings as such are imaginary, they are objections to the word "or" rather than to the pleading itself. If the adversary can answer to alternative counts, there is no reason why he cannot answer to the same matter when stated in one paragraph.

Within the past fifty years, however, there has been a gradual tendency toward a more liberal treatment of the alternative pleading. This has been brought about partly through legislative enactment, partly through judicial rules and interpretations. Furthermore, a distinction has arisen between pleading in the alternative as to parties and pleading in the alternative as to subject matter. It is difficult to see a difference in principle between these instances of alternative pleading; the difference is entirely historical. At common law only persons having unity of interest could be joined as parties plaintiff or defendant. And so in *Oglesby's Sureties v. State*¹⁴ the State not having sufficient evidence to determine which of two sets of sureties was liable, could not maintain action against both in the alternative. And in *Casey Pure Milk*

¹² *Spotswood v. Morris* (1904) 10 Idaho, 129, 77 Pac. 216; *Whitney v. Chic. & N. W. Ry.* (1870) 27 Wis. 327; *Chlorosciel v. N. Y. C. & H. R. R. R.* (1916, 2d Dept.) 174 App. Div. 175, 159 N. Y. Supp. 924.

These cases, however, do not throw direct light on the problem at hand, since it does not appear from the reports that the separate counts were stated in the alternative.

¹³ *Payne v. N. Y. C. & W. R. R.* (1911) 201 N. Y. 436, 95 N. E. 19.

¹⁴ (1889) 73 Tex. 658, 11 S. W. 873.

¹⁵ (1913) 124 Minn. 117, 144 N. W. 450; 51 L. R. A. (N. S.) 640, note.

*Co. v. Booth Fisheries Co.*¹⁵ the Court was of the opinion that without legislative provision parties may not be joined in the alternative.

After 1873 and before 1896, the rules of the Supreme Court of Judicature provided that all persons might be joined in one action as plaintiffs¹⁶ The courts, however, robbed the provision of its effect by interpreting it to cover only that class of cases where a number of plaintiffs claim relief in one and the same cause of action but not where there is a joinder of causes of action.¹⁷ On October 26, 1896, the rule was amended to read as follows:

"All persons may be joined in one action as plaintiffs, in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative, where if such persons brought separate actions any common question of law or fact would arise; And judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to. . . ."

At first the courts were inclined to interpret the rule strictly, but the tendency at present is toward a more liberal interpretation. As far as our present problem is concerned, it is to be noted that in England parties plaintiff may be joined in the alternative. It is also permitted at present in New Jersey by sections 4 and 5 of the 1912 Practice Act and in New York by section 209 of the Civil Practice Act of 1920. In both cases Order XVI, r. 1, of the Supreme Court of Judicature has been adopted practically *verbatim*.

Pleading in the alternative as to parties defendant has had a more extensive and more interesting development. The Judicature Act of 1873 expressly provided:¹⁸

"Where in any action the plaintiff is in doubt as to the person from whom he is entitled to redress, he may, in such a manner as may be prescribed by Rules of Court, or by any special order, join two or more defendants to the intent that in such action the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between all parties to the action."

Accordingly the rules of the Supreme Court prescribed¹⁹ that

"All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative. . . ."

But here also, before 1896, the courts interpreted the rule to involve only cases brought against the defendants on the same cause of action.²⁰ In other words, the rule was not given complete effect for over twenty

¹⁵ Order XVI, r. 1.

¹⁷ *Smurthwaite v. Hannay* [1894, H. L.] A. C. 494.

¹⁸ 36 & 37 Vict. c. 66, Schedule, sec. 13.

¹⁹ Order XVI, rr. 4, 7.

²⁰ *Sadler v. Great W. Ry.* [1896, H. L.] A. C. 450.

years, and the change came not through any alterations of this rule but through the amendment of an independent rule, Order XVI, r. 1, relating to parties plaintiff. Since October 26, 1896, rule 4 has been fairly uniformly interpreted to apply to all cases where a plaintiff or plaintiffs claim to be entitled to relief in respect of or arising out of a set of circumstances involving a common question of law or fact. Thus in *Bullock v. London General Omnibus Co.*²¹ the plaintiff brought action for personal injuries charging the defendants jointly with negligence, and alternatively that she had suffered such injuries by the separate negligence of each of them. The Court of Appeal held that after verdict and judgment it was too late to raise the question of joinder as involving jurisdiction when the appellant was not attacking the judgment but only the award of costs. The court, however, went on to distinguish the *Smurthwaite* case and to approve *Sanderson v. Blyth Theatre Co.* [1903] 2 K. B. 533, holding that in case of a contract a joinder such as this was good.

The effect of bringing action against defendants in the alternative is similar to that of an interpleader in equity. If after the plaintiff has introduced his evidence it appears that he has not made out a *prima facie* case against one or some of the defendants, he is not non-suited as to that defendant or defendants until all the evidence is in, for each of the defendants may disclose evidence which would prove the others liable.²²

In this country the rule as to joining defendants in the alternative has been adopted in five jurisdictions. Section 115 of the rules under the Practice Act of Connecticut, which is section 155, Practice Book of 1922 (p. 278), provides that "persons may be joined as defendants against whom right to relief is alleged to exist in the alternative, although a right to relief against one may be inconsistent with a right to relief against the others."²³ The English rule was in substance adopted in New Jersey,—section 6 of the 1912 Practice Act. Sections 211 and 213 of the Civil Practice Act of New York (1920) reproduced *verbatim* Order XVI, rr. 4, 7, of the English Supreme Court Rules. In Rhode Island the English rule was in substance adopted by statute in 1876, and in section 20, ch. 283 of the Revision of 1909. But the section reads: "Whenever in any action the plaintiff is in doubt as to the person from whom he is entitled to recover, he may join two or more defendants with a view of ascertaining which, if either, is liable . . ." The section says nothing as to joining defendants in the alternative. The courts, however, have interpreted the provision to allow joinder of defendants in the alternative, but in *Besharian v. R. I. Co.*²⁴

²¹ [1907, C. A.] 1 K. B. 264. See also *Re Beck* (1918, C. A.) 118 L. T. R. 629, and *Payne v. British Time Recorder Co.* [1921, C. A.] 2 K. B. 1.

²² *Lipman v. Fox & London General Omnibus Co.*

²³ *Eames v. Mayo* (1919) 93 Conn. 479, 106 Atl. 825.

²⁴ (1918) 41 R. I. 94, 102 Atl. 807.

the court interpreted the statute to mean that the plaintiff may so join the defendants only as to counts alleging common causes of action against both defendants. In other words, the court adopted the English interpretation prior to October 1896.²⁵ In Wisconsin by section 2603 of the Wis. Sts. 1919, a rule similar to that of Connecticut has been adopted.

Whether it is necessary for the courts to rely on legislative provisions to permit joinders of defendants in the alternative, as is stated by the court in *Casey Pure Milk Co. v. Booth Fisheries Co.*,²⁶ is a debatable question. It is entirely a question of expediency in procedure, and no constitutional or other rights of the parties are invaded through such simplified procedure. While it is not an improper subject for legislation, it may well be maintained that such reforms need not spring from the Legislature. In *Braun & F. Co. v. Paulson*²⁷ the court was of the opinion that "when a plaintiff is in doubt about the facts he can establish, he can plead in the alternative, and objections on the ground of multifariousness do not receive liberal treatment at the hands of the appellate courts." In this case the court gave this decision on the ground that the objection against misjoinder of parties came too late. Obviously, if the ends of justice are best attained, as the opinion of the court indicates, through action against the defendants in the alternative, why make that depend on the accident that the defendants will not make a timely objection as to joinder of parties? And if the court can permit such joinder in this case, it can do so in any similar case, notwithstanding any objections on the ground of misjoinder of parties defendant.

The statutory development of the problem of alternative pleadings as to subject matter has been by far more extensive than alternative pleading as to parties. Some jurisdictions expressly permit pleading facts in the alternative. The rules of the Supreme Court of Judicature²⁸ now provide that either party may include in his pleadings two or more inconsistent facts and claim relief thereunder in the alternative. And the Code of Civil Practice in Kentucky²⁹ provides: "But a party may allege, alternatively, the existence of one or another fact, if he state that one of them is true, and that he does not know which of them is true."

In the main, the statutory provisions have affected alternative pleadings of subject matter indirectly rather than directly, and as a result,

²⁵ (1918) 31 HARV. L. REV. 1034; and see (1924) 33 YALE LAW JOURNAL, 328.

²⁶ *Supra* note 15.

²⁷ (1906, Tex. Civ. App.) 95 S. W. 617, 620.

²⁸ Order XIX, r. 24, and Order XX, r. 7. Also as to inconsistent pleas, see Order XIX, r. 16, and cases cited under that rule in THE ANNUAL PRACTICE, 1923.

²⁹ Sec. 113, subsec. 4. And see Conn. Practice Book, 1922, sec. 174, "The plaintiff may claim alternative relief, based upon an alternative construction of his cause of action."

the extent of the effect is not uniform throughout the various jurisdictions. As illustration of such legislative provisions the following may be taken: (a) Some codes provide that pleadings must be liberally construed with a view to substantial justice between the parties.³⁰ (b) Some codes abolish the demurrer and hence limit the objector to a motion to strike or to make more definite and certain.³¹ (c) Some statutory provisions have the opposite effect. For example, the New Jersey Practice Act, section 160, expressly prohibits pleading of subject matter hypothetically or alternatively!

Whatever else has been accomplished in the relaxation of the rule against alternative pleading, has come about through judicial decisions. In some jurisdictions the courts held that where the plaintiff does not seek recovery on two different causes of action, but merely on two combinations of facts, he may state them in the alternative. Thus in *Taylor Cotton-seed Oil & Gin Co. v. Pumphrey*³² the court said: "The plaintiffs in framing their cause of action, had the right to state facts in the alternative so as to meet the phase of the case as may be made out by the evidence. They were not seeking to recover on two different causes of action, but were seeking to recover on two combinations of facts. Either one or the other would establish the liability of the defendant in the same way." And so where the acts of negligence are alleged in the alternative, the complaint is held to be not fatally defective, in *Alabama Great Southern Ry. v. Sanders*.³³ In a personal injury action against an automobile driver, alleging that the defendant caused the injuries "either wantonly or through negligently managing the automobile" the allegation was held to be good in *Jackson v. Vaughn*³⁴ but the court was not consistent in its decision of *Kuykendall v. Edmeston*³⁵ in which case the plaintiff brought an action for the wrongful death of his intestate alleging that the defendant "wantonly, wilfully or intentionally" killed him with a gun. The court held the complaint demurrable, adding that had the word "and" instead of "or" been used, the complaint would have been good. As a matter of fact, the logical conclusion is just the reverse: if the plaintiff alleges that the defendant acted wantonly, wilfully and intentionally, he ought to be made to prove all three, i. e. wantonness, wilfulness, and intention on the part of the defendant. Whereas, if he alleges the same in the alternative, he needs to prove only one of seven possibilities involved

³⁰ For example, see Alaska, C. C. P. 1900, sec. 75; N. Y. C. P. A. 1920, sec. 275; N. J. P. A. 1912, sec. 1; Wis. Sts. 1921, sec. 2668; Colo. Comp. Laws, 1922, C. C. P. sec. 83; Calif. C. C. P. 1872, sec. 452.

³¹ N. Y. C. P. A. 1920, sec. 277; N. J. P. A. 1912, sec. 159; Ark. Dig. of Sts. 1921, C. C. P. sec. 1189; Pa. Pub. Laws, 1915, ch. 483, sec. 3.

³² (1895, Tex. Civ. App.) 32 S. W. 225.

³³ (1906) 145 Ala. 449, 40 So. 402.

³⁴ (1920) 204 Ala. 543, 86 So. 469.

³⁵ (1921) 205 Ala. 265, 87 So. 882. See also *Birmingham Ry. L. & P. Co. v. McLeod* (1913) 9 Ala. App. 637, 64 So. 193.

in his statement, i. e. wantonness, wilfulness and intention; wantonness, wilfulness but no intention; wantonness, intention but no wilfulness; wantonness, but neither wilfulness nor intention; wilfulness and intention without wantonness; intention, but no wantonness and no wilfulness; at last wilfulness but no wantonness and no intention. In other words, if we are going to insist on technicalities, why not make the technicalities logical? Some courts do realize that for the purposes of pleading the words "or" and "and" may be regarded as equivalent, or, at least, that it is not practicable to raise any issue on the use of one or the other. The New York Code provides for affidavits "on information and belief," while the California Code has a similar provision with the words "on information or belief." The court held that if the word "and" is employed where the statute requires the word "or" the affidavit is sufficient.³⁶ In *Globe v. Shute*³⁷ it was held that the complaint alleging that "the injuries and damages sustained . . . were occasioned . . . by and through the negligence of the City of Globe in having improperly constructed, caused to be constructed, permitted to be constructed, or in permitting obstructions to be placed . . ." was good. The reason assigned by the court being that the inadequacy of the drain was the gist of the matter, and that the pleader by reference to the rubbish, and so forth, accumulating in the drain, only meant to express the same thing or idea although he used the alternative "or" in expressing the thought. In other words, although the alternative "or" is used, actually there is no alternative. Such reasoning is typical in cases where the court is aware that a recognized rule would work injustice, yet for some inexplicable reason wishes to adhere to it; hence the facts are named differently and the situation is saved.³⁸

Sometimes the rule is adopted that the party may plead in the alternative, but that if he does so, he will be made to adopt and stand by the weakest of the alternatives. "The pleadings are no stronger than their weakest alternative," says the court in *Union Cemetery Co. v. Jackson*,³⁹ and in *Cohn v. Graber*⁴⁰ the concurring opinion of Justice Greenbaum was based on the proposition that the weaker of the two alternatives did not state a cause of action, and the pleader must be made to adopt the weakest of his allegations. As a corollary to this rule it is held in some jurisdictions that each alternative must state a cause of action, and that if either alternative is bad, the whole pleading is bad. Thus in *Beall v. January*⁴¹ the court held that "when a party defendant pleads matter in defense in the alternative, each of the alternatives must, by itself, if true, constitute a defense; otherwise the plea will be

³⁶ *Patterson v. Frisbie & Ely* (1861) 19 Calif. 28.

³⁷ (1921) 22 Ariz. 280, 282, 196 Pac. 1024, 1025.

³⁸ Pound, *Law in Books and Law in Action* (1910) 44 AM. L. REV. 12.

³⁹ (1914) 188 Ala. 599, 603, 65 So. 986, 987.

⁴⁰ *Supra* note 9.

⁴¹ (1876) 62 Mo. 434, 440.

bad." In *Curran v. Olmstead*⁴² the allegation was: ". . . that said bill of sale and transfer by said Percy Olmstead to said First National Bank was voluntary, and the *consideration of \$5100 is simulated in whole, or in a large measure; or, if your orators are mistaken as to said consideration being simulated, then your orators allege that the said bill of sale was made . . . to First National Bank for the purpose of hindering, delaying and defrauding his creditors, and the creditors of said Olmstead & Schewing, and the First National Bank of Anniston participated with said Percy Olmstead in said intention of hindering, delaying and defrauding said creditors.*" The court held that since the second alternative did not set out facts constituting the fraud, the whole charge was bad on demurrer. Substantially the same was held in *Mountain v. Whitman*,⁴³ but here the alternative plea was saved by the fact that the respondent's demurrer was also bad, and the court did not choose to search the record.

In some cases, however, it was held that the party pleading in the alternative may assert and prosecute both claims in the same cause of action, leaving it to the court and jury to determine to which claim, if either, he is entitled, and proof of one constitutes no abandonment of the other. In *Cochran v. Craig*⁴⁴ the court was of the opinion that the law does not compel a plaintiff to select at his peril between alternative claims. He may assert both, leaving it to the court and jury as aforesaid. This is undoubtedly the more liberal and the more just rule, assuming that the court's purpose is to settle the dispute between the parties rather than to award a prize for good pleading.

The general tendency at present is to regard alternative pleadings as a defect of form only, hence not a ground for general demurrer but subject to a motion to make more definite and certain. Thus in *Parsons v. Smith*⁴⁵ the court held that alternative pleading is a defect in form only when the facts so stated are material, and may be demurred to specially; but not so with facts that are not material to the issue. And in *Turner v. First National Bank of Keokuk*⁴⁶ the court said: "As to the second ground of demurrer, that it appears from the petition and amendment, that the relation of bailor and bailee of the bonds existed between the plaintiff and the bank, and no conversion, except in the alternative, is alleged, it is only necessary to say, that this manner of

⁴² (1893) 101 Ala. 692, 695, 14 So. 398, 399. (italics mine.)

⁴³ (1893) 103 Ala. 630, 16 So. 15. See also *Birmingham R. L. & P. Co. v. McLeod*, *supra* note 35, and *Birmingham Ry. L. & P. Co. v. Nicholas* (1913) 181 Ala. 491, 61 So. 361, and cases cited therein.

⁴⁴ (1921) 88 W. Va. 281, 106 S. E. 633.

⁴⁵ (1911) 164 Ill. App. 509.

⁴⁶ (1869) 26 Iowa, 562, 566; also *School Dist. of Sioux City v. Pratt* (1864) 17 Iowa, 16; *Byers v. Rodabaugh* (1864) 17 Iowa, 53; *Kinyon v. Palmer* (1865) 18 Iowa, 377. The same rule applies in New York and most other code states. *Corbin v. George* (1856, N. Y. Sup. Ct.) 2 Abb. Pr. 465.

alternative allegation is not a ground for demurrer." Courts also allow alternative pleadings where the party pleading has no means of knowing which alternative is correct. Thus in *St. Louis Southwestern Ry. v. Langston*,⁴⁷ where the complaint set up a number of negligent acts in the alternative, the court said: "Where the plaintiff is in doubt about particular facts as to the cause of the injury, which facts are within the knowledge of the defendant, it is proper to plead such facts in the alternative, without rendering the pleading subject to the exception of inconsistency." And in *Bank of Saluda v. Flaster*⁴⁸ the court said that an allegation in the alternative, as a general rule, is bad; but it is sometimes permissible when from the nature of the case the party pleading cannot fairly be expected to know with certainty which of two conditions exist, either of which would sustain his action or defense.

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 than to any other pleadings. In other words, the mere fact that the pleading is stated in the alternative should not be a ground for objection. Thus if neither alternative states a cause of action, the whole pleading may be demurred to. 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. If the pleading is *actually* indefinite and uncertain, then it should be subject to a motion to make more definite and certain.

There is perhaps one type of pleading in the alternative which may be regarded as objectionable on principle, and that is, where the alternatives are inconsistent with each other. But we mean to employ the term *inconsistency* in its logical sense, that is, where on the face of the pleading it appears that if we assume the truth of one of the alternatives, we must admit the falsehood of the other.⁴⁹ The question of inconsistency has arisen in connection with alternative pleadings, but there is a tendency on the part of some courts to attach a meaning to the term, foreign to all systems of logic promulgated since the time of Aristotle. For example, in *Birmingham Ry. L. & P. Co. v. Nicholas*⁵⁰ the court seems to say that if one alternative would

⁴⁷ (1910, Tex. Civ. App.) 125 S. W. 334, 335.

⁴⁸ (1910) 87 S. C. 95, 68 S. E. 1045.

⁴⁹ If A and B are the alternatives, they are said to be inconsistent if A implies that B is false or B implies that A is false. In other words, their logical product, A and B, is non-existent in the given universe of discourse (i. e. $A \cdot B = 0$). See e. g. *Caruso v. Brown* (1911) 142 Ky. 76, 133 S. W. 948.

⁵⁰ *Supra* note 43.

amount to one cause of action and the other alternative to another, the two are inconsistent. Evidently, there is no question of inconsistency involved. Or if A charges B with ordinary or wilful negligence, he does not thereby allege two inconsistent facts. The test is: Can these two types of negligence coexist? Evidently, where there is wilful negligence there is also mere negligence, although where there is mere negligence there may or may not be wilful negligence. Since wilful and ordinary negligence are not mutually exclusive, the assertion of the two in the alternative does not involve an inconsistency. (If we represent the two types of negligence by X and Y respectively, then, mathematically speaking, $X \cdot Y \neq 0$.) If, however, the truth of one alternative does imply the falsehood of the other, it is reasonable to require the pleader to choose his position. Otherwise the pleader, by asserting the truth of one of the alternatives, denies the truth of the other and his adversary is put at a disadvantage, for by denying one of the alternatives he may be compelled to admit the other.

HYPOTHETICAL PLEADING

The hypothetical pleadings, like the alternative, were demurrable at common law on the ground of indefiniteness and uncertainty. Thus in *Griffiths v. Eyles*⁵¹ the defendant amended his rejoinder to read as follows: "That if the said prisoner did at any time or times after the said commitment, etc. go from and out of the said prison of the Fleet and from out of the custody of him the said Defendant, he the said prisoner so escaped and went at large privately, and without the knowledge, etc., of him the Defendant, and against his will; and that if any such escape or escapes was or were so made, the said prisoner after such escape or escapes, and before the Defendant knew of such escape or escapes and before the filing of the bill, voluntarily and of his own accord returned back again into the custody of the Defendant, and continually from thence forth until and at the time of the commencement of the suit was, and hath been, and still is, kept and detained, etc." The court held that the defendant cannot plead hypothetically and sustained the demurrer. And in *Ilfeld v. Ziegler*⁵² the plaintiff brought action for the conversion of sheep and lambs and the answer to the complaint read as follows: "That if any of the sheep or lambs now and heretofore in the possession of the defendants ever belonged unto Mateo Lujan and Ambrosia V. Lujan, or either of them; and were intended to be included in said chattel mortgage, if any such mortgage ever existed, described in the plaintiff's complaint, the plaintiff, by reason of his acts in permitting the said Mateo Lujan to transfer, sell, and convey the property pretended to be included in said mortgage, and by reason of his failure and neglect to notify the defendants within a reasonable

⁵¹ (1799, C. P.) 1 Bos. & Pul. 413, 417.

⁵² (1907) 40 Colo. 401, 404, 91 Pac. 825, 826.

time of his rights (if any) . . . is barred and prevented from having any claim or demand whatsoever against the defendants, or either of them." The trial court overruled a motion to make more definite and certain. On appeal the judgment was reversed, the court holding that such defects in pleading are subject to a general demurrer. And in *Suit v. Woodhall*⁵³ the defendant pleaded ignorance as to whether the plaintiff sold him the goods described, and in the second plea the defendant stated that "If it shall be made to appear that the plaintiffs ever sold . . . to the defendant, it will also appear that . . . [the sale was] in violation of the laws of the Commonwealth." At the trial the defendant offered to prove that the liquor sued for was sold contrary to the laws of the state. The court excluded the evidence on the ground that the answer did not set forth in clear and precise terms the substantial facts recited.

In some jurisdictions, however, it was held that the objections to such pleadings are not available on demurrer, but that the remedy is by motion to strike. In *Wiley v. Rouse's Point*⁵⁴ the defendant pleaded that "if the plaintiff fell upon the streets or sidewalks . . . and suffered any injury . . . the same was caused solely by the contributory negligence of the plaintiff." The plaintiff demurred, and the demurrer was overruled, the court holding that since the defendant did not deny that the plaintiff fell, and so on, it admitted the allegations and pleaded contributory negligence. And in *Emison v. Orwhyhee Ditch Company*⁵⁵ the answer alleged: "If any damage was sustained by overflowing said land, it was occasioned by the plaintiff or the companies designated." The appellate court held that the motion to strike out the pleadings was improperly overruled. In one case a hypothetical pleading was held to be sufficient, but the court intimates that the plaintiff could have objected by motion requiring the pleadings to be separately stated or by special demurrer for ambiguity and uncertainty. In that case, *Eppinger v. Kendrick*,⁵⁶ the defendant pleaded first, that he was not surety on the note in question, and second, if he was surety, then F. had directed certain payments made by him to be applied on the note, which had not been done. The defendant introduced evidence to prove the second defense. The plaintiff objected and the objection was overruled. On appeal the court held that the objection was properly overruled, adding, however:⁵⁷ "These defenses should have been separately pleaded; but no objection was taken by motion to require them to be separately stated, nor by special demurrer for ambiguity and uncer-

⁵³ (1875) 116 Mass. 547.

⁵⁴ (1895, Sup. Ct.) 86 Hun, 495, 497, 33 N. Y. Supp. 773.

⁵⁵ (1900) 37 Or. 577, 62 Pac. 13.

⁵⁶ (1896) 5 Calif. Unrep. 295, 44 Pac. 234. Compare with *Suit v. Woodhall*, *supra* note 53, where evidence on a hypothetical pleading was excluded.

⁵⁷ (1896) 114 Calif. 620, 624, 46 Pac. 613, 615.

tainty." In a Wisconsin case, *Zeidler v. Johnson*,⁵⁸ the court held that pleading a statute of limitations hypothetically is allowed under the code.

Such is the present state of the law. It is not uniform in the various jurisdictions, nor in some instances in the same jurisdiction. But it is clear that while the rule of definiteness and certainty is relaxed in the case of alternative pleadings, perhaps because it is being realized that the alternative is not necessarily a mark of uncertainty, the rule is practically unchanged with reference to hypothetical pleadings.

Logically however, every hypothetical proposition is equivalent to an alternative or a disjunctive proposition. Before we demonstrate this equivalence we must first indicate a condition which lies at its basis. It is the meaning of the ill-fated word "or." Whenever we use this disjunctive we mean to indicate at least one of a number of possibilities. Thus, if A charges B with having defrauded him while acting in the capacity of his agent or attorney, he means to allege that B might have been his agent but not his attorney, or attorney but not his agent. But that statement in no manner indicates that he cannot be both agent and attorney. This is not a matter for dispute but entirely a matter of definition. People in general use this word like most other words with a rather loose meaning; sometimes excluding the possibility of the conjunctive and at other times admitting such possibility. Logically a great deal can be accomplished by defining the word "or" as not excluding the possibility of *both*. Thus, if the plaintiff alleges that he was standing at or near the track the possibility of his having stood at and near the track is not excluded. The logical difference between the two uses of the word "or" may be tabulated as follows:

"OR" excluding BOTH ⁵⁹	"OR" not excluding BOTH ⁶⁰
A or B	A or B
If A is affirmed, B must be denied.	If A is affirmed, B may or may not hold.
If A is denied, B must be affirmed.	If A is denied, B must be affirmed.
If B is affirmed, A must be denied.	If B is affirmed, A may or may not hold.
If B is denied, A must be affirmed.	If B is denied, A must be affirmed.

⁵⁸ (1875) 38 Wis. 335.

⁵⁹ Let us take a concrete example: "The defendant either converted the plaintiff's slave to his own use or negligently suffered her to escape," and assume that the statement in the alternative is true. (1) Suppose it is true that he has done an act amounting to a conversion, it follows that he did not negligently suffer her to escape. (2) If it is false that he has converted her, then he must have negligently suffered her to escape. (3) If it is true that he negligently suffered her to escape, then he did not convert her to his own use. (4) If it is false that he negligently suffered her to escape, it follows that he must have converted her to his own use.

⁶⁰ But if we take the alternative to mean that the possibility of both is not excluded, then (1) if it is true that he has done an act amounting to a conver-

In other words, the difference consists in that the affirmation of one of the possibilities implies nothing concerning the other, if the possibility of the conjunctive is not excluded. With this condition accepted, we submit that every hypothetical proposition may be turned into its alternative equivalent. Let A and B be two propositions with the relation of implication between them. "If A, then B" is equivalent to the statement "either A is false or B is true."⁶¹ To persons not engaged in the study of logic this may at first appear absurd; yet it can be proved. Two statements are said to be equivalent when whatever may be inferred from the first can also be inferred from the second, and whatever can be inferred from the second can also be inferred from the first. That is what we must prove concerning the two propositions, the hypothetical and the alternative.

It is best to tabulate the proof:

Hypothetical Proposition ⁶²	Alternative Proposition ⁶³
If A, then B.	Either A is false or B is true.
1. Assuming that A is true, then B must be true.	1. If we deny that A is false, i. e. if we affirm A, then B must be true.
2. Assuming that A is false, nothing follows about B, i. e. B may or may not be true.	2. Affirming that A is false, nothing follows concerning B.
3. Assuming that B is true, nothing follows concerning the truth or falsehood of A.	3. Assuming that B is true, nothing follows concerning the truth or the falsehood of the proposition that A is false.
4. Assuming that B is false, it follows that A is false.	4. Denying B, we must affirm the falsehood of A.

sion, nothing follows as to whether he did or did not suffer her to escape. (2) If it is false that he has converted the slave to his own use, then he must have negligently suffered her to escape. (3) If it is true that he negligently suffered her to escape, nothing follows as to whether he did or did not convert her to his own use. (4) If it is false that he negligently suffered her to escape, it follows that he must have converted her to his own use.

⁶¹ Whitehead and Russell, *Principia Mathematica* (1905) II.

⁶² Let us take a concrete example: "If the plaintiff sustained injuries, he did so through his own negligence," and let us assert the truth of this complex proposition. (1) Assuming that he did sustain the injuries, it must be inferred that he was contributorily negligent. (2) Assuming that he did not sustain any injuries, nothing follows as to his having been contributorily negligent, i. e. he may have been contributorily negligent all the same. (3) Assuming that he was contributorily negligent, nothing follows as to the truth of his having sustained injuries. (4) Assuming that he was not contributorily negligent, it follows also that he did not sustain injuries, for had he sustained injuries it would have been on account of his contributory negligence.

⁶³ The equivalent of the hypothetical proposition is: "Either he did not sustain any injuries, or he was contributorily negligent." (1) If we deny that he did not sustain injuries, in other words, if we affirm that he did sustain injuries, then it must be true that he did so through his own contributory negligence. (2) If we affirm that he did not sustain any injuries, nothing follows as to whether he was or was not contributorily negligent. (3) Assuming that it is true that he

These are all the possibilities that may be inferred from both of these propositions. It can readily be seen that the inferences are the same for the hypothetical and the alternative propositions, that whatever further inferences which may be drawn from either must be the same, and that under no circumstances can inferences be drawn from one which would be contrary or contradictory to those drawn from the other. Hence all the alternative pleadings we have cited could as well have been put in the hypothetical form. For example, in *Merriweather v Sayre Min. & Mfg. Co.*⁶⁴ the plea alleged that the deceased was contributorily negligent since he had "knowledge or notice of the defect," etc. (held to be demurrable), but it could as well have alleged the same thing in the form: ". . . for, if he had no knowledge of the defect, he had notice of the same." And in *Alabama Iron & Fuel Co. v. Benenante*⁶⁵ the plea of contributory negligence alleged that the plaintiff knew that the rock was loose, nevertheless he "worked under or near the rock." The plea was held to be good, but had the pleader exercised the indiscretion of pleading exactly the same substance in the hypothetical form, e. g. ". . . if he did not work under the rock, he worked dangerously near it," then the plea would have undoubtedly been held bad on demurrer.

On the other hand, the allegations in the hypothetical form could as well have been put in the form of alternatives. Thus in *Ilfeld v. Ziegler*⁶⁶ the plea could as well have been put in the alternative form, in which case it would most probably have been held good: "Either the sheep and lambs did not belong to Mateo and Ambrosia Lujan, etc., or the plaintiff, by his acts, etc., is barred and prevented from having any claim or demand." And so in *Suit v. Woodhall*⁶⁷ the same plea could have been put in the words: "Either the plaintiff did not sell to the defendant, or he did so in violation of the laws of the Commonwealth." In *Wiley v. Rouse's Point*⁶⁸ the court missed entirely the force of the hypothetical by holding that the pleader admitted the allegation and pleaded contributory negligence. The real meaning of the hypothetical is: "Either the plaintiff did not fall upon the streets or sidewalks, etc., or the injury was caused solely through the contributory negligence of the plaintiff." Although the court overruled the demurrer to the plea, yet such misinterpretation might have worked hardship, had the

was contributorily negligent, nothing follows concerning the truth or falsehood of the statement that he did not sustain any injuries. (4) Denying that he was contributorily negligent, we must affirm also that he did not sustain any injuries.

⁶⁴ (1909) 161 Ala. 441, 49 So. 916. See also *Central of Ga. Ry. v. Freeman* (1901) 134 Ala. 354, 32 So. 778.

⁶⁵ (1914) 11 Ala. App. 644, 66 So. 942. A similar case is *Block v. Roden Coal Co.* (1912) 178 Ala. 531, 59 So. 497; also *Sloss-Sheffield Steel & Iron Co. v. Pilgrim* (1905) 14 Ala. App. 346, 30 So. 701.

⁶⁶ *Supra* note 52.

⁶⁷ *Supra* note 53.

⁶⁸ *Supra* note 54.

defendant attempted to introduce evidence tending to show that the plaintiff actually did not fall or did not sustain any injuries. And in *Emison v. Owhyhee Ditch Co.*⁶⁹ the answer was equivalent to: "Either no damage was sustained, or the same was caused by the plaintiff or companies designated." Since each of the alternatives states a good defense, the Court of Appeals might have found that the motion to strike was properly denied. Surely there must be some misunderstanding if preference is given to one form of expression and denied to the other, when the substance of the expressions is identical in both instances.

No doubt, neither alternative nor hypothetical pleadings are generally drawn in as clear cut and artistic a style as we should like to have pleadings drawn (although in some instances that is clearly not so), yet, if there is nothing in the pleadings which actually obscures the issues, there is no reason why the adversary should hinder the cause of justice by insisting on useless technicalities. Furthermore, to punish the party pleading because his attorney did not plead artistically is altogether too drastic and unjust, especially since, as a matter of fact, clients neither have nor by the nature of our system of law can have any control over the situation.

⁶⁹ *Supra* note 55.