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Pleadings -- Alternative Joinder of Defendants

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As a result of *Idlewild,* appeal to the court of appeals now provides a complete remedy when a district judge improperly refuses to convene a three judge court. If the court of appeals finds that the single judge did not have jurisdiction, it can proceed with the merits. If a three judge court is proper, it can be so ordered. There is no need to delay proceeding by seeking mandamus from the Supreme Court,[50] for mandamus does not consider the merits; it merely orders the convening of a three judge court.

The procedural result of *Idlewild* is a much needed simplification of review procedure. Procedural pitfalls and piecemeal determination have been eliminated and an uncertain area made uniform and clear.

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Pleadings—Alternative Joinder of Defendants

The Supreme Court of North Carolina has again considered the application of the alternative joinder of defendants statute[1] in *Conger v. Travelers Ins. Co.*[2] Prior to the decision, the status of the statute was very questionable.[3] The instant case has done much to sweep aside the confusion.

In *Conger,* the plaintiff alleged alternatively two causes of action. In the first clause, plaintiff alleged that she was the named beneficiary of a group life insurance policy issued by the defendant, Travelers, which policy insured the life of deceased; that the deceased died while the policy was fully effective; that payment to the plaintiff under the terms of the policy had been refused by Travelers; and that the plaintiff was entitled to full payment from Travelers in the amount of $8000. In the second cause of action,

[50] Apparently mandamus is still available to petitioner. See cases cited note 21 *supra.* However, mandamus will usually not issue where appellate review is available, even though the Court can, in its discretion, issue the writ in exceptional and appropriate cases. *Ex Parte* Republic of Peru, 318 U.S. 578 (1943); *Ex Parte* United States, 287 U.S. 241 (1932). In *Idlewild* the Court granted both certiorari and heard the petition for mandamus. 368 U.S. 812 (1961).

[1] N.C. GEN. STAT. § 1-69 (1953).

[2] 260 N.C. 112, 131 S.E.2d 889 (1963).

[3] State *ex rel* Cain v. Corbett, 235 N.C. 33, 69 S.E.2d 20 (1952); Foote v. C. W. Davis & Co., 230 N.C. 422, 53 S.E.2d 311 (1949) (Although the court did not construe the statute, it was a case for the application of the statute.); Peitzman v. Town of Zebulon, 219 N.C. 473, 14 S.E.2d 416 (1941); Smith v. Greensboro Joint Stock Land Bank, 213 N.C. 343, 196 S.E. 481 (1938); Grady v. Warren, 201 N.C. 693, 161 S.E. 319 (1931).

the plaintiff alleged alternatively that if Travelers was not liable to the plaintiff for the $8000, then the defendant, Colonial Stores, was liable. Pursuant to this allegation the plaintiff pleaded that the deceased had a contract with Colonial Stores whereby Colonial Stores was to deduct a certain amount per week from deceased's salary to pay a portion of the premiums of the insurance policy; that Colonial Stores had, in fact, so deducted the amount up to thirty-one days prior to deceased's death; and that if Colonial Stores had not remitted the premiums to Travelers in accordance with the contract, then Colonial Stores should be liable to the plaintiff for the $8000.

Both Travelers and Colonial Stores demurred to the complaint on the ground that there was a misjoinder of causes and parties. The trial court sustained the demurrer. On appeal, the Supreme Court reversed.

The opinion of the court, in effect, summarized the case law of North Carolina on alternative joinder of defendants, clearing up, to some extent, several prior irreconcilable decisions which were the subject of two previous articles in the *Review*.[4] The court considered in great detail the effect that the statutory provision that "all causes must affect all parties"[5] has upon section 1-69[6] of the General Statutes authorizing alternative joinder of defendants. Thus the main issue in the case was whether or not, in the case of alternative joinder of defendants, all causes must affect all parties; and if they must, did they do so here.

In its decision, the court has reconciled the two sections by saying that both causes, though phrased in the alternative, *do* in fact, affect both parties. This is true in the sense that if one de-

[4] Brandis and Graham, *Recent Developments in the Field of Permissive Joinder of Parties and Causes in North Carolina*, 34 N.C.L. REV. 405, 422 (1956); Brandis, *Permissive Joinder of Parties and Causes in North Carolina*, 25 N.C.L. REV. 1, 43 (1946).

[5] N.C. GEN. STAT. § 1-123 (1953): "The plaintiff may unite in the same complaint several causes of action . . . . But the causes of action so united . . . must affect all the parties to the action . . . ."

[6] N.C. GEN. STAT. § 1-69 (1953): "All persons may be made defendants, jointly, severally, or in the alternative, who have, or claim, an interest in the controversy adverse to the plaintiff, or who are necessary parties to a complete determination or settlement of the questions involved. In an action to recover the possession of real estate, the landlord and tenant may be joined as defendants. Any person claiming title or right of possession to real estate may be made a party plaintiff or defendant, as the case requires, in such action. If the plaintiff is in doubt as to the persons from whom he is entitled to redress, he may join two or more defendants, to determine which is liable."

fendant is held liable, the other cannot be held liable. The court so held and denoted the theory as "mutual exclusiveness" of remedies.[7]

Prior to *Conger,* in *Grady v. Warren,*[8] the court had indicated that section 1-69 could be applied only where a single cause of action is stated.[9] This indication was negated by a subsequent decision in *Peitzman v. Town of Zebulon.*[10] In *Peitzman,* the plaintiff sued the Town of Zebulon on a contract. Later he amended to join an ex-mayor of the town and ex-city clerk as additional parties defendant.[11] Plaintiffs joined the former officers in a second cause of action for wrongfully making and inducing the plaintiff to enter into the contract. Thus, there were alternative defendants, and two causes of action, one in contract and one in tort. The court allowed the joinder, and treated the two causes as arising out of the same transaction, thereby complying with the requirements for joinder of causes.[12]

The *Peitzman* decision left this question unanswered: Could there be alternative joinder of parties and causes where there were alternative facts?[13] Concerning this point the court said in *Peitzman,* "There are no alternative facts alleged, the only alternative involved under the allegations is as to which of the defendants is liable."[14] The court in *Conger* realized that *Peitzman* had not said that there could be no alternative joinder if there were alternative facts. It would appear, however, that the heretofore unanswered question has now been settled by *Conger*:

> The alternative causes are not separate and distinct; they are so interwoven that if one defendant is liable the other is not. Of course, neither may be liable. It seems to us that this complaint, though it contains *alternative factual allegations,* discloses

[7] 260 N.C. 112, 117, 131 S.E.2d 889, 893 (1963). For a full discussion of the "mutual exclusiveness" doctrine to which the court refers, see Brandis, *Permissive Joinder of Parties and Causes in North Carolina,* 25 N.C.L. REV. 1, 43 (1946).

[8] 201 N.C. 693, 161 S.E. 319 (1931).

[9] 260 N.C. 112, 114, 131 S.E.2d 889, 892 (1963).

[10] 219 N.C. 473, 14 S.E.2d 416 (1941).

[11] Plaintiff amended only after the town answered alleging that the former officers had made the contract without authority. *Ibid.*

[12] N.C. GEN. STAT. § 1-123 (1953): "But the causes of action so united must . . . affect all parties to the action . . . ."

[13] 25 N.C.L. REV. 1, 45 (1946).

[14] 219 N.C. 473, 475, 14 S.E.2d 416, 417 (1941).

> one of the situations for which G.S. § 1-69 was passed sixty-three years after G.S. § 1-123.[15]

In other words, where there is a single interwoven transaction, with mutual exclusiveness of the causes, the causes may be joined in the alternative in spite of alternative factual allegations.

Conger supplies the answer to a further question. *Smith v. Greensboro Joint Stock Land Bank*[16] had been decided prior to *Peitzman.* It involved a joinder of defendants which, from the facts,[17] would appear to have been a case for alternative joinder, although the decision did not mention this fact. Instead, the court treated the case as a joinder of *inconsistent* and *contradictory* causes of action, and sustained a demurrer for misjoinder.[18] Acknowledging that *Smith* did, in fact, involve an alternative joinder of causes, the court in *Conger* admits that *Smith* and *Peitzman* pose inconsistent rules, but follows *Peitzman* because "it seems to us to reach the conclusion most likely to expedite the prompt administration of justice."[19]

There is at least one problem left unsolved by *Conger* in the alternative joinder field: Will the reasoning applied in *Conger* be applicable to an alternative joinder of plaintiffs? *Foote v. C. W. Davis & Co.*[20] apparently involved alternative claims of two plaintiffs.[21] The court, however, sustained a demurrer for misjoinder on the grounds of inconsistency of causes without mentioning alternative joinder of parties plaintiff.[22] The language of the court on the point of inconsistency is interesting: "There is no joint or

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[15] 260 N.C. 112, 117, 131 S.E.2d 889, 893 (1963).

[16] 213 N.C. 343, 196 S.E. 481 (1938).

[17] In *Smith,* the plaintiff alleged in his first cause of action that the defendant bank had foreclosed his mortgage without sufficient power of sale; that at the foreclosure sale, the bank bought the property through its agent; and that the property had subsequently been conveyed to the other defendants in the action. The plaintiff asked in this cause that the sale and subsequent deeds be set aside. In the second cause, the plaintiff sought damages against the defendant bank only if it were found that the purchasers from the bank's agent were innocent.

[18] 213 N.C. 343, 346, 196 S.E. 481, 482 (1938).

[19] 260 N.C. 112, 118, 131 S.E.2d 889, 893 (1963).

[20] 230 N.C. 422, 53 S.E.2d 311 (1949).

[21] In *Foote,* the plaintiff alleged that the defendant, Davis, had breached its contract to buy prunes from the plaintiff. Because Davis set up in defense to the action an allegation that the plaintiff was not the real party in interest and that the plaintiff was the mere selling agent for Guggenhime, plaintiff had Guggenhime joined as a party plaintiff. Obviously, either one or the other, or neither, but not both in any case, was entitled to recover.

[22] 230 N.C. 422, 423, 53 S.E.2d 311, 312 (1949).

common interest in the claim asserted. Instead, each contradicts the other. If Foote's claim is well-founded, Guggenhime has no interest therein . . . ."[23] This statement would indicate an alternative joinder, as the language, in effect, is the "mutual exclusiveness" doctrine.[24]

That *Foote* would be controlling in the wake of the *Conger* decision is doubtful. Since *Conger,* however, was limited to a case of alternative joinder of defendants, some distinction might be made by the court due to the different wording of the statutes.[25] Section 1-69 of the General Statutes provides for alternative joinder of defendants if the plaintiff is in doubt as to the persons from whom he is entitled redress, whereas section 1-68 contains no such "doubt clause" regarding the joinder of plaintiffs. Rationally, this distinction should make no difference whatsoever.[26]

A reconsideration of the problem raised by *Foote* is still needed. As the situation now stands, multiple defendants may be joined in the alternative without the worry of having a demurrer for misjoinder sustained either on the ground that alternative facts have been alleged, or on the basis that the plaintiff is proceeding upon inconsistent theories. The only requirement is that there be "mutual exclusiveness" of remedies.[27] The same rule should apply to alternative joinder of plaintiffs, and *Conger* should be good authority for avoiding the *Foote* situation. Further consideration by the court is necessary, however, before it would be completely safe to

[23] *Ibid.* It must be noted that in Foote there were two separate complaints, and not merely one complaint with causes joined in the alternative. If this was the basis of the court's ruling that the claims were inconsistent, it would appear that if the claims were encompassed in a single complaint phrased in the alternative, the court would overrule a demurrer.

[24] 260 N.C. 112, 117, 131 S.E.2d 889, 893 (1963): "They [the causes] are so interwoven that if one defendant [plaintiff] is liable [entitled to recover] the other is not."

[25] N.C. GEN. STAT. § 1-68 (1953): "All persons having an interest in the subject of the action and in obtaining the relief demanded may be joined as plaintiffs, either jointly, severally, or in the alternative . . . ." Compare this *with* N.C. GEN. STAT. § 1-69 (1953): "All persons may be made defendants, jointly, severally, or in the alternative, who have, or claim, an interest in the controversy adverse to the plaintiff . . . . If the plaintiff is in *doubt* as to the person from whom he is entitled to redress, he may join two or more defendants, to determine which is liable." (Emphasis added.)

[26] 34 N.C.L. REV. 405, 424 (1956): "[T]he mere authorization of alternative joinder of plaintiffs so plainly contemplates a comparable uncertainty, that such a ground of distinction seems highly improbable."

[27] 260 N.C. 112, 117, 131 S.E.2d 889, 893 (1963).

say that the attorney could forget the inconsistency notion in alternative joinder of plaintiffs.

It would seem that by the *Conger* decision, North Carolina, in the alternative joinder situation, is becoming more liberal, perhaps even approaching the liberality of the Federal Rules.[28] It is hoped that the court will continue "to reach the conclusions most likely to expedite the prompt administration of justice."[29]

ARCH K. SCHOCH IV

Quasi-Contract—Expense of Medical Care of Indigent Parent

During the last illness of a parent, it is not unusual for his children to assume his medical bills. In *Deskovick v. Porzio*[1] the Superior Court of New Jersey, Appellate Division, recently considered an action to recover such expenses brought by two adult sons against the estate of their father, on an alleged contract for repayment.

The decedent's illness made his sons reluctant to discuss money matters with him and testimony indicates that they were erroneously led to believe that their father was unable to pay his medical bills.[2] They assumed and paid the bills, allegedly intending to have an accounting at some unspecified future date. Since the estate left by the decedent was more than sufficient to cover his medical expenses[3] they sought recovery, basing their action on a theory of contract implied in fact.[4] There could have been no such contract,

[28] 2 BARRON AND HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 533, at 193 (1961). Rule 20(a) of the Federal Rules of Civil Procedure was enacted in contemplation of procedural economy and provided for, among other aspects, the alternative joinder of defendants. The authors cite Payne v. British Time Recorder Co., [1921] 2 K.B. 1, as the forerunner of Rule 20(a). *Payne* is interesting, therefore, from a historical point of view. In *Payne,* plaintiff supplier ordered cards from manufacturer for a customer from a sample furnished by manufacturer. On arrival, customer refused acceptance, alleging variance from the sample. The British court allowed joinder of customer and manufacturer in the alternative, realizing that the case, as in *Conger,* presented one common question: Did the cards furnished meet the specifications of the sample? This is a case of "mutual exclusiveness," because recovery against one would definitely preclude recovery against the other.

[29] 260 N.C. 112, 118, 131 S.E.2d 889, 893 (1963).

[1] 78 N.J. Super. 82, 187 A.2d 610 (App. Div. 1963).

[2] *Id.* at 85-86, 187 A.2d at 611-12.

[3] *Id.* at 89, 187 A.2d at 613.

[4] "Contracts are express when their terms are stated by the parties and are often said to be implied when their terms are not so stated. The dis-