

servant relationship, do the courts of Ohio consider the plaintiff's remedies against the servant and against the master as being consistent or as being inconsistent? The answer to that question seems to be that the Ohio cases are in a state of confusion. There is one line of cases which refuses joinder of master and servant and requires election of remedies on the theory that the plaintiff's remedies are inconsistent. *Clark v. Fry*, *supra*; *French v. Central Construction Co.*, *supra*; *Cordes v. Deopke*, *supra*. Another line of cases recognizes that the remedies are consistent, and even though joinder cannot be permitted because of contrary precedent, the application of the doctrine of election of remedies is denied. *Maple v. Railroad*, *supra*; *Schultz v. Brunhoff Mfg. Co.*, *supra*; *L'Archer v. Rosenberger*, 3 Ohio Op. 101, 103 (1935); *Land v. Berzin*, *supra*, the principal case. The holding of the principal case, as indicated, follows the theory of the latter group of cases recognizing the consistency of the remedies. In light of the foregoing discussion, such a holding is to be commended. Where one rule prohibited joinder and another rule required election of remedies, a situation would be created whereby the chances of the plaintiff's recovery would be largely determined by the application of technical procedural rules. It is the group of cases finding the remedies consistent and refusing to apply the doctrine of election of remedies which saved the Ohio law from getting into such a predicament. The solution to the problem, of course, lies in the abrogation of both the rule against joinder and the doctrine of election of remedies in master-servant situations. It is hoped that the supreme court will see fit not only to affirm the rule laid down in the principal case, but also to overrule the cases which have refused joinder.

PHILIP AULTMAN

ALTERNATIVE PLEADING IN OHIO

In an action founded on the breach of a contract to lease property, plaintiff's prayer was that the court decree specific performance or alternatively, if equitable relief should be denied, award damages in lieu thereof. The trial court found the plaintiff disentitled to specific performance because of laches but assessed damages in his favor. Neither party at this first trial requested a jury. On appeal the judgment relative to laches and the right to specific performance was affirmed, but the case was reversed and remanded because of the application of an improper measure of damages. The court denied defendant's request for a jury made early in the second trial stating as its reason "the equitable rule that where a court of equity has once acquired jurisdiction, it will retain

the case until complete justice has been done, settling all questions incident to the principal relief sought." When the case was brought before it again the Appellate Court in its application of General Code 11379 providing that ". . . Issues of fact arising in actions for the recovery of money only . . . shall be tried by a jury, unless a jury trial be waived . . ." quoted statements of the Supreme Court in *Gunsaulus v. Pettit*, 46 Ohio St. 27, 17 N.E. 231 (1888), to the effect that under this provision the right of a party to trial by jury does not depend upon the character of the principles upon which he bases his right to relief, but upon the nature and character of the relief sought. *Hickman v. Co.*, 58 Ohio App. 38, 11 Ohio Op. 425, 15 N.E. (2d) 648, Ohio Bar (June 13, 1938) (1936).

The absence of any common agreement among the courts on the proper manner of dealing with pleadings under the code, even on this simple fact situation, results in this case being set down for a third retrial. Uncertainty still remains as to the proper disposition of the issues on the first trial when both the equitable and legal features of the case are to be adjudicated. Will either of the parties lose any of the rights that would have resulted to them in separate legal and equitable trials? In what particulars can one safely plead alternatively? It is extremely hazardous to state whether or not alternative or hypothetical pleading is permitted in Ohio for several reasons: first, the term is used in varying senses in legal writings and in the opinions; second, there is a peculiar scarcity of recent decisions purporting to rule directly on the point; third, it is quite conceivable, and neither proven nor disproven, that the practice and consequent rulings vary widely throughout the State and yet are more frequently assumed than contested. Numerous statements may be found in Ohio cases to the effect that alternative pleading is permissible under the codes. Other statements pertaining to certainty, hard to reconcile with this position, also appear. An Ohio case is numbered among those indicative of the adoption of the rule of alternative pleading by judicial interpretation at page 173 in Clark on Code Pleading. (See cited *infra*, *Dick v. Hyer*).

In one group of the existent rulings the uncertain or alternative quality pertains, as in the principal case, to the remedy sought. In an action wherein plaintiff prayed that the written contract for the sale of a right of way be corrected to conform to the agreement as he stated it and that the court decree specific performance of the corrected contract, or that the court rescind the written contract and for other relief, the Supreme Court of Ohio held it error for the trial court to hold the written contract invalid and refuse to give supplemental judgment for

damages. *Railroad Co. v. Steinfeld*, 42 Ohio St. 451 (1884). Although, inasmuch as plaintiff sought to overturn the written contract executed by mistake, each alternative included equitable features, it is virtually like the principal case in its request alternatively for specific performance or damages and differs only in the definiteness of the latter. The court has been held to be empowered to decree cancellation of a lease when the plaintiff sought specific performance and "such other and further relief in the premises as equity and conscience require." *Coffinberry v. Oil Co.*, 68 Ohio St. 488, 67 N.E. 1069 (1903). When the action is one to set aside fraudulent deeds and the prayer is for cancellation and general relief, it is not error to decree a reconveyance to the plaintiff. *Riddle v. Rall*, 24 Ohio St. 572, 5 Ohio Dec. Rep. 232 (1874). When plaintiff alleges breach of warranty and knowledge by the defendant that the warranty was false, failure to prove knowledge of the falsity cannot prejudice the right of recovery for breach of warranty. *Gartner v. Corwine*, 57 Ohio St. 246, 48 N.E. 945 (1897). More doubtful in its interpretation of plaintiff's wishes is the adjudication in *Brundridge v. Goodlove*, 30 Ohio St. 374 (1876). Relying on the breach by an irresponsible person of a negative covenant not to practice medicine, the complaining party after alleging and praying for damages, sought a perpetual injunction against irreparable injury. Though the court's ruling that he was erroneously denied the jury trial which he requested may be correct, one may doubt that the two remedies were meant to be alternative and not supplemental or that plaintiff's insistence on a jury was an election so to regard them with an indicated preference for damages. When recovery based on the legal theory advanced would result in judgment for damages against one group of the defendants and recovery on the equitable theory would bind another group, it has been held that the adjudication and dismissal of the equitable features does not change the character of the action so as to enable one of the first class of defendants to withdraw his waiver of a jury trial. *Engine Co. v. Mfg. Co.*, 8 Ohio App. 341, 30 Ohio C.C. (N.S.) 177 (1917). *Draper v. Moore* 13 Ohio Dec. Rep. 834 (1872) goes still further than the cases thus far cited but is quite in line with the attitude of the *Steinfeld* case in its holding that it is error to dismiss an action merely without prejudice to a subsequent action for damages, when plaintiff has asked specific performance of a modification of the contract and for all other proper relief in the premises. What appears to be the reasonable view of the matter was there stated: "To the code petition there must be a demand of the relief to which the party supposes himself entitled. At common law the facts often give the party a choice of several remedies,

to be obtained by bringing one or the other of several different actions. As this cannot now be done, the party is to state the relief he asks. If not proper, or not the most appropriate in the opinion of the Court, the proper relief will be granted. When upon the pleadings and evidence a party is entitled to any relief, it is error to dismiss his case, and compel him to bring another action."

Frequently the plaintiff encounters practical difficulties in drawing his petition because some of the operative facts are beyond his knowledge. It is manifestly unfair to require him then to blindly assume a definite stand at his peril. The courts have not always shown themselves sympathetic toward this practical difficulty. Under an allegation "that defendant saw or by the exercise of ordinary care could have seen him" *McGinn v. Columbus R. & Light Co.*, 4 Ohio App. 398, 25 Ohio C.C. (N.S.) 212 (1913) (*aff. without opinion*, 90 Ohio St. 384 (1914)) ruled that plaintiff could prove either fact. However, it was there implied that a motion to make more definite should, in such a case, be entertained; a subsequent case so held. *Harris v. Webb* 22 Ohio N.P. (N.S.) 359, 31 Ohio Dec. 387 (1919). An alternative form has been prescribed, strangely, as the only means of avoiding an inconsistency in legal theory between defendant's general denial and plea of contributory negligence. *Latham v. Columbus R. Co.*, 8 Ohio N.P. (N.S.) 185, 19 Ohio Dec. 333 (1909). Restrained from using the normal alternative or conditional language in such a situation, plaintiffs have resorted by analogy to the older common law method by incorporating one interpretation of the uncertain fact in one count, the contrary interpretation in a second count. This method of pleading has been generally sustained against attack. *Citizens Nat'l. Bank v. C. N. O. Ry. Co.*, 8 Ohio Dec. Rep. 788, 9 Wkly. L. Bull. 355 (1883); *Citizens Nat'l. Bank v. N. O. & T. P. Ry. Co.*, 9 Ohio Dec. Rep. 147, 11 Wkly. L. Bull. 86 (1884); *First Nat'l. Bank v. C. N. B. & T. P. Ry. Co.*, 9 Ohio Dec. Rep. 702, 16 Wkly. L. Bull. 399 (1886). On the other hand, the overruling of a motion to more definitely state directed against essentially this type of statement has been held to be error, even though non-prejudicial. *Cincinnati v. Third Nat'l. Bank*, 1 Ohio C.C. 199, 1 Ohio C.D. 109 (1885). Where this dual statement of the facts was employed so as to coincide with either of two possible interpretations of a statute, plaintiff was required to elect between them. *Sturges v. Burton*, 8 Ohio St., 215, 72 Am. Dec. 582 (1858). When no purpose whatsoever is served by the dual statement the second has been regarded as mere surplusage. *Ferguson v. Gilbert & Rush*, 16 Ohio St. 88 (1865). When plaintiff alleged that the wrongful act

was both wilful and negligent, a motion to elect was sustained on the ground that plaintiff must unconditionally and not alternatively preclude his own negligence as a directly contributing cause of the injury. *Hopman v. Terminal Co.*, 12 Ohio N.P. (N.S.) 543, 23 Ohio Dec. 505 (1912). The court, in *Citizens Nat'l. Bank v. C. N. O. Ry. Co.*, *supra*, rightly recognizes that multiplicity of counts in common law pleadings was one of the objects which the code specifically desired to remedy and states: "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 alternative relief."

In the absence of uncertainty as to the existence of a fact no practical reason can be cited for the extension of the practice of duplicate statement. However, the apparent doubt that the court would follow the liberal view earlier discussed of permitting an alternative and partially conditional prayer and awarding any relief to which the proven facts showed plaintiff entitled, together with the natural difficulty of the legal mind to conceive of a right to recover severed from the theory of recovery itself, have combined to make common the use of separate counts coincident with the various theories of recovery. *Murphy v. Quigley*, 21 Ohio C.C. 313, 11 Ohio C.D. 638 (1900); *Fugman v. Trostler*, 24 Ohio C.C. (N.S.) 521, 34 Ohio C.D. 746 (1903); *Dick v. Hyer*, 94 Ohio St. 351, 114 N.E. 251 (1916); *Boswell v. Security Life Ins. Co.*, 13 Ohio N.P. (N.S.) 364, 30 Ohio Dec. 581 (1912).

One may well doubt that the courts have succeeded, in the spirit of the codes, in working out a reasonable system of procedure avoiding the rigidity, artificiality and repetition of the common law procedure. Nevertheless, if all of these objectionable features cannot at once be eliminated considerations of practicability should have preference over those of mere form. The view of the Judicial Council of the State, in its 1939 Report to the General Assembly, is that greater leeway must be given to the free and normal statement of the relevant facts if prompt adjudication of claims, free from procedural technicalities, is to be facilitated. If these recommendations are accepted and made part of the law, the courts will be presented with another opportunity to work out a simple and reasonable technique of procedure bounded only by the requirement of responsiveness to the needs of the parties and the convenience of the court.

Text of the proposed amendment to the Code of Civil Procedure:

Joinder of Causes.

Sec. 11306

(c) *Alternative Statement Permitted.* A party may set forth two or

more statements of a claim or defense alternatively or hypothetically. 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. All statements shall be made subject to the obligations set forth in Sec. 11336.

ANNA FAYE BLACKBURN

REAL PROPERTY

ALLOWANCE OF ATTORNEY FEES IN STATUTORY PARTITION

Plaintiff sought to partition a piece of land which was subject to a mortgage. The mortgagee consented to come into the partition proceedings. Even though the proceeds of the partition sale were insufficient to cover the mortgage indebtedness, the Court of Appeals for Hamilton County gave plaintiff's attorney priority in his claim for a fee over the mortgagee. *Klosterman v. Klosterman*, 58 Ohio Ap. 511, 16 N.E. (2d) 826 (1938).

The decision was made on the authority of Ohio G. C. section 12,050, "Having regard to the interest of the parties, the benefit each may derive from a partition, and according to equity, the court shall tax the costs and expenses which accrue in the action including reasonable counsel fees, which must be paid to plaintiff's counsel unless the court awards some part thereof to other counsel for service in the case for the common benefit of all the parties, and execution may issue therefore as in other cases."

There are several other statutes in Ohio allowing attorney fees to be assessed as costs: in taxpayer's suits for the recovery of misappropriated funds, Gen. Code sec. 2923; in suits by municipalities for appropriation of land (allowance to defendant's attorney if land is not taken or money paid over within six months after the decree) Gen. Code sec. 3697; in suits for the collection of sanitary district assessments, Gen. Code sec. 6602-85; in land owner's suits for costs of erecting a fence for a railroad, Gen. Code sec. 8915; in appeals from justice courts to the common pleas court when there is a failure to substantially better appellant's judgment, Gen. Code sec. 10,356; in appeals from the court of appeals to the Supreme Court where there is no reasonable cause for appeal, Gen. Code sec. 12,223-36; in proceedings by one holding a mechanic's