PLEADING AND PROCEDURE

PLEADING AND PROCEDURE — JUDGMENT IN ACTION ON EXPRESS CONTRACT AS RES JUDICATA FOR ACTION ON IMPLIED CONTRACT — ALTERNATIVE PLEADING

In 1936 plaintiff lost an action on an express contract of partnership, it being held that there was no partnership contract. Plaintiff now sues on a *quantum meruit* theory, for services rendered. *Held*: that the judgment in the suit on the partnership contract was res judicata as to this action.[1]

The basic problem in this action is whether or not a judgment in an action on an express contract is res judicata for an action on an implied contract arising out of the same subject matter. This specific question of whether actions on express contracts and implied contracts must be joined in the same action has apparently never been decided in any previous Ohio case. Fundamentally, this is a question of the definition of "cause of action." Should it be used only as it has been used so far in this note, or should it be given a broader meaning? Do these two claims represent two different "causes of action" or are they so nearly alike as to represent but a single "cause of action"? In the narrow, legalistic, common-law sense they do represent two causes of action. Legalistically, *quantum meruit* does differ from express contract. Yet these claims are so close to each other that as a practical matter of everyday court practice the question should be raised as to whether or not there are really two causes of action. The operative facts and the evidence which plaintiff can produce for either claim are almost identical. The test of whether the same evidence would sustain both claims has been called the best and most accurate test of identity of causes of action.[2] Therefore, as a matter of practical judicial policy, it would be better to treat these two theories as alternate claims which must be raised in one action. As a result, treating the two claims as containing only one cause of action, res judicata applies to an attempt to raise either claim at a latter date.[3]

Defenders of the narrow view of a cause of action may protest that plaintiff was denied the opportunity of a full hearing on all of her

[1] Golden v. Mascari, 63 Ohio App. 139 (1940).

[2] Ohio Fuel Gas Co. v. Mt. Vernon, 37 Ohio App. 159, 174 N.E. 260 (1930).

[3] Petersine v. Thomas, 28 Ohio St. 596 (1876), quoting in effect, Fischli v. Fischli, I Blackf. (Ind.) 360 (1825): "When a matter is finally determined in an action between the same parties by a competent tribunal, it is to be considered at an end, not only as to what was determined, but also as to every other question which the parties might have litigated in the case."

claims. Judge Bradbury states the broad policy behind estoppel as a practical tool of the court.[4] It is equally applicable to the broader concept of res judicata:

"Doubtless cases occasionally occur where the estoppel works a hardship. It must always do that where it in fact prevents the association of a just demand or denies the interposition of a meritorious defense; but these results rarely occur, and where they do occur, they can usually be traced to the negligence of the party estopped. The possibility of an occasional advantage unfairly secured by one of the parties to an action by reason of the rule is indeed a slight evil when compared with the mischief which would result from its abrogation."

The above discussion sets forth one facet of a problem that has troubled Ohio courts for many years. Blackburn, in *"Alternative Pleading in Ohio,"*[5] sets the background for this decision. This background will be sketched briefly in this paragraph. The problem of alternative pleading arises whenever a party has a case some of the operative facts of which are beyond his knowledge. The alternative pleading method is best suited to enable him to set forth his claims, though often inconsistent ones, and to afford him full relief and justice in one action. But the Ohio courts have in the past failed to come to any consistent conclusion as to whether or not alternative pleading shall be permitted in Ohio. One line of cases upholds the practice. *Citizens Nat'l Bank* v. *C.N.O. Ry.*[6] permits alternative pleading, saying, "There is no question that the commissioners who drafted the code, understood that in a petition under the code there would be, in a case like this, not two causes of action but one, incorporating in one all the facts together with a prayer for alternate relief."[7] But another line of decisions has held that the plaintiff must elect which claim he will pursue.[8] Both lines of authority have been followed apparently indiscriminately up to 1919 when the last case in point was decided (of course excepting the principal case.)[9]

It might be concluded from the principal case that the court has finally accepted the alternative pleading theory. But, unfortunately, it has done so only in a negative manner. The fact that the court never

[4] 53 Ohio St. 361, 369 (1895).
[5] 5 O.S.L.J. 247 (1939).
[6] 8 Ohio Dec. Rep. 788, 790, 9 Wkly. L. Bull. 355 (1883).
[7] See also Citizens Nat'l. Bank v. N. O. & T. P. Ry., 9 Ohio Dec. Rep. 147, 11 Wkly. L. Bull. 86 (1884); First Nat'l. Bank v. C. N. B. & T. P. Ry., 9 Ohio Dec. Rep. 702, 16 Wkly. L. Bull. 399 (1886).
[8] Sturges v. Burton, 8 Ohio St. 215, 72 Am. Dec. 582 (1858); Cincinnati v. Third Nat'l. Bank, 1 Ohio C.C. 199, 1 Ohio C.D. 109 (1885).
[9] Harris v. Webb, 22 Ohio N.P. (N.S.) 359, 31 Ohio Dec. 387, which hewed to the line of requiring election of one or the other of two inconsistent claims, upon a motion to make more definite.

inspects the alternative pleading problem in so many words and therefore doesn't decisively state the conclusion which tacitly results from the decision tends to weaken the case as a final solution of that problem. There is even a slight possibility that the case might be held to establish a principle requiring an election of pleas rather than alternative pleading but the wording of the decision would seem to indicate that the court would have decided in favor of the alternative pleading theory had it looked the problem squarely in the face. R.L.B.

TRUSTS

TRUSTS — THE OHIO TRUST INVESTMENT STATUTE

The problem of investment in these days of wars, economic depressions, unemployment, and inflation are very real and very present. The questions of relative security of principal, amount and permanence of income are considered every day by all classes of investors. The investing public must be constantly alert to activities in all parts of the nation and the world which affect the great securities markets. A great silver shipment from India or China, or a change in the foreign policy of some distant nation, may, and often does affect the trends of stock, bond and commodity markets. The "blue chip" of today may be the "dog on the market" of tomorrow. All these factors and many more must be reckoned with by the usually careful but poorly informed investing public. Difficult as the position of the ordinary prudent investor may be, the position of a trustee, in placing the funds and property in his care in such manner as to ensure the beneficiaries an adequate income and at the same time safeguard the principal, is one infinitely more difficult and precarious. In order to aid the trustee in this matter and at the same time provide him with some protection, legislatures of many states have enacted statutes governing types of investments and prescribing the outer limits as to conduct and discretion.[1]

These statutes have been of two different types,[2] mandatory and permissive. The mandatory statutes expressly limit the trustee in investing to the types of securities set out.[3] Any deviation from this list constitutes a breach of trust. The permissive statute[4] is the more usual treatment and also sets forth categories of permissible investments for a

[1] See former section OHIO G.C. 11214. And the present section 10506-41.

[2] *Legal Lists in Trust Investment,* 49 YALE L.J. 891 (1940) sets out instances of mandatory and permissive statutes, pages 895-900.

[3] See for example IND. STAT. ANN. (Burns, 1933 Code Book sec. 18-1204). "Shall invest . . . but no other . . . "

[4] "The trustees may invest . . . ." The Ohio statute 10506-41 and the former statute 11214 are also permissive in form.