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Election of Causes or Grounds of Action in a Duplicitous Declaration

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EDITORIAL NOTE

ELECTION OF CAUSES OR GROUNDS OF ACTION IN A DUPLICITOUS DECLARATION

In a recent West Virginia case,[1] the Supreme Court of Appeals, by way of dictum,[2] suggests that, when two or more grounds for recovery are alleged in a single count of a declaration, the plaintiff may be compelled to elect a single ground upon which he will rely at the trial. Since this seems to be the first West Virginia case in which such a procedure is prescribed, and the court states no reason to sustain it other than the fact that, under the local statutes, the fault of duplicity can no longer be reached by demurrer, it may be profitable to inquire into the authorities and reasoning upon which the proposition may be based. Before

[1] Collins v. Dravo Contracting Co., 171 S. E. 757 (W. Va. 1933).

[2] The action was for death by wrongful act. In a single count, the death was alleged to have been caused (1) by negligence of the defendant and (2)

undertaking to evaluate the single authority[3] cited by the court, and other authorities which might be taken as sustaining the court's suggestion, it will be advisable to advert to some general distinctions and differentiations.

Strictly, the fault of duplicity consists in stating in a single pleading (count, plea, replication, etc.) more than one ground as bases for a single recovery or a single defense; but the term has also been used to designate the situation where more causes of action than one or more defenses than one are alleged in a single pleading. If the allegations involve no other violation of the rules of pleading than mere duplicity, then the fault is purely a formal one and can be reached only by a special demurrer. However, the same allegations which give rise to duplicity may at the same time violate other rules of pleading. Thus, there may be united in a single count of a declaration causes of action which could not be joined in separate counts. In such a case, there is not only duplicity (so called), but also a misjoinder of causes of action,[4] and the latter fault, although cured by the statute of jeofails after verdict, is nevertheless subject to a general demurrer.[5] Upon demurrer to such a count, the plaintiff, to save his declaration, would be compelled to elect, not to cure the duplicity, but to eliminate the misjoinder.[6] Again, where the original common-law rule requiring singleness of issue is still in force to the extent that only one replication can be pleaded to a single plea, or only one rejoinder to a single replication, etc., two wholly separate matters in a single replication or rejoinder will give rise to what is called duplicity, but the pleading is bad also for the

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by the willful act and deliberate intention of its servant. The defendant filed pleas relying upon compliance with the Workmen's Compensation Act. The case was tried on issues made up on these pleas. The plaintiff was not asked to elect and the trial court treated the pleas as presenting defenses to both grounds for recovery. The Supreme Court of Appeals held that the pleas presented no defense to the ground for recovery based on willfulness, but permitted a general verdict for the defendant to stand as to the ground based on negligence. A new trial was ordered as to the willful act alleged, the court suggesting that the defendant might have compelled the plaintiff to elect before the trial, in which event the pleas would have presented a complete defense or no defense at all depending upon which ground the plaintiff should have elected.

[3] Morriss v. White, 146 Va. 553, 131 S. E. 835 (1926).

[4] Knotts v. McGregor, 47 W. Va. 566, 35 S. E. 899 (1900); Grass v. Big Creek Development Co., 75 W. Va. 719, 84 S. E. 750, L. R. A. 1915E 1057 (1915); Farmers' & Merchants' Bank of Reedsville v. Kingwood National Bank, 85 W. Va. 371, 101 S. E. 734 (1920).

[5] Knotts v. McGregor, *supra* n. 4; Malsby v. Lanark Fuel Co., 55 W. Va. 484, 47 S. E. 359 (1904).

[6] Knotts v. McGregor, *supra* n. 4.

other reason — that the plaintiff is entitled to reply or the defendant to rejoin only once — and an election may be compelled, but not on the ground of duplicity.[7] An unfortunate circumstance that often exists in such cases is that, duplicity being present with the other fault and resting upon the same allegations, its name is lent to the other fault, although the facts and circumstances of the case and the reasoning of the court usually clearly indicate that the decision and its consequences are not actually predicated on the ground of duplicity.[8]

The single Virginia case[9] cited by the court to support its proposition is hardly sufficient for the purpose. In the Virginia case, the trial court compelled the plaintiff, over his objection and exception, to elect between what it considered two separate causes of action stated in a single count. In the appellate court, the plaintiff urged that the trial court committed error in compelling the election. The appellate court decided that the declaration in fact contained only one cause of action (the defendant and the trial court having mistaken a collateral allegation as a statement of an independent cause of action) and hence was not duplicitous; that the plaintiff, through his supposed election, had selected and relied upon the true cause of action alleged; and hence that no error had been committed in compelling the supposed election. The court made no attempt to decide that, if (as claimed by the defendant) two separate causes of action had been alleged in the single count, the plaintiff should have been compelled to elect. What is said in the case as to the attempt by the plaintiff to reply more than one matter to a single plea, for reasons stated above, should be carefully differentiated from what is decided with reference to the declaration.

Seemingly, the defendant in the Virginia case cited could discover only two authorities to cite in support of his contention that the plaintiff should be compelled to elect. These two authorities are an earlier Virginia case[10] and BURKS, PLEADING AND PRACTICE.[11] The earlier Virginia case deals with election where the plaintiff attempted to reply more than one matter to a single plea and hence is not in point. The same case is cited by Burks

[7] Chesapeake & Ohio Ry. Co. v. Rison, 99 Va. 18, 37 S. E. 320 (1900); Morriss v. White, *supra* n. 3.

[8] *Idem.* A similar situation might arise in West Virginia as to rejoinders, surrejoinders, etc., the statute permitting multiple pleadings not applying beyond the replication stage.

[9] *Supra* n. 3.

[10] Chesapeake & Ohio Ry. Co. v. Rison, *supra* n. 7.

[11] 2d ed. 327; 1st ed. 335.

as authority for the procedure when the plaintiff attempts to indulge in a double replication; but as to duplicity in a declaration, Burks makes the following statement:

> "In Virginia it has been held that duplicity in a declaration is a defect of form only, and cannot be taken advantage of by a general demurrer; and it is doubtful if the vice can be reached at all. If it can be, it is probably by a motion to compel the plaintiff to elect on which cause of action he will proceed."[12]

Burks cites no authority to indicate the possibility of compelling an election and, if he concedes the possibility, seems to be of the opinion that an election cannot be compelled. Professor Minor, speaking of duplicity, says: ". . . . It would appear that the objection cannot be taken advantage of in Virginia at all, except as to dilatory pleas."[13] The West Virginia Court has said, "Duplicity in a plea is no longer ground of demurrer or objection to it."[14] In a later West Virginia case,[15] it is said that the only remedy open to a defendant when confronted with duplicity in a declaration is resort to the statute which permits him to demand a bill of particulars. The weight of authority in other states, independently of statutory regulation, seems to be that, where duplicity in a declaration is no longer subject to a demurrer and there is no inconsistency in the allegations, no objection can be raised and an election cannot be demanded.[16]

It is common knowledge that the practice of permitting multiple counts for the purpose of stating the same cause of action in different aspects in order to meet the exigencies of proof was designed in order to escape the fault of duplicity. Where a resort is had to multiple counts, of course an election between the counts is not required. Such a requirement would wholly defeat the object of the right to resort to multiple counts. Hence it must be reasoned that, if a single count employed for such a purpose is faulty because of duplicity, the objection must be based, not on the ground that the plaintiff should be prohibited from alleging more than one ground of recovery, but solely on the ground that

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[12] *Idem.*, 326.
[13] 4 MINOR, INSTITUTES, 939.
[14] Poling v. Maddox, 41 W. Va. 779, 24 S. E. 999 (1896).
[15] Grass v. Big Creek Development Co., *supra* n. 4.
[16] 49 C. J. 743-4 and cases cited. In some of these cases, as in the principal case, the duplicity resulted from allegations of negligence and of willfulness in the same count.

he has alleged them in an improper form. Hence it would seem that a statute which merely abolishes the common-law method of objecting to this matter of form does not contemplate any substituted method of objection by means of which a plaintiff may be compelled to suffer curtailment of the substance of his allegations. The abolishment of form is usually intended merely to clear the way to substance, not to expose it to new methods of attack. Abolition of the demurrer going to duplicity in a declaration must have been intended for the benefit of the plaintiff and not of the defendant. Yet if, as a consequence of abolishing the demurrer in this respect, the defendant is allowed the substituted right of compelling the plaintiff to elect one ground of recovery to the exclusion of one or more others, the plaintiff may be in a worse position than if a demurrer were sustained to his count. Unless the plaintiff should always be given, as alternative to election, the right to amend by way of substituting multiple counts for his single duplicitous count, he would be deprived of all his grounds for recovery except one. Presumably a court would rarely, if ever, oppose its discretion to such an application to amend if a demurrer were sustained to a duplicitous count. However, if the defendant is given the power to compel an amendment as alternative to election, then he is in a position to compel the plaintiff to suffer all the substantial consequences of a demurrer to the duplicitous count and the statute abolishing demurrers on the ground of duplicity has accomplished substantially nothing.

One can very easily agree with Professor Minor[17] to the effect that it is unfortunate that the statutes have left the courts powerless to cope with the evils of duplicity. It is one thing to indulge in generalities about eliminating objections as to formal technicalities, but it is an entirely different thing when a trial court is confronted with the task of determining what cause, or how many causes, of action are stated in the jumbled allegations of a single count when the difficulty could easily have been avoided and the issues clearly defined by a resort to multiple counts.[18] It will be noted that the fault of duplicity may still be carried to such an extreme that a demurrer may perhaps be sustained to a declaration, not because of the duplicity, but because the attempt to indulge in duplicity has led to such uncertainty in the declaration

[17] 4 MINOR, INSTITUTES, 620-621, 939.

[18] The declaration in the principal case seemingly was not subject to the criticism of uncertainty. The two grounds were so clearly separable in the

that the court cannot determine what cause of action is intended to be stated.[19] In such a case, the ground of demurrer would be uncertainty in the declaration. Short of this extreme, the only resort seems to be to demand a bill of particulars stating more definitely the grounds of the plaintiff's claim or claims.[20]

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allegations that the court could permit the verdict to stand as to one ground and order a new trial confined to the other ground.

[19] Gould v. Coal & Coke Ry. Co., 74 W. Va. 8, 81 S. E. 529 (1914).

[20] Grass v. Big Creek Development Co., *supra* n. 15.