# AN ESSAY ON THE LAW OF PLEADING BY WAY OF CLAIM FOR ALTERNATIVE RELIEF

Published @ 2017 Trieste Publishing Pty Ltd

ISBN 9780649338283

An Essay on the Law of Pleading by Way of Claim for Alternative Relief by Albert Gordon Langley



Edited by Trieste Publishing Pty Ltd.
Cover @ 2017



www.triestepublishing.com

ALBERT GORDON LANGLEY

# AN ESSAY ON THE LAW OF PLEADING BY WAY OF CLAIM FOR ALTERNATIVE RELIEF

Trieste

# Law of Pleading

BY WAY OF

# CLAIM FOR ALTERNATIVE RELIEF.

# An Essay

ON THE

# LAW OF PLEADING

BY WAY OF

# CLAIM FOR ALTERNATIVE RELIEF.

BY

ALBERT GORDON LANGLEY,

OF LINCOLN'S INN, ESQ., BARRISTER-AT-LAW.



LONDON:

BUTTERWORTHS, 7, FLEET STREET,

Law Publishers to the Queen's most excellent Majesty.

DUBLIN: HODGES, FIGGIS & CO.

EDINBURGH: T. & T. CLARK; BELL & BRADFUTE.

CALCUTTA: THACKER, SPINK & CO. MELBOURNE: GEO. ROBERTSON.

1881.

# Law of Pleading

BY WAY OF

# CLAIM FOR ALTERNATIVE RELIEF.

# ON PLEADING

BY WAY OF

# Claim for Alternative Relief.

THE department of pleading which it is proposed to consider in this essay has hitherto been moulded by the decisions of the judges and the necessities of litigation. But now the rules of Court made in pursuance of the Judicature Act expressly sanction the pleading of alternative relations. "The Judicature Act has enlarged the liberty of the plaintiff in claiming relief, for it is expressly provided that, subject to certain regulations, alternative relief may be asked and several causes of action may be joined in the same Statement of Claim,"—per Lord Cairns, L. C., *Bagot* v. *Easton* (7 Ch. D. 8). By Order XIX., rule 8, every Statement of Claim shall state specifically the relief which the plaintiff claims either simply or in the alternative and may also ask for general relief. By Rule 27, if a person desires to rely in the alternative upon more contracts or relations than one as to be implied from certain circumstances he may state the same in the alternative. By Order XVI., rule 1, all persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist whether jointly, severally or in the alternative. By Rule 3 all persons may be joined as defendants against whom the right to any relief is alleged to exist whether jointly, severally or in the alternative.

Jessel, M.R., commenting on this rule in *Evans* v. *Buck* (4 Ch. D. 432), said, "The same rules of pleading which prevailed under the old law prevail now, unless there is

anything in the Judicature Act or in the new orders or rules which prevents it;" and his lordship held that the word "alternative" in the above rule did not mean an inconsistent alternative.

It will be necessary to bear in mind that the results to which pleading is directed must be shaped by the old maxim that a party must recover *secundùm allegata et probata*. Fry, J., in the case of *Cargill* v. *Bower* (10 Ch. D. 508), speaking of the prayer for further relief, observed, "Such a prayer must always be limited by two things, the facts which are alleged and the relief which is expressly asked. You cannot under a general prayer for further relief obtain any relief inconsistent with that relief which is expressly asked for." And at page 516, his lordship observed: "Above all in cases of fraud the decision of the Court must proceed *secundum allegata et probata*" (*a*).

(*a*) See also Dart's Vendors and Purchasers, 5th ed. p. 1015. For the difference to be observed between *allegata* and *probata* so as to obey Order XIX. rule 4, which provides that "every pleading shall contain as concisely as may be a statement of the material facts on which the party relies, but not the evidence by which they are to be proved," see *Philipps* v. *Philipps*, 4 Q. B. D. 127. The following observations of Brett, L. J., as to the above distinction will be found valuable:—"I will not say that it is easy to express in words what are the facts which must be stated and what matter need not be stated. I know that great pains were taken to draw Rule 4, and it is difficult to state the matter more clearly than in that rule. The distinction is there pointed out that every pleading shall contain a statement of the material facts on which the party pleading relies, but not the evidence by which they (that is, those material facts) are to be proved. The distinction is taken in the very rule itself, between the facts on which the party relies and the evidence to prove these facts. Erle, C. J., expressed it in this way. He said that there were facts that might be called the *allegata probanda*, the facts which ought to be proved, and they were different from the evidence which was adduced to prove those facts. And it was upon the expression of opinion of Erle, C. J., that Rule 4 was drawn. The facts which ought to be stated are the material facts on which the party pleading relies. It was purposely not put 'the facts which will be necessary to support the cause of action,' for the party might not be able to state such facts, as, for instance,

We may consider this subject in the following order:—



---

he might only know such facts as would render his case demurrable, and could only state facts which would not be sufficient to maintain the cause of action; but he states the facts on which he intends to rely at the trial. There are some tests which show practically what the rules mean. I think that in a pleading under the new rules such facts ought to be stated, which if a person had had to state a special case formerly for the opinion of the Court, he would have stated in the special case as facts. If a person had to state a special case as an arbitrator, there are certain facts which he must find and state, but he does not state the evidence upon which he was brought to find those facts; and the difference, although not so easy to express, is perfectly easy to understand. An arbitrator had to state every fact which would support, when proved, the contention of the person on whose behalf he was stating that fact. He did not state the evidence by which he came to find those facts. Now such facts as would be stated in a special case to support or meet the claim are precisely the facts which are to be stated under the new system. It seems to me that there is another test. If parties were held strictly to their pleadings under the present system, they ought not to be allowed to prove at the trial, as a fact on which they would have to rely in order to support their case, any fact which is not stated in the pleadings." *Ib.* pp. 132, 133.

In *Evelyn* v. *Evelyn*, 28 W. R. 531; 42 L. T., N. S. 248, an application was made, under Order XXVII. rule 1, to strike out paragraph 25 of the Statement of Claim, which alleged "The said Frances Evelyn died intestate as to real estate, and leaving Sir Hugh Evelyn her heir-at-law." Malins, V.-C., distinguishing *Philipps* v. *Philipps*, refused to strike out the allegation. And see *Barre* v. *Fewkes*, 10 Jur., N. S. 466; 12 W. R. 666; not following *Baker* v. *Harwood*, 7 Sim. 373.