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ALTERNATIVE PLEADING: I

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I

INTRODUCTION

ON December 8, 1941, oral arguments were presented to the Supreme Court of Nebraska with respect to the report of its advisory committee, appointed some two years before to suggest amendments to the state's code of civil practice.[1] The court, by an act of June 5, 1939 had been requested to prepare and to report to the legislature proposed rules of procedure.[2] For two years the committee had worked at its assignment. There had been sharp disagreement in the state bar as well as in the committee as to the extent to which the Federal Rules of Civil Procedure should be followed. Now it was presenting the result of its labors.

The document, which incorporated a number of the Federal Rules, was handed up without any committee recommendation that it be adopted, and with a preliminary oral statement by the committee's chairman suggesting that haste was unnecessary and that the court might "with prudence, economy and stability await the early solidification of the Federal practice." The court, however, took no such dim view of its duty. Despite an adverse vote by the lawyers participating in a statewide poll, the court, after careful study and consultation with the judicial council and others, made some changes, and on

* The research on which this and the following articles are based was conducted under the supervision of Professor Paul R. Hays of Columbia University and the articles are submitted in partial satisfaction of the requirements for the degree of Doctor of the Science of Law in the Faculty of Law, Columbia University.

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1 The account here given is summarized from Shackelford, "Why Adopt New Rules of Pleading and Practice," 21 NEB. L. REV. 94 (1942); Bongardt, "Final Draft Report, Nebraska Rules of Civil Procedure," id. at 76; Statement of Committee Chairman John W. Delehant, id. at 71; Clark, "The Nebraska Rules of Civil Procedure," id. at 307; Simmons, "Why New Rules of Procedure Now," 26 J. AM. JUD. SOC. 170 (1943).

2 Neb. Laws (1939), c. 30, p. 164; Neb. Comp. Laws (Supp. 1941), §§27-231—27-237.

April 20, 1942, unanimously approved rules which would have incorporated material changes in the practice. These rules came before the legislature in 1943. Their approval was recommended in a strong presentation personally delivered to the legislature by Chief Justice Robert G. Simmons.

The legislature rejected the rules and repealed the act under which they had been prepared and reported.[3]

The story is pertinent to a study of alternative pleadings not only as a commentary upon the attitude of many practitioners toward the whole subject of procedural reform, but more specifically because one ground on which opposition was based was that the rules reported by the advisory committee proposed to incorporate a specific authorization, in the form of Federal Rule 8(e)(2), of alternative and hypothetical pleading. Certainly the opposition to this rule was not determinative of the outcome of the whole effort. It was an incidental but a symptomatic skirmish. It was urged upon the court in oral argument that such a rule would "greatly complicate litigation and add to the burden and expense of the opposing party." Waxing enthusiastic, the speaker argued: "Facts do not exist in the alternative. . . . I feel that justice will be best promoted by continuing to limit a pleader to statements of the facts which he knows or has reason to believe are true. If he is so limited, there is no reason or occasion for him to plead alternative or hypothetical claims or defenses."

This statement was undoubtedly made in good faith. Indeed, with but slight rephrasing, it might have been thrown into quotation marks and attributed to distinguished judges who have served on the highest courts of some states. Yet it runs flatly counter to the Federal Rules and the codes and rules of a substantial number of states. When views as to procedural techniques are so diametrically opposed, the words "right" and "wrong" do not fit neatly into an analysis. When procedural reform is in process, however, it is necessary to make a choice. The effort must be to choose that approach which is most likely, in terms of a value statement applicable to rules of practice, to develop as fully as possible (within the human limitations of our society) a complete knowledge of all the events which created the conflict resulting in the litigation, and to assist in the evaluation of such events

[3] Neb. Laws (1943), c. 63, p. 236.

and in the awarding of such consequences as accord with the maximum feasible conceptions of justice.[4]

Actual experience casts doubt upon the validity of the quoted argument. Any lawyer who is involved with litigation in his day-to-day practice and who is at all frank must confess that he is often uncertain as to the fact propositions which are likely to be established as true in the course of a trial. Quite early in his practice each lawyer learns that one of his most difficult professional responsibilities will be to isolate, from the mass of undigested information uncovered in an investigation of potential litigation, the particular fact propositions which will depict most forcefully, and with the greatest likelihood of jury or judge conviction, the contentions of his client. Usually it requires only a brief experience, coupled perhaps with a disastrous court appearance in some case where he inadvertently has saddled the wrong horse, to lead the young lawyer into a diligent study of the statutes, rules and precedents of his jurisdiction to determine, in Professor Blume's descriptive phrase, "the maximum scope (outer boundary) of a civil action."[5] This outer boundary, in anything save the most simple litigation, frequently turns upon the freedom with which he may allege diverse statements of the factual propositions and legal theories on which he wishes to rely.

This keenly perceived desire to urge alternative or hypothetical[6] contentions may arise in various exigencies. Situations frequently occur where a party simply cannot be sure, in advance of trial, which of several equally seductive theories of his claim or defense will be supported by the evidence. Particularly is this apt to be true when the facts are within the control of the opponent, especially if an inadequate discovery procedure in the local practice prevents their being made fully available before trial. Again, the evidence may come from witnesses not known to the party in advance of trial, and may develop facts which could not have been anticipated from the statements of witnesses accessible to him. Moreover, pleading in the alternative is often the only method by which a party can "guard against the

[4] This test is based upon the norm outlined in McDonald, "The Background of the Texas Procedural Rules," 19 TEX. L. REV. 229 (1941). See also McDonald, "The Evaluation of Procedural Techniques," 22 TEMPLE L. Q. 397 (1949).

[5] Blume, "The Scope of a Civil Action," 42 MICH. L. REV. 257 (1943).

[6] "Hypothetical" pleadings are usually allegations which assert that *if* one fact proposition is true, *then* another fact proposition is true or false. When so employed, hypothetical pleadings are in effect a form of alternative pleading, and where allowed are governed by the same general rules. CLARK, CODE PLEADING 256-7 (1947).

infirmities of human memory and the defects of human testimony."[7] And even where there is reasonable assurance as to the probable drift of the evidence, alternative contentions may be suggested by doubts as to the legal theory which will appeal to the judge. Freedom to put forward distinct theories on the basis of the same, or closely related, factual situations seems, therefore, an important aspect of the flexibility implicit in the allowance of alternative pleadings.

The present series of articles seeks to test the extent to which the dictates of this common professional experience have influenced the statutes, rules, and precedents which govern our civil practice. As a background for a review of procedures typical of the code and federal practice within the United States, it will be useful initially to consider briefly the English practice during the past century and a half. The English procedures, as they existed at the end of the eighteenth century, though everywhere locally modified and simplified in some respects, formed authoritative guides for the practices of most of the states for varying periods, some even to this date.[8] Even in those states which have overhauled their procedures most thoroughly, the echo of experience remains a potent factor in problems of interpretation. We turn, therefore, to the English courts.

II

COMMON LAW

A. The Single Issue Requirement

As is well known, the unique object of classical common law pleading was to reduce litigation to a single issue of law or fact.[9] The dominant precept which had been developed to effectuate this objective was that the "facts" be alleged with certainty. Three subordinate rules —that pleadings not be duplicitous, or repugnant, or in the alternative—tended to the "chief object . . . that the parties be brought to

[7] Birdseye v. Smith, 32 Barb. (N.Y.) 217 at 218 (1860).

[8] American precedents could be and on occasion are cited for many of the points discussed in this article. In a later article I shall outline the code and later developments in the United States, but shall not attempt a detailed analysis of the American efforts to adopt, with modifications, the traditional common law and equity procedures.

[9] Compare the freedom of statement allowed in continental procedure. See STEPHEN, PLEADING, 5th Am. ed., *pp. 124-125 (1845); 1 CHITTY, PLEADING, 6th Am. ed., *p. 259 (1833).

issue, and that the issue be material, single and certain in its quality."[10] Apologists had supported the requirement with arguments as to economy and expedience: the decision of one material issue would dispose of the controversy, so it was unnecessary to consider more. This, of course, was true, provided one did not inquire too closely into the justice of the decision. "[M]echanical ease . . . in disposing of cases"[11] was furthered, but at the expense of a full development of the controversy.

At the end of the eighteenth century, pleading in the common law courts still proceeded within the diminishing shadow of this requirement so deeply embedded in their tradition. Possibilities of evasion had been developed by the employment of devices hereafter noted. But subject to these evasive techniques, the plaintiff still was to state in his declaration a single theory, without alternatives or inconsistencies; and this the defendant was to meet with a single contention. There was a long background of excessive literalness in the interpretation of pleadings.[12] The rules applied also to the plaintiff's replication and to all subsequent pleadings. The classical common law rule was that so long as new matter responsive to the immediately preceding pleading of the opponent could be introduced without departure,[13] the exchange continued, each pleading limited to its single issue, until the parties ultimately clashed head-on at a single point.

Such rules were by their very nature incompatible with alternative pleadings. Accordingly, alternatives were prohibited upon the theory

[10] STEPHEN, PLEADING, 5th Am. ed., *p. 135 (1845). Cf. id. at *p. 59; SHIPMAN, COMMON LAW PLEADING, 2d ed., 350 (1895).

[11] Dewey, "Logical Method and Law," 10 CORN. L. Q. 17 (1924).

[12] Illustrative of the technical rigidity was Lawly v. Arnold, summarized in Nevil v. Soper, 1 Salk. 213, 91 Eng. Rep. 190 (1698): in an action for trespass plaintiff alleged the removal of timber from a spot where it was lying "for the completion of a house then lately built." The pleading was held defective because a house "lately built" could require no timber for its "completion."

[13] "A departure occurs where, in any pleading, the party deserts [a material] ground [either of fact or law] taken in his last antecedent pleading and resorts to another [material ground] distinct from and not fortifying the first." SHIPMAN, COMMON LAW PLEADING, 2d ed., 473 (1895). In many cases where departures were condemned, the facts were such that alternative allegations, if allowed, would have produced a more adequate test of the merits. Thus where the declaration was grounded upon a common law liability, reliance in the replication upon custom was a departure. Co. LITT. *p. 304e. An initial plea of no injury, followed in the rejoinder by a plea that the plaintiff was injured through his own fault was a departure: Richard v. Hodges, 1 Mod. 43, 86 Eng. Rep. 719, 2 Keb. 619, 84 Eng. Rep. 389, 2 Saund. 83, 85 Eng. Rep. 751, 1 Sid. 444, 82 Eng. Rep. 1207 (1670). The same was held in an action of trespass in which the defendant first pleaded that he had impounded the mare in question because it was trespassing, and in his rejoinder pleaded that he had impounded it because it was deeased: Palmer v. Stone, 2 Wils. 96, 95 Eng. Rep. 705 (1759).

that the party must take a stand and notify his opponent with precision as to his contention.[14] Neither party could assert in a single count or defense two theories, either of which independently would sustain his claim or defense, and each of which would require a separate response.[15] A count or plea containing material allegations which were inconsistent or contradictory was defective.[16] The simplest alternative was condemned.[17] In a single count the plaintiff could not allege a contract for a specific and also for a reasonable sum.[18] In an action upon a bond, or for any penal sum for the non-performance of covenants, it had at first been held that only one breach could be alleged.[19] But it is interesting to note that an exception was made when a count relied upon a contract containing several obligations, each of which might be breached. Thus in an action of covenant upon an agreement to pay a sum in installments, the allegation that

[14] STEPHEN, PLEADING, 5th Am. ed., *p. 378 (1845); SHIPMAN, COMMON LAW PLEADING, 2d ed., 457-458 (1895). See Birmingham Ry. Light & Power Co. v. Nicholas, 181 Ala. 491, 61 S. 361 (1913). Note Bentham's comment that the rules required "certainty," which meant "precision," not "truth." "Of the information required to be given ... in pleading ... it is in so many instances allowed to be false, that, upon the whole, it is of at least as little use as if it were always so." 4 BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 276, 278 (1827).

[15] Co. LITT. *p. 304a; STEPHEN, PLEADING, 5th Am. ed., *p.251 (1845); 1 CHITTY, PLEADING, 6th Am. ed., *p. 249, *p. 564 (1833).

[16] STEPHEN, PLEADING, 5th Am. ed., *p. 377 (1845); 1 CHITTY, PLEADING, 6th Am. ed., *p. 265 (1833); SHIPMAN, COMMON LAW PLEADING, 2d ed., 449 (1895); Butt's Case, 7 Co. 23a, 77 Eng. Rep. 445 (1600).

Superfluous and immaterial allegations did not render a pleading double: Countess of Northumberland's Case, 5 Co. 97b, 77 Eng. Rep. 206 (1596); Exec. of Grenelife v. W, 1 Dyer 42a, 73 Eng. Rep. 91 (1538). But note that matter "ill pleaded" might still make the pleading double if it be material. STEPHEN, PLEADING, 5th Am. ed., *p. 259 (1845). Nor did a "protestation," i.e., a plea entered, not to raise an issue upon the fact protested, but to reserve the right to contest such fact in any later litigation. It was held under the rule that any allegation not denied or protested was deemed to be admitted. Co. LITT. *p. 124b; SHIPMAN, COMMON LAW PLEADING, 2d ed., 361 (1895).

[17] Macurda v. Lewiston Journal Co., 104 Maine 554, 72 A. 490 (1908), allegation that the defendant had done, or caused to be done, an act. The same rule was applied in criminal cases: King v. Brereton, 8 Mod. 328, 88 Eng. Rep. 235 (1725); King v. Stocker, 5 Mod. 137, 87 Eng. Rep. 568, 1 Salk. 342, 371, 91 Eng. Rep. 300, 323 (1695). Cf. 4 BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 282 (1827), "Wherever a man speaks in the disjunctive, a sort of doubt is confessed. ... Accordingly the disjunctive *or* is proscribed in pleading. The word *and* is exacted ... because *and* is always *certain*, though it be always false."

[18] 1 CHITTY, PLEADING, 6th Am. ed., *p. 265 (1833).

[19] Humphreys v. Bethily, 2 Vent. 198, 86 Eng. Rep. 391 (1690), that defendant "did not pay the sum or any part thereof." The error was cured by the defendant's answer. See 2 Vent. 222, 86 Eng. Rep. 405 (1690). "Bills penal" were succeeded by "Bonds with conditions," and consequently such cases did not arise in the later practice. See PERRY, COMMON LAW PLEADING 303n (1897). In any event the rule was modified by 8 & 9 Wm. III, c. 11, §8 (1697) to allow plaintiff to assign all breaches in an action upon a bond or for any penal sum in a single declaration. The statute was construed to be for the defendant's benefit and compulsory. See extensive note to Gainsford v. Griffith, 1 Wms. Saund. 51, 85 Eng. Rep. 59 at 62 (1678).

the defendant "did not pay the total sum, or any part thereof," was allowed.[20] Here, when there was doubt as to the number of payments made, was a germ of alternative pleading.

The defendant also was required under the traditional rules of common law pleading to stand upon a single ground. Prior to 1705 he could not plead both in abatement and in bar, or demur and plead, or deny and plead in avoidance.[21] An affirmative defense was to assert a single point, by putting forward one fact or a series of dependent or related facts which together made up one point.[22] This "often led to much inartificial and repugnant pleading, as it naturally induced the defendant to endeavor to crowd as much reasoning into his plea as he possibly could."[23] A famous example was *Griffith v. Eyles*,[24] debt for the escape of a prisoner, wherein the defendant, warden of the prison, in his rejoinder (1) traversed the allegation of escape; and (2) pleaded that if the prisoner had escaped, he did so against the defendant's will and returned before the defendant knew of the escape and before the action was brought. Either defense would have defeated the claim, but the court required the defendant to stand upon one or the other.

B. Evasion of the Single Issue Requirement

It is not surprising that here, "as always, technical certainty bred uncertainty and dissatisfaction,"[25] and that methods of escape had been developed and were in common use by the beginning of the nineteenth century.

[20] 1 CHITTY, PLEADING, 6th Am. ed., *p. 408 (1833). And cf. Cornwallis v. Slavery, 2 Burr. 772, 97 Eng. Rep. 555 (1759) where in an action upon a paymaster's bond it was held that the failure to pay "all or any part of the receipts" constituted a single breach.

[21] 1 CHITTY, PLEADING, 6th Am. ed., *p. 260, *p. 565 (1833); SHIPMAN, COMMON LAW PLEADING, 2d ed., 354 (1895). But if defendant's plea in abatement was defeated by demurrer, he was allowed to plead in bar. Millar, "The Old Regime and the New in Civil Procedure," 14 N.Y. UNIV. L. Q. REV. 197 at 214 (1937).

[22] Co. LITT. *p. 304a. 1 CHITTY, PLEADING, 6th Am. ed., *p. 261 (1833). Rowles v. Lusty, 4 Bing. 426, 130 Eng. Rep. 832 (1827); Robinson v. Raley, 1 Burr. 316, 97 Eng. Rep. 330 (1757).

[23] 1 CHITTY, PLEADING, 6th Am. ed., *p. 592 (1833). Cf. TIDD, PRACTICE, 3d ed., 608 (1803).

[24] 1 Bos. & Pul. 413, 126 Eng. Rep. 983 (1799). The defendant was given leave to amend in this case and ultimately received judgment. This case was decided in 1799, long after the statute of 4 & 5 Anne, c. 16 (infra, note 64) authorized the defendant to plead multiple defenses. The statute did not aid the defendant, however, because by the accidents of pleading it was not until the defendant's rejoinder that the alternatives were set up, and the statute did not relax the rules upon rejoinder. See below.

[25] Nelles, "Towards Legal Understanding," 34 COL. L. REV. 862, 871 (1934).

Searching for ways to evade the single issue requirement, the courts and the practitioners had worked within the pattern of arbitrary forms of action fashioned for conditions long since outworn. The plaintiff still initiated his action by suing out the writ which seemed most nearly to fit his complaint. A multiplicity of forms, each with its own peculiar origin and historical evolution, increased the possibility that a plaintiff, by mistaking his step, might find himself without remedy. The correct course must be chosen at his peril: "It was not enough that . . . [the plaintiff] stood within the temple of justice, he must have entered through a particular door."[26]

The growth of equity had afforded some relief from these rigidities, but within the common law courts themselves relief also had been found necessary. Though some statutory changes had been made, the more common method had been "to neutralize the wrong done at one point by introducing a new mechanism to counteract the old . . . the most tempting, and the most fallacious," type of reform.[27] In the unceasing rivalry between tradition and innovation, tradition was at least nominally the victor. Bacon's precautionary advice perhaps was still remembered: "It were good . . . that men in their innovations would follow the example of time itself, which indeed innovateth, greatly, but quietly; and by degrees scarce to be perceived."[28] By the manipulation of accepted doctrines, and by the introduction of legal fictions, the rigors had been modified, and the courts, within limits, were able to grasp more complex fact situations. Four examples, which are illustrative rather than exhaustive, will be noted.

1. Pleading Claim in Multiple Counts. At common law the writs and the forms of action formed the foundation for the joinder of causes of action, though neither test was logically defensible or con-

[26] HEPBURN, DEVELOPMENT OF CODE PLEADING 48 (1897). See also AMOS, THE SCIENCE OF JURISPRUDENCE 326 (1872); Millar, "The Old Regime and the New in Civil Procedure," 14 N.Y. UNIV. L. Q. REV. 197 at 210 (1937); Field, "Law Reform in the United States and Its Influence Abroad," 25 AMER. L. REV. 515, 518 (1891). HEPBURN, DEVELOPMENT OF CODE PLEADING 89 (1897): "If variations rather than essential differences are made the test, the number might be run into the hundreds.... There appear, however, to have been in common use thirty or forty actions which were largely different."

Cf. 4 BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 280 (1827): "Was there any possible means of safety for an unfortunate or perhaps obnoxious suitor? Oftentimes it has appeared to me there was none. The claim was alike capable of being preferred in either of two [actions]: the plaintiff pitched upon the first, and the judge upon the second: had the plaintiff employed the second, the judge would have stamped his exclusive approbation on the first."

[27] PLUCKNETT, CONCISE HISTORY OF THE COMMON LAW, 3d ed., 351 (1940).

[28] BACON, ESSAYS, "Innovations."

sistently applied.[29] The historical similarity of the writ explained the exceptional joinder of actions in debt and detinue, and actions in trover and trespass on the case.[30] With these historical exceptions, claims could be joined only when the distinct causes of action fell within the same form of action. Tort and contract actions could not be joined,[31] and it was of course impossible to join legal and equitable claims.[32]

As a result of the use of the forms as a matrix for joinder, unrelated controversies could be thrown into a single action,[33] while at the same time closely related disputes were arbitrarily severed because they did not fit the same mold.

[29] CLARK, CODE PLEADING 435 (1947). The logical weaknesses incident to the tests of joinder actions at common law have been pointed out. See Sunderland, "Joinder of Actions," 18 MICH. L. REV. 571, 575-578 (1920); Blume, "A Rational Theory for Joinder of Causes of Action and Defenses and for the Use of Counterclaims," 26 MICH. L. REV. 1 at 2 (1927).

[30] Originally the relief accorded in debt and detinue had been dispensed through a single broad form of debt. PLUCKNETT, CONCISE HISTORY OF THE COMMON LAW, 3d ed., 326 (1940); MARTIN, CIVIL PROCEDURE 49, 55 (1899). Trover, originally an action on the case, became a separate action only after the middle of the sixteenth century. Id. 86-89; PERRY, COMMON LAW PLEADING 90 (1897); 3 STREET, FOUNDATIONS OF LEGAL LIABILITY 250 (1906). After Slade's case, 4 Co. 92b, 76 Eng. Rep. 1074 (1602), the courts attempted to distinguish between actions on the case founded on tort, and those founded on contract: "if the former it may be joined with any tort; if the latter with any contract." Mast v. Goodson, 2 Wm. Black. 848, 96 Eng. Rep. 500 (1773). But this case illustrates the difficulty: to sustain the joinder the court construed as based on tort a claim on a special agreement by defendant to allow plaintiff to land coal on defendant's wharf.

The historical relationship in the cases of exceptional joinder seems the most logical explanation of their existence. See MARTIN, id. at 184. This explanation appears to be a recent discovery. In Dalston v. Janson, 5 Mod. 91 at 92, 87 Eng. Rep. 538 at 539 (1695) the court commented that the practice of allowing the joinder of debt and detinue was "strange." 1 CHITTY, PLEADING, 6th Am. ed., *pp. 229-230 (1833) suggests that the joinder of these two actions was probably allowed because the practice is sanctioned in the Registum Brevium, but suggests no reason why it was so sanctioned. HEPBURN, DEVELOPMENT OF CODE PLEADING 53 (1897) remarks that the joinder was allowed "without apparent reason."

A failure to understand the historical basis of the joinder of debt and detinue and of trover and case resulted in efforts to rationalize the rules because of identities of process, plea, judgment, or some combination of these. 1 CHITTY, id. at *p. 229. The difficulties of such an attempt are pointed out in TIDD, PRACTICE, 3d ed., 10-11 (1803). Cf. Brown v. Dixon, 1 T.R. 274, 99 Eng. Rep. 1091 (1786); Dickson v. Clifton, 2 Wils 319, 95 Eng. Rep. 834 (1766); Denison v. Ralphson, 1 Vent. 365, 86 Eng. Rep. 235, Beningsage v. Ralphson, 2 Show. 250, 89 Eng. Rep. 921, Bevingsay v. Ralston, Skin. 66, 90 Eng. Rep. 32 (1682).

[31] Denison v. Ralphson, 1 Vent. 365, 86 Eng. Rep. 235; Bull v. Mathews, 20 R.I. 100, 37 A. 536 (1897); Joy & Carr v. Hill, 36 Vt. 333 (1863); Chamberlain v. Robertson, 52 N.C. 9 (1859). Note, however, that claims which were not joinable as separate causes of action could sometimes be asserted in the declaration in aggravation of damages. See "Legislation: Recent Trends in Joinder of Parties, Causes and Counterclaims," 37 COL. L. REV. 462, 469 (1937).

[32] Cherokee Nation v. Southern Kansas Ry. Co., 135 U.S. 641, 10 S.Ct. 965 (1889).

[33] Blume, "A Rational Theory for Joinder of Causes of Action and Defenses and for the Use of Counterclaims," 26 MICH. L. REV. 1 AT 8 (1927) points out that *case* was "the

Upon the foundation of the rules as to joinder of separate causes of action was erected the fictional practice of stating in separate counts various versions of one claim.[34] Under the ægis of this makeshift, a plaintiff confronted with a complicated aggregate of fact propositions, some of which might be inconsistent, could set forth those which made up each distinct theory in a separate count. Each count was to be complete, sufficient to support a recovery, and distinct from all others. One count must not embrace more than one cause of action,[35] and internally its allegations must not be alternative, repugnant, or inconsistent.[36] Further, each count purported to state a claim upon a distinct transaction, and they were joined conjunctively rather than alternatively. Indeed, a pleading which neglected this fiction was fatally defective. A farcial illustration is *Hart v. Longfield,* decided in 1702.[37] The plaintiff, in an action in assumpsit to recover for the board of an infant, presented counts in *indebitatus assumpsit* and (necessarily by implication in the alternative) in *quantum meruit.* His error was that he stated his claim for the support of the same child, instead of pretending that he had supported two children of the same name. His pleading was defective: "the way had been to aver them to be different children . . . for here you ought to multiply [the child] as often as you multiply your declaration."

The use of multiple counts minimized the unfortunate results of bona fide and justifiable uncertainty; but on the other hand it tended to countenance laxity of factual investigation and looseness of legal analysis. Ingenuity was exercised in framing as many counts as pos-

proper remedy for malicious prosecution, libel, slander, nuisance, seduction, injuries to incorporeal hereditaments, all injuries to rights of person where the injury was not immediate," etc. See also Drury v. Merrill, 20 R.I. 2, 36 A. 835 (1897) allowing joinder in assumpsit of actions upon a promissory note and for breach of promise to marry.

[34] 1 CHITTY, PLEADING, 6th Am. ed., *pp. 445, 448 (1833). This was recognized as a device for evading the requirements of a single issue. Id. *p. 260. See THIRD REPORT COMMON LAW COMMISSIONERS 53 (1831); PERRY, COMMON LAW PLEADING 313 (1897).

[35] Southern Ry. Co. v. Bunnell, 138 Ala. 247, 36 S. 380 (1903) illustrates a strained application of this rule. Plaintiff alleged that he had bought a ticket to town *A* but was given a ticket to town *B*, an intermediate stop, and had been ejected at town *B*. This was construed as alleging two causes of action, one for the negligence of the ticket agent and another for the improper action of the trainman. The pleading was held defective.

[36] Illinois C. Ry. Co. v. Abrams, 84 Miss. 456, 36 S. 542 (1904). See Cook v. Cox, 3 M. & S. 110, 105 Eng. Rep. 552 (1814).

[37] 7 Mod. 148, 82 Eng. Rep. 1156, 2 Ld. Raym. 841, 87 Eng. Rep. 1156 (1702). See Millar, "Unitary Demands and Plural Counts," 16 J. AM. JUD. SOC. 48 (1932). Plaintiff was directed to dismiss as to all except the first count and took judgment on it. After verdict, if the counts did not appear necessarily to be the same, the court would assume they involved different claims: West v. Troles, 1 Salk. 213, 91 Eng. Rep. 190 (1697).

sible, rather than in determining the exact ones which were necessary to place the dispute efficiently before the court, for no limit was imposed on the number of counts, and it was important that the plaintiff exhaust the possibilities, lest the one overlooked be the one established at the trial.[38] By the early nineteenth century the counts in a typical pleading had multiplied beyond reason, with a resulting increase of costs, confusions, and complexity.[39] No less influential than the effort to anticipate all possible theories, one may suspect, was the chance that the opponent might be misled as to the true strength and point of the plaintiff's attack. The Rules of Hilary Term (1834) placed the use of multiple counts under severe limitations,[40] but by that time they had served to loosen the bonds of inflexibility. The admitted values which the practice demonstrated, despite its manifest abuse in many instances, serve to preserve it to this date in the procedures of many states.

2. *The Common Counts.* The common counts, employed in actions of general assumpsit or debt upon a simple contract, served also to mitigate somewhat the restrictions upon alternative allegations. The common counts, which came into use after the custom of alleging multiple counts,[41] were of four general types: *indebitatus assumpsit,* for a sum of money defendant had promised to pay; *quantum meruit,* for the reasonable value of work, labor, or services rendered; *quantum valebant,* for the reasonable value of goods sold; and *account stated,*

[38] See Smith v. Woodward, 4 East. 585, 102 Eng. Rep. 955 (1804) wherein the plaintiff alleged an instrument as though it could be produced, and lost the case when the evidence revealed that the instrument had previously existed and had been destroyed by the defendant.

[39] For example, see Robinson v. Raley, 1 Burr 316, 97 Eng. Rep. 330 (1757) (fourteen counts). 4 BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 283 (1827) makes the caustic observation: "The more counts, the more writing; the more writing, the more fees." REPORT OF THE COMMON LAW COMMISSIONERS (1833) quoted STEPHEN, PLEADING, 5th Am. ed., Appx. 84 (1845), suggested that a contributing factor in the increase in the number of counts was "the increasing remuneration which the pleader or attorney obtains."

[40] STEPHEN, PLEADING, 5th Am. ed., Appx. 77-82 (1845) quotes at length the rule dealing with multiple counts and pleas. Certain minor exceptions were made to the general prohibition. For criticisms of the use of multiple counts, see SECOND REPORT OF COMMON LAW COMMISSIONERS 34 (1831); REPORT OF COMMON LAW COMMISSIONERS (1833) quoted STEPHEN, PLEADING, 5th Am. ed., Appx. 72 (1845).

[41] MARTIN, CIVIL PROCEDURE 56 (1899) places the earliest date in which the common counts were in general use as the period of Lord Holt (1689-1710). Martin cites Hayes v. Warren, 2 Str. 933, 93 Eng. Rep. 950 (1731), in which Sir John Strange *argued* that the declaration on a common count was good, quoting Lord Holt's famous remark that "he was a bold man that first ventured" to use common counts, "but now they are every day's experience." The court held the declaration bad, though it did not disapprove the use of common counts when correctly alleged. Hayes v. Warren was disapproved on other grounds in Pillans & Rose v. Van Mierop & Hopkins, 3 Burr. 1663, 1671, 97 Eng. Rep. 1035, 1039 (1756) as being "strange and absurd."

for an agreed sum due upon a date certain.[42] "The great benefit," as Lord Mansfield observed, ". . . is, that the plaintiff need not state the special circumstances from which he concludes 'that ex aequo et bono the money received by the defendant belongs to him:' he may declare generally . . . and make out his case, at the trial."[43] The common counts indicated the general nature of the controversy, but their vague language provided indirect access to potentially alternative contentions. Chitty commented that "even where the declaration contains a special count it is in general advisable to insert one or more of the common counts. . . . Such a count may sometimes save a verdict where the evidence may vary from the special count."[44]

Because a claim under the common counts must rest upon an executed consideration, their use was limited to cases where any duty which rested on the plaintiff had been fully performed and the defendant's obligation was payable in money,[45] or (though not without conflict) where the plaintiff's performance had been prevented by the defendant's fault or by an agreement to abandon further execution.[46] But where applicable, the common counts provided a welcome tool for a plaintiff in bona fide doubt as to the exact frame of his rights. By the beginning of the nineteenth century Chitty could observe that they were "now much more frequent than the special counts, where the action is for any money demand,"[47] and could caution against inserting in a common count any "unnecessary statements . . . as a variance might be fatal."[48]

[42] For a statement of the rules as to the common counts, see 1 CHITTY, PLEADING, 6th Am. ed., *pp. 372-392 (1833); SHIPMAN, COMMON LAW PLEADING, 2d ed., 19-37 (1895) (listing three only).

[43] Moses v. Macferlan, 2 Burr. 1005, 1010, 97 Eng. Rep. 676, 679 (1760). 1 Black. W. 219, 96 Eng. Rep. 120 (1760). Accord: Monkman v. Shepherdson, 11 Ad. & E. 411, 113 Eng. Rep. 471 (1840).

[44] 1 CHITTY, PLEADING, 6th Am. ed., *pp. 371, 372 (1833).

[45] SHIPMAN, COMMON LAW PLEADINGS, 2d ed., 22-23 (1895). See Gordon v. Martin, Fitzg. 302, 94 Eng. Rep. 766 (1732). An example was Hulle v. Heightman, 2 East. 145, 102 Eng. Rep. 324 (1802), where plaintiff had contracted to work as seaman from port *A* to port *B* and return, and sought recovery for work from *A* to *B* after master ejected at *B*. The court held that indebitatus assumpsit would not lie.

[46] The decisions were in conflict as to the right to maintain an action upon an implied assumpsit where the plaintiff had not fully performeed. MARTIN, CIVIL PROCEDURE 341-349 (1899) reviews this problem in detail. Though some cases went further, Martin suggested phrasing the rule in terms allowing recovery for part performance except where it was provided or necessarily implied in the contracts that complete performance was a condition precedent to recovery, or where the contract was void for illegality. Id at 59.

[47] 1 CHITTY, PLEADING, 6th Am. ed., *p. 376 (1833).

[48] Id. at *pp. 375, 376.

3. *The General Issue.* Counsel for the defense did not lack ways to preserve trial flexibility for their clients. A wedge was supplied by the general issue. According to Blackstone, the general issue was used in the earlier common law only if the defendant intended "wholly to deny the charge alleged against him. But when he meant to distinguish away or palliate the charge, it was always usual to set forth the particular facts in what is called a *special* plea, which was originally intended to apprise the court and the adverse party of the nature and circumstances of the defence, and to keep the law and fact distinct."[49] In the later common law period, however, the issue raising potentialities of several of the general issues went far beyond this merely negative scope. In actions in assumpsit based upon obligations implied by law the general issue of non assumpsit would justify virtually any evidence tending to prove that the plaintiff never had such a claim or that, because of facts legal or equitable in nature, it had been extinguished before suit.[50] By the end of the common law period the same rule was applied to an action in assumpsit upon a special contract, in which originally payment and similar discharges had been specially alleged.[51] Similar latitude was allowed under *nil debet* when the action was in debt upon a simple contract;[52] and under *not guilty* in trespass on the case[53] or in trover.[54] In trespass the general issue, *not*

[49] 3 BLACKST. COMM., Wendell ed., *p. 305 (1854).

[50] Moses v. Macferlan, 2 Burr. 1005, 97 Eng. Rep. 676. 1 Black. W. 219, 96 Eng. Rep. 120 (1760); Fits v. Freestone, 1 Mod. 210, 86 Eng. Rep. 834 (1676); Seff v. Brothman, 108 Md. 278, 70 A. 106 (1908); Young v. Rummell, 2 Hill (N.Y.) 478 (1842). PLUCKNETT, CONCISE HISTORY OF THE COMMON LAW, 3d ed., 368 (1940) lists as available under non assumpsit, the defenses of capacity, duress, want of consideration, statute of frauds, and payment. TIDD, PRACTICE, 3d ed., 591 (1803) adds release, accord and satisfaction, res judicata, etc.

[51] 1 CHITTY, PLEADING, 6th Am. ed., *pp. 508, 513 (1833); STEPHEN, PLEADING, 5th Am. ed., *p. 162 fn (1845). TIDD, PRACTICE, 3d ed., 591-592 (1803). The exceptions are stated by SHIPMAN, COMMON LAW, PLEADING, 2d ed., 283 fn (1895); "Tender, set-off when notice was not given with the plea, bankruptcy, or insolvency, and the statute of limitations," and it did not put in issue "the breach, nor performance by the plaintiff of a condition precedent to his right to sue, nor performance by him of a bilateral contract." Id. at 383.

[52] 1 CHITTY, PLEADING, 6th Am. ed., *p. 508 (1833); STEPHEN, PLEADING, 5th Am. ed., *p. 162 fn (1845); TIDD, PRACTICE, 3d ed., p. 591 (1803).

[53] 1 CHITTY, PLEADING, 6th Am. ed., *p. 527 (1833); Bird v. Randall, 3 Burr. 1345, 1353, 97 Eng. Rep. 866, 870, 1 Black. W. 373, 96 Eng. Rep. 210 (1762) supports this upon the theory that the plaintiff's action in case was founded upon "the mere justice and conscience" of the case and was "in the nature of a bill in equity." Accord: Ridgeley v. West Fairmont, 46 W. Va. 445, 33 S.E. 235 (1899); TIDD, PRACTICE, 3d ed., p. 598 (1803). But Chitty observes that this description was inaccurate as of the early nineteenth century. 1 CHITTY, PLEADING, 6th Am. ed., *p. 527 (1833). See Barker v. Dixon, 1 Wils. 44, 95 Eng Rep. 483 (1743); SHIPMAN, COMMON LAW PLEADING, 2d ed., 292 fn (1895) states the exceptions: "Limitations, justifications in slander, retaking of prisoner in fresh pursuit."

[54] 1 CHITTY, PLEADING, 6th Am. ed., *pp. 508-509 (1833).

guilty, had a broad scope when the violation was of a "relative," as distinguished from an "absolute," right—admittedly an obscure distinction.[55] In the other actions the general issues had a much more limited effect.[56] But in assumpsit, trover, trespass on the case, and some instances of trespass and of debt, the defendant under the general issue could not only rebut the elements of the plaintiff's claim, but also show such affirmative defenses as payment, release, accord and satisfaction, performance, and former judgment.[57] So great was the tactical advantage of the general issue on the common law field of battle that is was not uncommon for companies set up by act of parliament to secure a clause in their enabling acts "empowering them to plead the general issue at all times, putting in their special matter as evidence."[58]

The shotgun scatter of the general issue in such actions obviously defeated the announced policy of reducing the dispute to a single issue, and the practice could not be reconciled rationally with the general principle that pleadings should notify the opposing party as to the defendant's contentions and should plead specifically matters in avoidance.[59] Nothing could be more vague at the pleading stage than an action upon common counts met by a plea of non assumpsit. Even more paradoxically, a special plea setting forth fact propositions which

[55] 1 CHITTY, PLEADING, 6th Am. ed., *p. 509 (1833); TIDD, PRACTICE, 3d ed., 598 (1803). SHIPMAN, COMMON LAW PLEADING, 2d ed., 350 (1895) makes no such distinction and states that "not guilty" in trespass had merely the narrow effect of raising issues as to the action of the defendant.

[56] In debt upon specialty or in covenant, non est factum put in issue only the execution of the deed or matters showing it void in law: 1 CHITTY, PLEADING, 6th Am. ed., *p. 508 (1833); STEPHEN, PLEADING, 5th Am. ed., 162 fn (1845); TIDD, PRACTICE, 3d ed., 593-595 (1803); SHIPMAN, COMMON LAW PLEADING, 2d ed., 286, 288 (1895). Whelpdale's Case, 5 Co. Rep. 119a, 77 Eng. Rep. 239 (1604) and notes; Pigot's Case, 11 Co. Rep. 26b, 77 Eng. Rep. 1177 (1614); Yates v. Boen, 2 Str. 1104, 93 Eng. Rep. 1060 (1739), lunacy of defendant on date of contract. But facts showing the instrument void could be specially pleaded. Collins v. Blantern, 2 Wils. 341, 95 Eng. Rep. 847 (1767). In debt on judgment, nul tiel record put in issue only the existence of the record. SHIPMAN, COMMON LAW PLEADING, 2d ed., 288 (1895). In replevin, non cepit modo et forma (or, if defendant merely detained wrongfully, non detinet) put in issue merely the act. 1 CHITTY, PLEADING, 6th Am. ed., *p. 509 (1833); SHIPMAN, COMMON LAW PLEADING, 2d ed., 293 (1895).

[57] Release could not be shown under the general issue in actions in trover. SHIPMAN, COMMON LAW PLEADING, 2d ed., 291 (1895).

[58] PLUCKNETT, CONCISE HISTORY OF THE COMMON LAW, 3d ed., 367 (1940). Plucknett illustrates by Act Incorporation Conservators of Bedford, 15 Car. II, c. 17, §15 (1663) and by 11 Geo. I, c. 30, §43 (1724), wherein the right to plead the general issue was granted to two insurance companies organized under 6 Geo. I, c. 18 (1719).

[59] See 1 CHITTY, PLEADING, 6th Am. ed., *pp. 513-514 (1833); STEPHEN, PLEADING, 5th Am. ed., *p. 158, *p. 162-3 fn (1845); SHIPMAN, COMMON LAW PLEADING, 2d ed., 283, 292 (1895).

could be proved under the general issue was subject to demurrer on the ground that it amounted to a special issue. "Thus [stood] the matter in regard to written pleadings. General pleading convey[ed] no information, but there [was] an end to it; if any information [was] conveyed by pleading, it [was] by special pleading, but there [was] no end of it."[60]

But despite the lack of pre-trial notice inherent in the general issue, there is little doubt that a majority of the barristers in the early 1800's shared the strictly pragmatic view of the attorney who commented upon the proposal to abolish the general issue in the Hilary Rules:

> "My experience . . . has given me a decided opinion in favour of the general issue. . . . If the pleader could know all the facts precisely as they are to be proved, it would be well to confine the pleadings to a simple statement of these facts. But every practitioner will at once admit, that the pleader seldom or ever has the facts perfectly before him, and that in very many cases it is not in the nature of things that he should. This unavoidable uncertainty . . . I take to be the great and essential cause of difference in opinion between the theorist and the practitioner."[61]

Yet three results naturally followed from the excessive liberality of issues subsumed under certain of the general issues: first, an added expense on the plaintiff in preparing and producing evidence on undisputed issues; secondly, an increased number of new trials due to surprise; and thirdly, an added burden on the judge who was forced to extract the true point at issue from the welter of evidence and argument at the trial.[62] The simplicity of pleading resulting from the use of the general issue was purchased at the price of increased trial complexity.

[60] 4 BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, 267 (1827). See Ill. Civ. Prac. Ann. (McGaskill, 1933) 68-69.

[61] Remarks of a Mr. Addison from the LONDON LAW MAG., quoted in STEPHEN, PLEADING, 5th Am. ed., Appx. 66 (1845), footnote by American editor. Compare HALE, HISTORY OF THE COMMON LAW, Runnington ed., 212 n. (1820), a footnote which, in recommending a more liberal use of the general issue, first praises the logic of the common law system of pleading as "admirably calculated for the purposes of analyzing a cause, of extracting, like the roots of an equation, the true points in dispute, and referring them with all imaginable simplicity to the court or to the jury," and then admits that "nothing would . . . more promote the ends of justice, than to enact that the defendant shall in all actions, on giving previous notice of his intended defence, to the plaintiff, be permitted to plead the general issue."

[62] REPORT OF COMMON LAW COMMISSIONERS (1833) quoted STEPHEN, PLEADING, 5th Am. ed., Appx. 62-63 (1845).

4. *Multiple Defenses.* In 1705 the famous statute of 4 & 5 Anne, which John Anstey a century later described as "the foster-father of all special pleadings,"[63] relaxed the restrictions upon defensive pleadings. This statute provided:

> "The defendant or tenant in any action or suit, or any plaintiff in replevin, in any court of record, may, with the leave of the same court, plead as many matters thereto, as he shall think necessary for his defence."[64]

The statute's limitations left untouched serious defects in the practice. It applied only to pleas in bar[65] in courts of record (that is, the King's Courts), and was dependent upon leave granted by the court. It applied only to the answer, leaving the parties in all subsequent pleadings bound still to the single issue.[66] It was extended by implication to prohibit the defendant from pleading several matters requiring different trials.[67] It did not suffice to permit equitable defenses in actions at law.[68] And it authorized separate pleas, so that a single plea which was duplicitous in the traditional sense still was defective.[69]

Nevertheless, the statute marked an important forward step. Its purpose obviously was to permit the filing of pleas which presented distinct defenses when they were "deemed, in the discretion of the court, essential to the justice of his cause."[70] Gradually the courts, in passing on applications for leave, accorded to defendants an increasing freedom. Initially the party was required to state in his application

[63] JOHN ANSTEY, THE PLEADER'S GUIDE, 8th ed., 94-95, fn (1826).

[64] 4 Anne, c. 16, §§4, 5, effective Trinity Term, 1706. This statute was held to have become a part of the common law as adopted in the United States. See Ann. Cas. 1917C, 706.

[65] Leave was not granted to file multiple dilatory pleas. STEPHEN, PLEADING, 6th Am. ed., *p. 276 (1833); SHIPMAN, COMMON LAW PLEADING, 2d ed., 374 (1895); PERRY, COMMON LAW PLEADING, 321 (1897).

[66] TIDD, PRACTICE, 3d ed., 637 fn (1803); 1 CHITTY, PLEADING, 6th Am. ed., *p. 261 (1833). Tidd notes that where the same plea was urged to claims stated in different counts, the replication could urge a distinct answer to the plea as to each count. But plaintiff continued under the burden of selection at his peril between two or more equally valid replies to one defense. STEPHEN, PLEADING, 5th Am. ed., *p. 276 (1845). Compare the Virginia practice prior to 1934 under a similar statute: 2 Va. Code Ann. (1919) §6107. See Chesapeake & O. R. Co. v. Exch. Bk., 92 Va. 495, 23 S.E. 935 (1896).

[67] 1 CHITTY, PLEADING, 6th Am. ed., *p. 593 (1833): "As in dower, *ne unques accouple in loyal matrimonie, and ne unques seisie que dower;* for the first matter is triable by the bishop, and the other by a jury."

[68] Braddick v. Thompson, 8 East. 344, 103 Eng. Rep. 374 (1807); Scholey & Damville v. Mearns, 7 East. 148, 103 Eng. Rep. 56 (1806).

[69] STEPHEN, PLEADING, 5th Am. ed., *p. 277 (1845).

[70] Gully v. Bishop of Exeter & Dowling, 5 Bing. 42, 45, 130 Eng. Rep. 975, 976 (1828). Accord: PERRY, COMMON LAW PLEADING 319 (1897) citing Clinton v. Morton, 2 Str. 1000, 93 Eng. Rep. 994 (1734).

the substance of his proposed pleas, that the court might supervise the pleading and prevent the inclusion of inconsistent defenses[71] or multiple statements of a single defense. But as the judges became accustomed to the use of numerous pleas the motion for leave came to be granted as a matter of course.[72] Significantly, the gradual relaxation was accompanied by the realization that one plea should not be used as evidence against another.[73] Once this was established, inconsistent pleas and multiple theories of a single factual defense were generally allowed. Even under the later practice, however, the court might compel an election between pleas which were "decidedly repugnant, and would create unjust delay."[74]

The right to plead inconsistent alternative defenses was viewed askance, however, as the period of common law pleading merged into the period of nineteenth century reforms. Conflicting pleas were criticized by the common law commissioners in 1831,[75] and their use was prohibited by the Hilary Rules of 1834.[76]

C. *Summary*

Thus we find that as the period of English procedural reform opened in the second quarter of the nineteenth century, the traditional common law requirement of a single issue was subject to evasion by a variety of devices. The plaintiff was free to allege various versions of his claim in multiple counts; and, where they came within the facts, could use common counts to avoid the necessity of alleging the details of his claim. The defendant could interpose a general issue which in many actions opened a wide variety of defensive positions; and could assert his answer in any action multiple pleas in bar which might, subject to the possibility of his being required to elect, be mutually contradictory. True, certain of these devices tended to obscurity of pleading, unnecessary expense, and trial complexity. And

[71] TIDD, PRACTICE, 3d ed., 611 (1803).

[72] Ibid.; STEPHEN, PLEADING, 5th Am. ed., *p. 274 (1845).

[73] Harington v. McMorris, 5 Taunt. 228, 128 Eng. Rep. 675 (1813).

[74] 1 CHITTY, PLEADING, 6th Am. ed., *p. 594 (1833). In King's Bench the use of multiple pleas in the 1800's was hampered by less formality than in Common Pleas, but substantially the same result was reached through compelling election when multiple pleas could cause confusion. Rama Chitty v. Hume, 13 East. 255, 104 Eng. Rep. 368 (1811).

Plea of non assumpsit or non est factum to entire declaration joined with tender as to part, improper: MacLellan v. Howard, 4 T.R. 194, 100 Eng. Rep. 969 (1791); Jenkins v. Edwards, 5 T.R. 97, 101 Eng. Rep. 55 (1793); TIDD, PRACTICE, 3d ed., 609 (1803); 1 CHITTY, PLEADING, 6th Am. ed., *p. 592 (1833).

[75] THIRD REPORT OF COMMON LAW COMMISSIONERS 57 (1831).

[76] STEPHEN, PLEADING, 5th Am. ed., Appx., 77-82, quotes the rule at length.

alternatives within the individual counts and pleas were still disallowed, while the right to assert multiple pleas was limited to the answer stage of the pleadings. But one fact clearly stands out: with the increasing alertness of the courts to the merits, rather than the formal techniques, of litigation, it became manifest that flexibility of position was essential to any litigation save that of the most elementary simplicity. Further, the experience of the judges in disposing of increasingly complex litigation, hampered by the necessity of employing awkward and fictional devices to afford that essential flexibility, was demonstrating that there was no reason why the full scope of alternative pleading should not be allowed. It was only a matter of time until the relaxation should be frankly recognized.

[To be continued]