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of another, when in both forums equal laws are applicable and an 
equal administration of justice is obtained.  

The distinction in the Kentucky statutes relating to venue as 
against non-residents and residents is, undoubtedly, a legitimate one, 
which works no hardship upon the defendant. It is designed to secure 
rights of the injured plaintiff which may otherwise be completely 
lost, and the statute should be declared constitutional.

Dorothy Salmon.

MOTION FOR JUDGMENT ON THE PLEADINGS IN KENTUCKY 
OTHER THAN FOR JUDGMENT NOTWITHSTANDING THE 
VERDICT.

The Kentucky Code provides: "judgment shall be given for the 
party whom the pleadings entitle thereto, though there may have 
been a verdict against him". In view of this rather broad and 
general statement, which would seem to include judgment on the 
pleadings in any situation in which the pleadings are insufficient, the 
paucity of cases in Kentucky relating to motion for judgment on the 
pleadings is surprising. In other states this motion is not infrequently 
used in practice under the reformed codes of procedure. Nevertheless, even in these states it is not always looked upon with favor by the 
courts.

The highest court of Kentucky has indulged in a great deal of 
loose language in discussing judgments on the pleadings, so that it 
is difficult to ascertain by a reading of the cases whether the court 
is speaking of judgment given on the pleadings on motion therefor, 
or peremptory instructions, demurrers, or judgments notwithstanding 
the verdict. However, the propriety of this motion for judgment on the 
pleadings would seem to be established by a few cases which, 
upon careful perusal, appear to bear upon this point with some 
degree of exactitude. The case of Miller v. Hart squarely upholds 
a judgment given on such a motion. In this case the defendant had 
promised, for a consideration, to let the plaintiff have her life estate 
in certain land, and relying on this promise the plaintiff had pur-
chased defendant's grandchildren's reversionary interest in the land. 
The defendant then refused to abide by the agreement and the plain-
tiff brought suit. The defendant answered, denying the allegations 
of the petition, and afterwards entered a motion for judgment in her 
favor on the pleadings. Her position was that the contract was within

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1 Kentucky Civil Code (Carroll, 1932), section 386.
2 Finley v. Tucson, 7 Ariz. 108, 60 Pac. 872 (1900); Botto v. 
Vandament, 67 Cal. 322, 7 Pac. 753 (1885); Steinhauser v. Colmar, 11 
Colo. App. 494, 56 Pac. 291 (1898); Grimmett v. Grimmett, 80 Okla. 
176, 195 Pac. 133 (1921); Robinson v. Anderson, 88 Okla. 136, 212 Pac. 
121 (1922).
3 Good v. First National Bank of Roff, 88 Okla. 110, 211 Pac. 1051 
(1922); James River Nat. Bank v. Purchase, 9 N. D. 280, 83 N. W. 7 
(1900).
4 122 Ky. 494, 91 S. W. 698 (1906).
the Statute of Frauds. The court sustained the motion and judgment was entered. Upon appeal by the plaintiff the decision of the lower court was upheld. Unfortunately there was no discussion of the question of the motion for judgment on the pleadings beyond the mere statement that "as the judgment was entered on the pleadings the allegations of the petition must be taken as true upon the appeal." Evidently the court took for granted the validity of the motion. This decision is doubtless correct, but the question hardly deserves such cavalier treatment, inasmuch as it has never been discussed in any case in a manner approaching completeness. *Blythe v. Warner* is another case in which the appellate court squarely upholds the judgment of a lower court given upon a motion for judgment on the pleadings, but it is no more satisfactory because the motion is referred to by the appellate court only as a demurrer, and no distinction is drawn. Other cases are more vague as to the exact point decided, and are scarcely more informative, but indicate the court would not retreat from the position it took in the aforementioned cases favorable to the motion in question. More indicative of the court's position are several cases in which judgment was rendered on such motion in the lower court, but reversed on appeal. These cases were reversed only on the ground that the motion was not proper in the particular situations arising in the cases, and nothing whatever was said about any impropriety of the motion in general.

In other jurisdictions the motion for judgment on the pleadings is of a double nature. It is like a demurrer because it attacks the sufficiency of the pleadings, admits the truth of all well pleaded facts in the pleadings of the opposing party, and may be carried back and sustained against a prior pleading of the party making the motion, and because the court will consider the whole record and give judgment for the party who, on the whole, appears entitled to it. It is a motion because it is an application for an order for judgment. The Kentucky court has indicated that it looks upon the motion in much the same light, and has even expressly referred to it as a demurrer. It has been said that "the motion, under the circumstances, partook of the nature of a demurrer, which, if it had been filed and overruled,

*See Blythe v. Warner, 190 Ky. 104, 105 (1920), supra, n. 5.*
would not have prevented the appellees from presenting their proof." A slight doubt is thrown upon this point by an earlier case in which the ruling of the lower court sustaining the motion on the ground that the answer presented no defense, was reversed with the statement that "if the answer did not constitute a defense, or was not sufficiently definite, these questions could have been raised by demurrer or by proper motion". This statement indicates hostility to the motion, and particularly to its use as a substitute for a demurrer, but it is submitted that this opinion is not controlling because the case was really decided on the ground that the answer had in fact presented a defense. The similarity of the motion for judgment on the pleadings and the demurrer is further indicated in those cases in which the lower court has overruled a demurrer to a pleading, and then later granted judgment on the pleadings on the ground that the pleading demurred to was, after all, insufficient. It has been said that the court should not create in a party’s mind the belief that his pleading is sufficient by overruling a demurrer to it, and then, without affording him an opportunity to amend, allow submission of the cause upon the motion of the adverse party, and render a final judgment against him because the pleading which the court has just said was sufficient, is in fact defective. But it appears that to save himself from a final judgment in such case the party moved against must file a sufficient pleading, because the motion calls the sufficiency of the pleading directly into question, and directs his attention to it.

In other jurisdictions the motion for judgment on the pleadings has been found to be useful in situations where the complaint fails to state a cause of action or the counterclaim is clearly insufficient, particularly where the pleading is not susceptible of amendment, and where the answer or reply admits or leaves undenied all the material facts stated in the pleading of the opposing party and sets up no new matter which is a defense. The cases indicate that Kentucky would hold the same way, allowing the motion both where the complaint or counterclaim is insufficient, and where the answer or

24 Good v. First National Bank of Roff, 88 Okla. 110, 211 Pac. 1051 (1923).
reply admits or leaves undenied all material facts stated in the opposing party’s pleading. But the pleading must be clearly bad in order to justify a judgment in favor of the other party. In case of an answer in which the affirmative averments are nothing more than another manner of making a denial, the court will refuse to sustain a motion for judgment.

The right to move for judgment is not waived merely by answering the frivolous or defective pleading. That this is true in Kentucky is shown by the case of Miller v. Hart, previously discussed. The propriety of the use of this motion at any time from the filing of the pleadings until after the trial has started is one of its chief advantages. The exact point at which the right to make this motion is waived has not been determined, and probably the trial court would be allowed to use some discretion in fixing it according to the peculiar circumstances of the case, but it appears that in other jurisdictions if the parties introduce evidence as though an issue were properly raised, it is then too late to ask for a judgment for want of a reply. There is practically nothing to indicate Kentucky’s stand on this point. In one case the trial court was held to have erred in granting a judgment on the pleadings on motion therefor, because the issue was really made up by the pleadings, the jury empaneled and sworn, and the case stated. But the controlling factor was the fact that the issue had been, in fact, made up by the pleadings. Since Kentucky has not differed from other states upon the whole question of motion for judgment on the pleadings, it is probable there would be no difference upon this particular point, and therefore no waiver at least until the case had gone to trial and some evidence had been introduced. Where a party does fail to move for a judgment on the pleadings, an objection on the ground of absence of reply is waived where the motion for new trial is not put upon any grounds of defect in the pleadings.

In conclusion it is submitted that the motion for judgment on the pleadings is allowable in Kentucky; that it may be used to object to the sufficiency or lack of a pleading of the opposing party; that it partakes of the nature both of a demurrer and of a motion; and that it may be used at least until the case has gone to trial and the parties have commenced introducing evidence.

Jo McCown Ferguson

30. Covel v. Smith, 68 Miss. 296, 8 So. 850 (1891).
32. Louisville and Nashville Railroad Co. v. Copas, 95 Ky. 460, 26 S. W. 179 (1894).