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## THE OBJECTIVE AND FUNCTION OF THE COMPLAINT COMMON LAW—CODES—FEDERAL RULES

FLEMING JAMES, JR.\*

Before a court can properly decide a case and enter judgment, certain things must have taken place. The court must have obtained jurisdiction over the parties and over the controversy to be decided.<sup>1</sup> Limits must be set to the controversy so that the court and the parties may know how to direct their efforts, and so that the court may rule on questions of relevancy. The issues of fact and of law must be framed so that each is allocated to the appropriate tribunal for decision and is presented clearly enough so that the tribunal knows what to decide. The adversary must be given fair notice of the case alleged against him so that he will be able to prepare his own case to try to meet it. There must be some appropriate time and place set apart for allowing the parties to present their evidence or their arguments to the tribunal. The basis for the judgment should be so laid that parties may determine its scope whenever it becomes important, either for enforcing the judgment itself or in some later proceeding. The obtention of jurisdiction must probably precede a valid judgment;<sup>2</sup> beyond that there is no ironclad time sequence for these steps. Judgment may even precede trial or hearing, provided the one cast in judgment is given reasonable opportunity to present his case upon attacking the judgment after it is entered.<sup>3</sup> But of course trial or hearing nearly always comes before judgment. Moreover it is certainly desirable from the point of view of convenience and administrative efficiency to have as many of the other steps taken before trial as possible. Otherwise the trial itself must be interrupted while issues are framed and the controversy limited or while the adversary is given opportunity to meet contentions of which he had no notice.

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1. See, e.g., *McDonald v. Mabee*, 243 U.S. 90 (1917); *Pennoyer v. Neff*, 95 U.S. 714 (1877).

Recent developments in this field may be suggested by *Hanson v. Denckla*, 357 U.S. 235 (1958); *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Henry L. Doherty & Co. v. Goodman*, 294 U.S. 623 (1935).

2. *Riverside & Dan River Cotton Mills v. Menefee*, 237 U.S. 189 (1915); *but cf. York v. Texas*, 137 U.S. 15 (1890).

3. *Baldwin v. American Sur. Co.*, 287 U.S. 156 (1932). *Cf. Catlin v. United States*, 324 U.S. 229 (1945). This was an eminent domain proceeding under the War Purposes Act of 1917; "judgment" vesting title in the United States was entered prior to hearing of trial pursuant to the Declaration of Taking Act of 1931. A judgment so rendered is not a final judgment.

Traditionally, at common law, principal reliance was placed upon pleadings—the written statements by the parties of their claims and defenses—to do most of these jobs.<sup>4</sup> Indeed this was nearly the only device which common law courts afforded for the pretrial discovery of adversary claims or of evidence in an adversary's possession.<sup>5</sup> Courts of Chancery did, to be sure, devise machinery for interrogating an adversary, for obtaining disclosure of documents and things in his possession, and for taking depositions, all before trial.<sup>6</sup> And this machinery for what may be called discovery became available in aid of an action or defense at law under some circumstances.<sup>7</sup> But the availability of such pretrial discovery was limited by important conditions so that by and large the common law did look only to pleadings to get a case ready for trial and to protect the adversary's rights in preparing for trial.<sup>8</sup>

In recent years there has been a very great development and expansion in the use of discovery and other pretrial devices.<sup>9</sup> This means that the steps which it is desirable to have taken before trial need no longer be done solely by pleadings, if they are to be done at all. We must bear this in mind in the following discussion of the function of the pleadings for we may well find that there are other better ways to take many pretrial steps; this in turn may well lead to a de-emphasis of pleading itself.

Before proceeding to a more detailed examination of the functions listed above, one thing further should be noted. The listing contains a good deal of overlap and duplication. The vesting in a court, for example, of jurisdiction over a particular controversy necessarily involves some definition of that controversy—that is the setting of limits to it. The framing of specific issues to be tried is one way to limit the controversy. Both the framing of issues and the setting of bounds to the controversy give some kind of notice to the court and adversary of what is to be the subject of trial and—for the adversary—what must be prepared against and met. These functions have been listed separately because each emphasizes a different purpose and each has been selected, at one time or another, by some school of thought, as particularly deserving of emphasis.

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4. See generally STEPHEN, *TREATISE ON THE PRINCIPLES OF PLEADING* ch. II (1824) [hereinafter cited as STEPHEN]. The original edition of STEPHEN is cited (except as otherwise noted) since this was a contemporaneous reflection of the common law even before the Hilary Rules.

5. See MILLAR, *CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE* 219 (1952) [hereinafter cited as MILLAR].

6. MILLAR 201.

7. MILLAR 204.

8. MILLAR 36, 37, 204. See also James, *Discovery*, 38 *YALE L.J.* 746 (1929); RAGLAND, *DISCOVERY BEFORE TRIAL* (1932), on the general subject.

9. On the historical development of discovery, see MILLAR ch. XIV.

In what follows we shall first briefly examine the principal aims which pleadings have sought to achieve from time to time in Anglo-American law and trace the history of their emphasis. In the second part we shall examine how the notice-giving function of the plaintiff's complaint was served at common law and in equity, and how it is served under more modern procedures.

### I. THE AIMS OF PLEADINGS

*Vesting the court with jurisdiction over the particular subject matter of an individual case.*—Courts are created and vested with jurisdiction by constitutional or statutory provision. Such provision defines the subject matters of the jurisdiction in general terms; it does not give the court jurisdiction over a specific case. Nor do courts possess general roving jurisdiction to bring matters of a civil nature before themselves.<sup>10</sup> Under our system it is left to the parties to bring specific cases within the jurisdiction of the court. In most cases the pleadings are relied upon to vest the court with jurisdiction over the particular subject matter of an individual case. The general notion is that a court has no jurisdiction to decide matters which the parties have not presented to it by their pleadings, although there may also be other ways for the parties to put a matter before the court; questions may arise whether these alternatives confer jurisdiction upon the court.<sup>11</sup>

*The setting of bounds to a controversy.*—This is important primarily to serve what may be called the secondary objectives of procedure. Some definition of the controversy is needed to give the adversary fair notice and an opportunity to defend. It is needed also for administrative efficiency and to make clear, for those who have later occasion to look, just what has been adjudicated.<sup>12</sup>

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10. *Webster Eisenlohr, Inc. v. Kalodner*, 145 F.2d 316 (3d Cir. 1944), *cert. denied*, 325 U.S. 867 (1945).

11. The court was held to lack jurisdiction over issues not presented by proper pleadings in *Rhodes v. Sewell*, 21 Ala. App. 441, 109 So. 179 (1926). See also *New Haven Sand Blast Co. v. Dreisbach*, 104 Conn. 322, 133 Atl. 99 (1926); *Munday v. Vail*, 34 N.J.L. 418 (1871).

Compare, however, *Vider v. City of Chicago*, 60 Ill. App. 595 (1895); *Gwin v. Williams*, 27 Miss. 324 (1854); *Leach v. Western N.C. R.R.*, 65 N.C. 486 (1871).

12. It is submitted that the primary objective of all procedure should be to secure to parties the full measure of their substantive rights (or impose upon them their duties under substantive law). In a finite world under any system administered by fallible human beings, however, the unfettered pursuit of ultimate truth in every dispute is practically out of the question. There is the need to put limits on inquiry, and the existence of these limits in turn calls for safeguards so that the inquiry shall give each party concerned a sense that he is being fairly dealt with. Under our adversary system this means not only determination by an impartial and not too inconvenient tribunal, but also a reasonable chance for each party to present his side of

*The production of an issue.*—Different systems have stressed different aspects of this general objective. The common law laid particular emphasis on the production of an issue and relied entirely on pleadings to achieve this purpose.<sup>13</sup> To each pleading, therefore, the adversary had either to demur or to plead until a single issue of law or of fact was framed.<sup>14</sup> A demurrer raised an issue of law upon the sufficiency of the pleading demurred to. A denial, or traverse, of the material allegations in the next prior pleading raised an issue of fact; but if the adversary confessed those allegations and set up other facts (new matter) to avoid their legal effect, further pleading was called for. A pleader might not both demur and plead, or both deny and avoid; and avoidances had to be single.<sup>15</sup>

One reason for this, in early times, was that the nature of the trial or hearing depended upon the nature of the issue which therefore had to be framed before the trial took place.

As questions of law were decided by the *court*, and matter of fact referred to other kind of investigation, it was, in the first place, necessary to settle whether the question in the cause, or issue, was a matter of *law* or *fact*. Again, if it happened to be a matter of fact, it required to be developed in a form sufficiently specific to show what was the method of trial appropriate to the case.<sup>16</sup>

Early forms of trial included: trial by jury, by ordeal, by battle, and by wager of law. Even in Stephen's day the following could be listed, though all of them save jury trial were very rare: trial by jury, "by *the grand assize—by the record—by certificate—by witnesses—by inspection—and by wager of law.*"<sup>17</sup>

Under such a system administrative efficiency would clearly be served by the production before trial of a single issue; indeed the production of issue is well nigh a necessity, and a requirement that it be single—while not strictly necessary—is of the highest convenience.<sup>18</sup>

As time wore on the common law courts came to try virtually all

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the case before the tribunal. The objectives sought by these safeguards, and the aim of administrative efficiency are here called secondary, not to disparage them, but to emphasize the paramount importance of what is called the primary objective. Those who drafted the original code made a similar value judgment. See STATE OF NEW YORK, FIRST REPORT OF COMMISSIONERS, ON PRACTICE AND PLEADING 67-87 (particularly 74, 75), 137-47 (1848) [hereinafter cited as FIRST REPORT OF COMMISSIONERS].

13. STEPHEN 145, 155.

14. STEPHEN 157.

15. STEPHEN 157, 170, 219-32, 290, 296. In Stephen's day multiple pleas were allowed. *Id.* at 290.

16. STEPHEN 148.

17. STEPHEN 102. For a description of earlier forms, see, *e.g.*, MAITLAND, THE FORMS OF ACTION AT COMMON LAW 14-18 (1936).

18. See MILLAR 33.

issues of fact to a jury. However, the traditional ideal of the single issue persisted and came to be justified in part by the notion that a lay tribunal without special skill should have the controversy thus simplified for them lest the matter get beyond the depth of their competence.<sup>19</sup>

Such was the picture drawn by theory. But the insistence that decision turn on a single issue, while it produced administrative efficiency with a vengeance, too often did so at the expense of substantive justice. It has been a perennial characteristic of dispute-settling processes that no one can forecast with certainty what the proof will bring forth in the way of facts, or of issues, or of the possible attitude towards facts and law that the tribunal may take, even where the merits of a controversy finally do turn on a single issue which originally seemed to be crucial. Moreover, numerous controversies present two or more issues—sometimes many—which must all be resolved if full justice is to be done. Any system, therefore, which compels litigants to stake the outcome of litigation on the accuracy of a forecast that its merits will properly turn on the resolution of a single issue specifically designated in advance, will be bound to cause many a miscarriage of justice. The common law did not ignore the hardship thus produced; but neither did it altogether abandon the ideal of the single issue. Courts and legislatures in fact attempted to ameliorate the hardship by a series of halfway measures, compromises, and fictions that yielded a system which lacked both the stark simplicity of the older dispensation, and the elasticity needed for the unfettered pursuit of justice.<sup>20</sup> The practice of inserting multiple counts in a declaration started with cases wherein multiple wrongs of the same nature had been done the plaintiff, but was extended to cover multiple statements of the same wrong.<sup>21</sup> In this way a plaintiff could have the advantage of more than one version of a single occurrence.<sup>22</sup> Multiple defenses were allowed by statute.<sup>23</sup> Permission for multiple replications followed,<sup>24</sup> and so on. The result was graphically described by the *First Report of the Commissioners on Practice and Pleadings*:

Suppose then, what frequently happens, that a declaration contains five counts, that there are three pleas to each count, with but a single replica-

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19. Cf. MILLAR 133.

20. FIRST REPORT OF COMMISSIONERS 140.

21. See SHIPMAN, COMMON LAW PLEADING 201 (3d ed. Ballantine 1923) [hereinafter cited as SHIPMAN]. See also CLARK, CODE PLEADING 132 n.152 (2d ed. 1947).

22. The practice is described in a report made by the English Common Law Commissioners as set out in the appendix to the second American edition of STEPHEN, STEPHEN, PRINCIPLES OF PLEADING IN CIVIL ACTIONS, app. at CX *passim* (2d Am. ed. 1831).

23. 4 Ann c. 16, § 4 (1706). See FIRST REPORT OF COMMISSIONERS 140.

24. FIRST REPORT OF COMMISSIONERS, 140.

tion to each plea. Here are fifteen issues: and if there be two replications to each plea, there will be thirty . . . . Indeed, the effect of the system has been to raise up issues upon verbal distinctions, and thus far increase rather than diminish the number of questions.<sup>25</sup>

The ideal of singleness—and with it, administrative efficiency—was thus abandoned in fact. But the insistence upon the production of issues remained as long as did common law pleading.

*Later developments.*—The objective of framing issues before trial has not been altogether abandoned in later American procedural systems but the emphasis has shifted. While pleadings still often frame issues there is no insistence that they do so in all cases. Thus, if an answer admits the allegations of a complaint but sets up matter in avoidance no issue is framed until there is either a denial or a statement of further new matter which is in turn denied. Yet the federal rules and many states provide for no pleadings beyond the answer in such a case.<sup>26</sup> Further, other pretrial devices are often relied on to frame issues, notably the pretrial hearing.

In place of issue framing, the early codes gave first importance to the notice-giving function of pleading, and this emphasis has largely persisted to the present day. Among those who would stress the notice-giving function, however, two different viewpoints have developed. One would look to the pleadings to afford the adversary fairly detailed notice of the facts to be presented against him.<sup>27</sup> The other would have the pleadings give only a more general notice of the pleader's claim or defense, and would rely on other pretrial discovery devices for fuller development of the facts.<sup>28</sup> There are, of course, all degrees of detail or generality, and there is no bright line to separate these viewpoints. Differences have, however, been recognizable enough. At one extreme stand those who favor what is sometimes called "notice pleading," under which the pleadings do no more than identify the transaction or occurrence out of which the claim or claims arise.<sup>29</sup> There is no strong support today for going that far in the ordinary run of cases, but the most recent large-scale movement, which culminated in the Federal Rules of Civil Procedure and a number of state counterparts, was in the direction of greater generality and less detail in pleading than is required by some state courts

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25. *Id.* at 143.

26. Fed. R. Civ. P. 7; MILLAR 171.

27. See, e.g., Fee, *The Lost Horizon in Pleading Under the Federal Rules of Civil Procedure*, 48 COLUM. L. REV. 491 (1948); McCaskill, *Actions & Causes of Action*, 34 YALE L.J. 614, 641 (1935). See also *Claim or Cause of Action*, 13 F.R.D. 253 (1952).

28. Clark, *Simplified Pleading*, 2 F.R.D. 456 (1943); CLARK, *CODE PLEADING* 57 (2d ed. 1947). See also Pike & Willis, *The New Federal Deposition-Discovery Procedure*, 38 COLUM. L. REV. 1179 (1938).

29. Whittier, *Notice Pleading*, 31 HARV. L. REV. 501 (1918).

under their codes.<sup>30</sup>

Detailed pleading does, of course, tend to define the controversy more narrowly and give fuller notice to the adversary than does more general pleading. It ties the pleader down to specifics. By the same token, however, it multiplies the danger that substantive justice will be avoided because of the fact, noted above, that it is often impossible to forecast with accuracy the course of proof at the trial or how the tribunal will view it. Proponents of general pleading are therefore content with fairly broad notice and fairly broad scope for the controversy at the pleading stage but would insist upon providing for a thorough mutual pretrial disclosure of the facts themselves (as distinguished from *claims of fact*).<sup>31</sup>

## II. THE COMPLAINT

*The common law declaration.*—Under the formulary system the plaintiff's first pleading had to be one which was appropriate to the form of action he had chosen.<sup>32</sup> Each form of action had its own earmarks, quite familiar to the profession, so that in most cases the defendant could tell from the declaration—and indeed from the original writ if there was one—just what the form of action was. Since each form of action had its own peculiar train of legal consequences, this was important information. Thus a defendant could know from the very first pleading what theory of substantive law might be urged against him. Substantive law grew up separately for each form of action. There were no general theories of liability. If a defendant was proceeded against in trespass, he knew that only those legal rules which governed liability in trespass could successfully be urged against him; the question, in other words, would be not whether defendant was liable under the law of the land but only whether he was so under the law of trespass. If not, plaintiff could not succeed

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30. MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION (1956) [hereinafter cited as MORGAN]; CLARK, CODE PLEADING 241, 242 (2d ed. 1947). See also Pike & Willis, *The New Federal Deposition-Discovery Procedure*, 38 COLUM. L. REV. 1179 (1938). On the historical development of the Federal Rules, see CLARK, CODE PLEADING 31-39 (2d ed. 1947); 1 MOORE, FEDERAL PRACTICE §§ 0.521-0.528 (2d ed. 1960).

31. Compare 4 MOORE, FEDERAL PRACTICE §§ 33.17, 33.29 (2d ed. 1950) with James, *Revival of Bills of Particulars Under the Federal Rules*, 71 HARV. L. REV. 1473 (1958).

32. This choice was usually made before any pleading. Each form of action had its own peculiar form of original writ. At early common law, actions were usually begun by obtaining such an original writ from the Chancery. By the nineteenth century, however, alternative ways of commencing actions (*e.g.*, by writs of process, or by bill) had become prevalent. STEPHEN 24-28, 51-60. And ejectment commenced not by writ or bill, but by delivering to the tenant in possession of the premises, a declaration framed as against a fictitious defendant. *Id.* at 45.

even though the facts showed clearly that he was entitled to recover in some other form of action.

Moreover each form of action had its own peculiar procedural incidents. The form of action determined, for example: the competency of the court; the form of process available to make defendant appear (whether, for instance, there could be a body attachment); the appropriate steps in case of default; the mode of trial (whether by jury or by some older method such as wager of law, ordeal, and so on); the proper form of plea; the form of judgment and of execution (whether plaintiff could be put in possession of the subject of dispute, whether defendant could be imprisoned or made an outlaw, and so on).<sup>33</sup>

The initial stage in a common law action (including the declaration) did, then, give defendant fairly detailed and precise notice of the legal theory and the procedural incidents with which he would be confronted. Of course there were areas of doubt. There was not always a clear line separating the forms of action. There was some confusion, overlap and growth.<sup>34</sup> Yet, by and large, a competent lawyer could tell the defendant how he stood in these respects. But how much did a common law declaration tell the defendant about the facts which the plaintiff would rely on at trial?

The answer to this question is not simple. Early common law pleading was oral. "The litigants stood opposite each other at the bar of the court, and the plaintiff stated his case by his own mouth or that of the pleader."<sup>35</sup> There followed something of an altercation between the parties and the court. What was initially said on this occasion was apparently not final; it could be amended or even abandoned as the discussion progressed.<sup>36</sup> Finally, however, the parties had to take a stand and their statements were noted on the roll of the court. Thus the issue in the case came to be fixed by a process which Morgan has likened to the modern pretrial hearing.<sup>37</sup> What emerged was often a simple and direct statement of fact.<sup>38</sup>

The first written pleadings tended to follow the short and pithy forms of the only existing precedents;<sup>39</sup> and indeed the common law

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33. See MAITLAND, *op. cit. supra* note 17, at 2-4.

34. See, e.g., FIELD & KAPLAN, *MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE* 225-36 (1953).

35. HEBURN, *THE HISTORICAL DEVELOPMENT OF CODE PLEADING* 60 (1897) [hereinafter cited as HEBURN]; MORGAN 9-11; STEPHEN 28-32.

36. *Ibid.* See, e.g., Watkins Case, Y.B. 3 Hy. 6, f. 36b, pl. 33 (1425), as reported in FIELD & KAPLAN, *MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE* 245 (1953); Latimer v. Walton, Y.B. 1 & 2 Edw. 2, S.S. 165 (1308-1309), as reported in CLARK, *CASES ON PLEADING & PROCEDURE* 32 (2d ed. 1940).

37. MORGAN 28, 34.

38. Watkins Case, note 36 *supra*; HEBURN 62.

39. HEBURN 61.

never abandoned the theory that pleadings should "have only occasion to state facts"<sup>40</sup> and that these should be stated simply and truly. Moreover there continued to be, throughout the history of common law pleading, instances where the theory represented the fact. Thus the declaration in an action on the case for damages caused by negligent driving of a vehicle was in the nineteenth century still a simple and accurate description of events.

In many other situations, however, the original theory came to be belied by the facts. For one thing some forms of action developed and expanded through fictions, and many of these fictions were recited in the declaration. In general assumpsit, although the obligation was imposed by law, the defendant was always said to have undertaken the obligation by a promise.<sup>41</sup> In trover the plaintiff was said to have casually lost and the defendant to have found the articles which defendant was charged with converting,<sup>42</sup> although the action would lie when there was neither losing nor finding.<sup>43</sup> In ejectment "the declaration and accompanying proceedings were a mass of fictions which had become ridiculous";<sup>44</sup> not even the parties plaintiff or defendant were real persons.

In other situations the greatest particularity was required and the slightest deviation from the details alleged was fatal.<sup>45</sup>

In still other situations the greatest generality and vagueness were allowed. If a plaintiff pleaded a simple capsule formula of liability he might recover even though he proved quite different facts, so long as they had the same legal effect as the stereotyped facts within the formula. This was very much the case in general assumpsit. A plaintiff who declared that defendant had and received money to the plaintiff's use, and promised to pay the same to him, might prove under that declaration that defendant had stolen or converted plaintiff's goods and sold them; that defendant had fraudulently induced plaintiff to buy some worthless article and that plaintiff had thereafter rescinded the sale; that plaintiff had himself paid or overpaid money to defendant by mistake (as where one mistakenly pays a bill twice); and so on.<sup>46</sup> Of course plaintiff might show the very facts suggested

40. HEPBURN 63.

41. SHIPMAN 254, 258.

42. SHIPMAN 230.

43. SHIPMAN 98.

44. POMEROY, *REMEDIES AND REMEDIAL RIGHTS BY CIVIL ACTION ACCORDING TO THE REFORMED AMERICAN PROCEDURE* 539 (1876) [hereinafter cited as POMEROY]. The original edition of POMEROY is cited throughout since this was nearest in time to the original adoption of the codes.

45. See *Wabash W. Ry. v. Friedman*, 146 Ill. 583, 30 N.E. 353 (1892); *Span- gler v. Pugh*, 21 Ill. 85 (1859). The report cited *supra* note 22, contains references to other harsh decisions.

46. See *FIRST REPORT OF COMMISSIONERS* 70-71, 145.

by the declaration—that money was entrusted to defendant on his undertaking to turn it over to plaintiff—but this does not seem to have been the usual case.

General assumpsit afforded the extreme example of permissible vagueness but there were others. Thus in *Scott v. Shepherd*,<sup>47</sup> an action brought in trespass, the declaration alleged in effect that defendant threw a squib at plaintiff and hit him in the face with it. The proof revealed an entirely different situation, namely that the squib was thrown by defendant in a market place and landed near the stall of Yates; that it was picked up and thrown again by Willis, a bystander; that it then landed near the stall of Ryall and was thrown still a third time by Ryall, this time finally hitting plaintiff in the face. Although the action was strenuously and ably contested for defendant, no point of variance was urged. Presumably if the facts shown by the evidence afforded a remedy in trespass (which was the chief bone of contention) then they might properly be shown under the simple formula.

To sum up, the common law declaration did give a defendant fairly accurate notice of the substantive legal theory and the procedural incidents which might be used against him; it sometimes gave him such notice of the facts which might be shown at trial. On the score of facts, however, the opposite was true in many situations; there was often little or no correspondence between the facts alleged and those which appeared on trial. From the plaintiff's point of view, common law pleading tied him down narrowly to a single legal theory and sometimes, with Procrustean rigidity, to the facts alleged. In other situations it gave him very great latitude in matter of fact.

*The bill of complaint in equity* had become cumbersome and prolix by the nineteenth century. Typically it consisted in three parts: the narrative, the charging, and the interrogative parts.<sup>48</sup> Only the first of these, which contained a statement of the complainant's case for relief, was strictly necessary.<sup>49</sup> The charging part contained a fairly detailed statement of evidence which anticipated and rebutted defendant's supposed positions. The last part propounded interrogatories calculated to extract admissions and discover evidence from the adversary who had to respond to proper interrogatories under oath. All this involved a good deal of repetition and detail. It did not, however, involve the fictions so prevalent in common law pleading. Nor did it involve to nearly the same degree the pleading of facts according to their legal effect when that legal effect would not

47. 2 W. Black. 892, 96 Eng. Rep. 525; 3 Wils. 403, 95 Eng. Rep. 1124 (C.P. 1773).

48. POMEROY § 507 at 535. See also SHIPMAN 11.

49. *Ibid.*

be aptly described by the languages used.<sup>50</sup>

It was to equity pleading that those who drafted the New York Code turned for their model. In their *First Report*, the Commissioners on Practice and Pleadings found that the chancery practice,

however disfigured in some places by unnecessary forms—however disfigured at this day by extreme prolixity—was nevertheless, in its own nature, flexible, highly convenient, and capable of being made to answer all the ends of justice. There was literally no form about it. The party stated his case and asked the relief he desired; and the court, if he proved his case, gave him that relief. Under this practice any suit for any kind of a remedy may be brought.<sup>51</sup>

*The Code Complaint.*—The framers of the original codes sought to do away with the rigidity and resulting injustice which had been produced by the formulary system of the common law and by the distinction between law and equity.<sup>52</sup> This was central to the whole system they proposed. They sought to set up instead a system wherein a plaintiff would state the facts of his grievance in simple, nontechnical language and the court would be free to administer whatever substantive law it found applicable to those facts without regard to any *distinctions* between the forms of action or between law and equity.<sup>53</sup> No new rights and remedies were meant to be created, and the substantive law still had to be drawn from existing precedents.<sup>54</sup> But the inquiry now was to be whether the facts warranted relief on the basis of any of those precedents—not simply on the basis of those associated with a single form of action. The whole law of the land was made available to the court in deciding each case.<sup>55</sup> The drafters

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50. POMEROY § 507 at 537.

51. FIRST REPORT OF COMMISSIONERS 71.

52. FIRST REPORT OF COMMISSIONERS 67-87. This title of the report starts out with these words: "The chief object of this title is to declare the leading principles which lie at the foundation of the whole proposed system of legal procedure, and without which, in our judgment, very few, if any essential reforms can be effected in remedial law. We refer to the abolition of the distinction between actions at law and suits in equity, and of the forms of such actions and suits." *Id.* at 67-68. See also CLARK, CODE PLEADING §§ 7, 15 (2d ed. 1947); POMEROY §§ 28, 67.

53. *Rogers v. Duhart*, 97 Cal. 500, 32 Pac. 570 (1893); *White v. Lyons*, 42 Cal. 279 (1871); *Knapp v. Walker*, 73 Conn. 459, 47 Atl. 655 (1900); *Metropolis Mfg. Co. v. Lynch*, 68 Conn. 459, 36 Atl. 832 (1896); *Wright v. Wright*, 54 N.Y. 437 (1873); *Emery v. Pease*, 20 N.Y. 62 (1859); POMEROY §§ 70-71. Compare *Clissold v. Cratchley* [1910] 2 K.B. 244 (C.A.).

54. FIRST REPORT OF COMMISSIONERS 146, 147. ["No rule of law, by which rights and wrongs are measured, will be touched, the object and effect of the change being only the removal of old obstructions, in the way of enforcing the rights, and redressing the wrongs."] POMEROY §§ 37, 68; sources cited *supra* note 53.

55. Sources cited *supra* note 53. *Crary v. Goodman*, 12 N.Y. 266 (1855). "[S]ince the enactment of the Code . . . the question . . . is not whether the plaintiff has a legal right or an equitable right, or the defendant a legal or equitable defence against the plaintiff's claims; but whether, according to the whole law of the land, applicable to the case, the plaintiff makes out the

of the codes also sought to do away with the fictions and technicalities of common law pleading.<sup>56</sup>

These new objectives, it will be seen, involved a shift—almost a reversal—of view of the function of the pleadings. The plaintiff was now required in his complaint to give accurate notice of the facts in all cases, but he was relieved of the requirement that he tie himself down to the single legal theory embodied in a form of action. Fact certainty and notice were substituted for certainty and notice of legal theory and legal procedural consequences.

These basic objectives are still today widely recognized as valid guides for determining the functions of modern pleading.<sup>57</sup> But the course of developments under the codes was by no means clear and uniform. Simple notions became encrusted with gloss, so that they were beyond recognition in some jurisdictions. Sound objectives became confused and were even lost sight of. There was need for much rethinking and revamping when new rules for the federal courts were to be drafted in the 1930's.

One unfortunate development under the early codes was the emergence of the *theory of the pleadings doctrine*. Under this abortive doctrine the court had to "decide with certainty what the specific cause of action counted and relied upon [in a complaint] is,"<sup>58</sup> and then to confine plaintiff to recovery under that theory. Thus on demurrer the court would test the sufficiency of the allegations in the light of the legal theory which it found embodied in the complaint. And if the allegations did not support recovery *under that particular legal theory*, the demurrer would be sustained *even though* the allegations were sufficient to support recovery under a different legal theory.<sup>59</sup> The complaint had to embrace a single legal theory and stick to it. It might not be "uncertain and ambulatory . . . now presenting one face to the court and now another, at the mere will of the pleader, so that it may be regarded as one in tort, or one in contract, or in equity as he is pleased to name it and the necessities of argument require, and if discovered to be good in any of the turns of phases which it may thus be made to assume, that it must be

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right which he seeks to establish, or the defendant shows that the plaintiff ought not to have the relief sought for." *Id.* at 268.

56. See FIRST REPORT OF COMMISSIONERS 70, 145; POMEROY §§ 510, 529.

57. Clark, *Code Pleading and Practice Today*, in DAVID DUDLEY FIELD CENTENARY ESSAYS 55 (1949); CLARK, CODE PLEADING § 15, at 4 (2d ed. 1947); 2 MOORE, FEDERAL PRACTICE ¶¶ 8.12-8.14, at 1641, 1653-58 (2d ed. 1960).

58. *Supervisors of Kewaunee County v. Decker*, 30 Wis. 624, 633 (1872).

59. *Oölitic Stone Co. v. Ridge*, 169 Ind. 639, 83 N.E. 246 (1908); *Magwire v. Tyler*, 47 Mo. 115 (1870); *Supervisors of Kewaunee County v. Decker*, *supra* note 58. See Albertsworth, *The Theory of the Pleadings in Code States*, 10 CALIF. L. REV. 202 (1922); Page, *Application of the Derogation Rule to the Code of Civil Procedure*, 1955 WIS. L. REV. 91; Whittier, *The Theory of a Pleading*, 8 COLUM. L. REV. 523 (1908).

upheld in that aspect, as a proper and sufficient pleading by the court."<sup>60</sup>

Such rulings in effect perpetuated much of the essence of the formulary system, and much of its rigidity. The form of action simply became transformed into the theory of the action; the code term "cause of action" was interpreted as meaning legal theory of the action and equated to the ancient forms.<sup>61</sup> "[T]he inherent and essential differences and peculiar properties of actions have not been destroyed, and from their very nature cannot be."<sup>62</sup>

It is hard to imagine a concept which would fly more directly in the face of what the codes were trying to do. The codes expressly abolished the distinctions between the forms of action, and its proponents had explained at length how they sought to escape from the evils of a system which compelled a suitor to choose a single legal theory and stand or fall on it, without regard to the meritorious question whether plaintiff's cause is a just one under the law of the land.<sup>63</sup>

The theory of the pleadings doctrine probably represented for the most part nostalgia for the older system. It was increasingly abandoned with the passing of the generation which was steeped in the ancient learning.<sup>64</sup> In modern context the only rational basis for defending any such notion is a belief that the defendant should have accurate advance notice of the legal theories<sup>65</sup> as well as of the facts which plaintiff intends to rely upon. The prevailing view under the codes denies this and chooses to protect a party's substantive right to recover upon any legal theory properly found applicable to the facts pleaded and proved, rather than to protect his adversary against a possible (but often fanciful) surprise from the invocation of an unexpected legal theory.<sup>66</sup> While there are dissenting voices,<sup>67</sup> the prevailing view seems sound and was embodied in the federal rules.

Most commentators hailed the merger of law and equity and of the forms of action as the great accomplishments of the codes.<sup>68</sup> To a certain extent these things were tied in with the notion of fact plead-

60. *Supervisors of Kewaunee County v. Decker*, *supra* note 58, at 629.

61. For different renditions of the term "cause of actions," see Clark, *The Code Cause of Action*, 33 *YALE L.J.* 817 (1924); POMEROY §§ 452-57, 518-25.

62. *Supervisors of Kewaunee County v. Decker*, *supra* note 58, at 629.

63. *FIRST REPORT OF COMMISSIONERS* 67-88, 137-47.

64. POMEROY §§ 66-67, 72. Compare the Missouri and Wisconsin cases cited *supra* note 59 with *Bragg v. Specialty Shoe Mach. Co.*, 225 Mo. App. 902, 34 S.W.2d 184 (1931); *Bieri v. Fonger*, 139 Wis. 150, 120 N.W. 862 (1909).

65. The modern view would not confine plaintiff to a single legal theory as the theory of the pleadings doctrine did.

66. See James, *The Revival of Bills of Particulars Under the Federal Rules*, 71 *HARV. L. REV.* 1473, 1481-85 (1958).

67. MILLAR, 194-200. Cf. Cleary, *The Uses of Pleading*, 40 *KY. L.J.* 46 (1952).

68. See, e.g., CLARK, *CODE PLEADING* § 15, at 78 (2d ed. 1947); POMEROY §§ 28, 34.

ing; as we have seen, they meant the abandonment of the formulary system which stressed the pleading of stereotyped formulas of legal liability, and the substitution for it of pleading facts to which the courts were free to apply any applicable substantive law. But the code ideal of fact pleading involved another aspect of more doubtful value. It came to be associated, especially in some jurisdictions, with a requirement of detail or particularity in pleading which has often proved a stumbling block to suitors in their quest for substantive justice.<sup>69</sup> In order to escape from the fictions and the vague, misleading legal formulas of common law pleading, and to provide for all cases what was thought to be best in equity pleading, the Code required the complaint in all civil actions to contain: "A statement of facts constituting the cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended"; and a demand for relief.<sup>70</sup>

The word "facts" in this context is commonly distinguished from "evidence" on the one hand, and "law" on the other. Facts are to be pleaded; law and evidence are not.<sup>71</sup>

This was by no means an altogether new requirement. In one sense "law" has never been properly pleaded, either at common law or under the codes. The concept was familiar enough that the office of a declaration was to furnish the minor premise in a syllogism. The rule of law invoked was the major premise, but that was judicially known to the court and need not be stated. The declaration stated the facts in this particular case and thereby brought it under the appropriate rule of law. The conclusion was the judgment of the court. The classic example<sup>72</sup> was this:

*Major premise:* Against him who hath ridden over my corn, I shall have damages.  
*Minor premise:* But A hath ridden over my corn.  
*Conclusion:* Wherefore I shall have damages against A.

The codes did not, and were not intended to, change this concept.

The strictures against pleading "law" found among judicial decisions and commentators on code pleading were not directed against pleading "law" in the sense just described—although it continued to be improper to plead a rule of law—but what was meant rather was a prohibition against pleading facts according to their legal effect, or

69. CLARK, CODE PLEADING § 38 (2d ed. 1947). See also notes 98, 99 *infra*; 2 MOORE, FEDERAL PRACTICE ¶ 8.12 (2d ed. 1960).

70. FIRST REPORT OF COMMISSIONERS § 120 (2).

71. CLARK, CODE PLEADING § 38, at 225-30 (2d ed. 1947); POMEROY §§ 530, 532.

72. 3 BLACKSTONE, COMMENTARIES \*396.

pleading "conclusions of law." Thus in a famous passage Pomeroy stated: "Every attempt to combine fact and law, to give the facts a legal coloring and aspect, to present them in a legal bearing upon the issues rather in their actual naked simplicity, is so far forth an averment of law instead of fact, and is a direct violation of the principle upon which the codes have constructed their system of pleading."<sup>73</sup> He then gives examples from common law pleading of offenses against this principle but states that the declaration in a special action on the case "was framed in substantial conformity with the reformed theory." Under the codes in all cases, "the allegations must be of dry, naked, actual facts."<sup>74</sup>

This passage is ambiguous. If the first sentence is to be taken literally it lays down a rule which is virtually impossible of fulfillment. Moreover, no good purpose would be served by trying to fulfill it. The total number of facts which go to make up even a simple occurrence or transaction is well-nigh infinite. Consider all that goes into the signing of a man's name; what myriad facts are represented by the words "fountain pen," for instance. We neither think nor speak in terms of all these facts unless there is particular occasion for it. We select and combine them for the purpose at hand. And we use concepts and words which involve selection and combination along functional lines. In the case of the signature, for instance, if the fact of signing alone was important we would say: "He signed the document." If we were concerned with determining whether the signer was right-handed, we would say: "He signed it with his left [or right] hand." If the medium mattered, we would say: "He signed it in ink." If we were interested in advertising we would say: "The President signed the ——— treaty with a Writewell fountain pen." When we are involved in litigation we are concerned with legal relations and consequences. What could be more natural, then, than to use words which "give the facts a legal coloring and aspect," and "present them in a legal bearing"? If one sought to describe a situation having legal significance entirely in words which were devoid of all legal evaluation the result would be a series of prolix circumlocutions which would serve neither elegance of style nor ease of understanding.<sup>75</sup>

No court has ever consistently insisted on any such rule and most pleadings bristle with words which would fall under the literal prohibition set forth in Pomeroy's passage. Very occasionally, however,

73. POMEROY § 529, at 566.

74. *Ibid.*

75. See generally Cook, *Statements of Fact in Pleading under the Codes*, 21 COLUM. L. REV. 416 (1921); Cook, *'Facts' and 'Statements of-Fact'*, 4 U. CHI. L. REV. 233 (1937). See also CLARK, *CODE PLEADING* § 38 (2d ed. 1947).

a decision has apparently tried to squeeze out all words which involve a legal evaluation of the facts. An extreme example is *Kramer v. Kansas City Power & Light Co.*,<sup>76</sup> in which plaintiff, employed by defendant as a lineman, was injured when a spike or step used for climbing a pole gave way under his weight. The complaint charged "that defendant negligently caused said step to be driven and placed in said pole not far enough to make it reasonably safe. . . ."<sup>77</sup> The court held this to be nothing "but the statement of a legal conclusion." The plaintiff should have alleged that the spike was driven in so as to leave exposed in excess of 4½ inches between the pole and the inside of the flange of the step, and "charged defendant with negligence in maintaining said step at a greater length than 4½ inches . . ."<sup>78</sup>

Nothing in their report indicates that the framers of the original code had any such idea as this in mind. Indeed the forms set out in the appendix are very simple and direct and show no effort to avoid words which present facts in their legal bearing. Thus the complaint "on a covenant" alleges that "defendant *executed* . . . an instrument"; that "for assault and battery" states that defendant "*assaulted* and beat the plaintiff"; that for trespass to land, that defendant "*wrongfully* entered a lot of land, of which the plaintiff is *owner* . . ."; that for libel that "defendant . . . *published* the following libel . . .";<sup>79</sup> and so on. The italicized words certainly fall within the literal terms of Pomeroy's strictures.

What this report does indicate is that the Commissioners disapproved of the many fictitious and false allegations of the common law and the practice of pleading the facts according to their legal effect when that did not correspond to the way laymen would describe them. The common counts, especially that for money had and received, came in for much criticism.<sup>80</sup> And it was such fictitious allegations that Pomeroy gave as examples of what he was condemning. Moreover, the same passage has words of tempered praise<sup>81</sup> for the declaration in an action on the special case which also employed words containing legal evaluation, as that "defendant *negligently* drove his carriage into and against plaintiff." The difference here is that the word in question is neither false nor fictitious but would be understood by a layman to be used in just the sense of its legal significance. Perhaps, then, Pomeroy did not mean his words to be

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76. 311 Mo. 369, 279 S.W. 43 (1925).

77. 311 Mo. at 383, 279 S.W. at 47.

78. *Id.* at 47.

79. FIRST REPORT OF COMMISSIONERS 266, 267. (Emphasis added.)

80. See note 46 *supra*.

81. POMEROY § 529 at 566.

taken literally, but if not they are unfortunately misleading. Whatever Pomeroy's meaning may have been, it may be safely asserted that the principles of code pleading do not forbid the use of words containing legal evaluation when those words are fairly descriptive of the facts in ordinary lay language, without resort to legal fictions like the promise in general assumpsit.<sup>82</sup>

But the striking down of fictions does not exhaust the prohibition against pleading law or legal effect. The statement that *defendant is legally liable to plaintiff for damages* is in a certain sense a statement of fact. It is certainly not the statement of a legal rule. It can be made to fit into a syllogism as the minor premise. It is not satisfied by the showing of any conceivable combination of evidentiary facts because many such combinations will not entail legal liability, so this allegation limits the scope of what may be proved under it. It amounts, in other words, to a statement of the existence of one or more of those combinations of subordinate facts which spell legal liability, not just any facts. Yet the statement just given would not serve as a complaint under the codes (nor as a common law declaration, for that matter).<sup>83</sup> In order to get at the gist of the notion we are dealing with here, let us take a series of statements, starting with the one just analyzed.

1. Defendant is legally liable to plaintiff for damages.
2. Defendant negligently caused plaintiff injury.
3. Defendant negligently caused plaintiff bodily injury through the operation of a motor vehicle.
4. Defendant negligently drove a motor vehicle against plaintiff who was then crossing [named] highway.

As a result plaintiff was thrown down and had his leg broken, etc.

5. Same as # 4 with an added paragraph following the first, as follows:

The defendant was negligent in that he failed to keep a proper lookout, drove at excessive speed, etc.

6. Same as # 4 with an added paragraph following the first, as follows:

The defendant was negligent in that he was looking at a passenger in the back seat of his automobile and not in the direction in which he was going; in that he was driving at a speed of 43 miles per hour, etc.

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82. See, e.g., *Bank of Marshall County v. Boyd*, 308 Ky. 742, 215 S.W.2d 850 (1948); *Louisville & N. R.R. v. Wolfe*, 80 Ky. 82 (1882); *Clark v. Chicago, M. & St. P. R.R.*, 28 Minn. 69, 9 N.W. 75 (1881); *Omaha & R.V. R.R. v. Wright*, 49 Neb. 456, 68 N.W. 618 (1896); CLARK, CODE PLEADING § 38 (2d ed. 1947).

83. *King v. Wilmington & N.C. Elec. R.R.*, 17 Del. (1 Pen.) 452, 41 Atl. 975 (Del. Super. 1898).

It will be noted that what was said about the first statement is true of all the others except that each of the following statements will be satisfied by a progressively narrower, more limited, showing of evidentiary facts. The second, for example, will not be satisfied by *any* facts showing legal liability, but only by those entailing liability based on negligence. The last will not be satisfied by *any* failure to keep a lookout or *any* speed, but only by evidence showing a certain kind of failure of lookout and a speed of 43 miles per hour.

It will also be noted that all of the above statements describe facts according to their legal effect and "present them in a legal bearing." Only in the sixth is any attempt made (in the second paragraph) to describe defendant's conduct in words which avoid legal evaluation.

To complete the picture it should be added that most courts would hold that the first three forms of statement do not suffice; that the allegations are mere conclusions of law.<sup>84</sup> On the other hand, few if any courts insist on the form of statement found in # 6; some would even characterize it as an improper statement of evidence.<sup>85</sup> All or virtually all courts would accept the form of statement found in # 5.<sup>86</sup> The form of statement found in # 4 is taken from the common law declaration in an action on the case, is found in Form 9 of the forms set forth in the Federal Rules of Civil Procedure, and would be held by many courts to satisfy the code requirement which we are dealing with here.<sup>87</sup>

The proscription against pleading evidence is also concerned primarily with questions of degree of detail. Here again an analytical distinction of sorts is possible,<sup>88</sup> but it is largely illusory and does not cover the whole field of the prohibition which is in effect one against undue prolixity.<sup>89</sup> The rule against pleading evidence under the codes is of less practical importance than the rule against pleading legal conclusions. The latter are bad on demurrer and will be disregarded in determining the sufficiency of the complaint.<sup>90</sup> Too much detail on the other hand rarely will render the complaint vulnerable

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84. *Newell v. Woodward*, 241 App. Div. 786, 270 N.Y. Supp. 258 (3d Dep't 1934); *Pagnillo v. Mack Paving & Constr. Co.*, 142 App. Div. 491, 127 N.Y. Supp. 72 (2d Dep't 1911).

85. Cf., e.g., *Georgia S. & F. R.R. v. Williamson*, 84 Ga. App. 167, 65 S.E.2d 444 (1951), wherein plaintiff complained of injury from falling on clinker, coal, or other debris negligently allowed to remain in railroad yard. Defendant by special demurrer attacked the complaint for vagueness in failing to state exactly the kind of debris and its location. Demurrer overruled. "[T]he pleader is not required to set out his evidence."

86. See, e.g., forms in *CONN. PRACTICE BOOK* 251-64 (1951); *DEC. DIG., Pleading* at Key number 8 (17).

87. See cases cited *supra* note 82.

88. See *POMEROY* § 526.

89. *CLARK, CODE PLEADING* § 38 (2d ed. 1947).

90. *Didier v. Macfadden Publications, Inc.*, 299 N.Y. 49, 53, 85 N.E.2d 612 (1949); *Bornhorst v. Lyon*, 279 App. Div. 820, 109 N.Y.S.2d 194 (1952).

to demurrer, though it may be stricken on appropriate motion, and is rarely prejudicial to the pleader's adversary (by failing to give adequate notice of what is to be proven).<sup>91</sup> It may of course be the case that the evidentiary facts pleaded fall short of showing, by legitimate inference or otherwise, the existence of a necessary element of the pleader's claim or defense. Where that is true the pleading may be fatally defective.<sup>92</sup>

Of the foregoing, the following is the sum:

- (1) The office of the code complaint is to state the facts of the specific case and not a rule or rules of law.
- (2) It is often said that the complaint should state facts, or ultimate or issuable facts, but not conclusions of law, or evidence.
- (3) This rule should not be read as forbidding the statement of facts by words which gave them a legal coloring or "present them in a legal bearing," except where the legal aspect is fictitious and fails to correspond with a way in which laymen might describe the facts.
- (4) This rule should mean only that a certain amount of detail or specificity will be required. The distinction between law, facts, and evidence is one of degree of generality on the one hand and detail on the other. If the facts are given in enough detail, they may be stated in, or characterized by, words which involve a legal conclusion.
- (5) Nevertheless, this rule was sometimes taken literally and some courts were induced to pursue the will-o'-the-wisp of a valid analytic distinction between fact and legal conclusion.
- (6) The prohibition against too general pleading (legal conclusions) was in practice far more troublesome than the prohibition against pleading too much detail.

The net result of all this was a good deal of confusion and difference of opinion among the states<sup>93</sup> and even within a single state.<sup>94</sup> To the extent that the distinction was simply one of degree, it invited a wide range of decisions upon the precise degree of detail to be required; and the invitation was accepted. Some courts permitted fairly broad and simple allegations comparable to those in an action on the case (and those set out above in # 3, page 915).<sup>95</sup> This is probably what

91. CLARK, *loc. cit. supra* note 89.

92. DeCordova v. Sanville, 214 N.Y. 662, 108 N.E. 1092 (1915), reversing 165 App. Div. 128, 150 N.Y. Supp. 709 (1st Dep't 1914), on dissenting opinion of Ingraham, J.

See CLARK, CODE PLEADING 233 n.79 (2d ed. 1947).

93. CLARK, *loc. cit. supra* note 89. Compare note 95 with notes 98-100, *infra*.

94. Cf. CONN. PRACTICE BOOK 452 (1922) (form essentially like FED. R. CIV. P. Form 9) with later editions omitting such form. See Clark, Book Review, 44 YALE L.J. 1483 (1935); 9 CONN. B.J. 282 (1935).

95. Cases cited *supra* note 82.

the framers of the original codes had in mind; witness the simple forms prepared by the Commissioners<sup>96</sup> (not made part of the act), and the direction to use "ordinary and concise language."<sup>97</sup> Other courts, however, insisted on great detail<sup>98</sup>—even to the point described in the *Kramer* case.<sup>99</sup> And the situation was vexed by the fruitless quest of an analytic distinction which would transcend differences in degree.<sup>100</sup> It is small wonder that leading critics have found this aspect of fact pleading the least successful venture of the codes.<sup>101</sup>

*The complaint under the federal rules.*—When the federal rules were drafted in the 1930's, the provision for the content of pleadings contained neither the word "facts," nor the term "cause of action." It provided instead that a claim for relief should contain "a short and plain statement of the claim showing that the pleader is entitled to relief."<sup>102</sup> The omissions were quite deliberate. Those who chose the new language did not intend, however, to repudiate the original objectives of code pleading, but rather in large part to restore them.<sup>103</sup> The intention was to repudiate the gloss which some courts had put on the omitted words and thereby to avoid the trouble which had resulted from what were probably misconceptions of the original purpose.<sup>104</sup>

The difficulties we are concerned with here came from attempts to distinguish between "fact" and "legal conclusion," and from too much insistence on detail in pleading, and both of these difficulties

96. See note 79 *supra*, and accompanying text.

97. FIRST REPORT OF COMMISSIONERS § 120 (2).

98. See, e.g., *Overton v. Alford*, 210 Ga. 780, 82 S.E.2d 836 (1954); *Brown v. Western Ry. of Ala.*, 77 Ga. App. 780, 49 S.E.2d 833, *rev'd*, 338 U.S. 294 (1949); *Langenberg v. City of St. Louis*, 355 Mo. 634, 197 S.W.2d 621 (1946); *Crenshaw v. Crenshaw*, 120 Mont. 190, 182 P.2d 477 (1947); *Shives v. Sample*, 238 N.C. 724, 79 S.E.2d 193 (1953).

99. Note 76 *supra*.

100. As in the *Kramer* case. See also the attempt to distinguish between an allegation of undue influence (conclusion of law) and an allegation that Cleary's acts "were not the natural result of the uncontrolled will of Cleary but represent in fact that of defendant" (allegation of fact). *Krug v. Meehan*, 109 Cal. App. 2d 274, 240 P.2d 732 (1952).

101. CLARK, CODE PLEADING 226 (2d ed. 1947). See also 2 MOORE, FEDERAL PRACTICE ¶ 8.12 (2d ed. 1960) and authorities cited in note 5 of ¶ 8.12.

102. FED. R. CIV. P. 8(a)(2). This rule "was deliberately drafted to avoid this terminology because of the gloss of technical decisions that have grown up in New York and some other code states around the words 'facts' and 'cause of action.'" Tolman, *Advisory Committee's Proposals To Amend the Federal Rules of Civil Procedure*, 40 A.B.A.J. 843, 844 (1954). The Committee rejected a proposal to reintroduce the omitted language into the rule. ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS 8-9 (1954). See also Wright, *Amendments to the Federal Rules: The Function of a Continuing Rules Committee*, 7 VAND. L. REV. 521, 549-51 (1954); 1 MOORE, FEDERAL PRACTICE ¶ 0.528 (2d ed. 1959).

103. Pound, *David Dudley Field: An Appraisal*, in DAVID DUDLEY FIELD CENTENARY ESSAYS 3, 13, 14 (1949); Clark, *Code Pleading and Practice Today*, *Id.* at 55, particularly 64-67.

104. See Clark, *op. cit. supra* note 103; Tolman, *op. cit. supra* note 102.

were associated with the code provision for pleading "facts."

We have seen how a requirement of detail in pleading tends to thwart the attainment of substantive justice. The federal rules added another reason for allowing general pleading.

The only justification for requiring detailed pleading (and thereby aggravating the danger that the pleader will fail to get his just desserts) is that detail gives the pleader's adversary and the court better guidance for their conduct in the litigation. The adversary will know better how to prepare, and the court how to rule, if they are given a detailed blueprint of what to expect. The federal rules provide a better blueprint than the pleadings by affording extensive discovery devices and the chance for pretrial hearings. Discovery allows each party to probe his adversary and witnesses for relevant facts and evidence in a manner far more searching than even the strictest pleading. Moreover, discovery yields information concerning facts from witnesses who really know about them, whereas pleadings are merely the paper statements and claims of the lawyers.<sup>105</sup> The pretrial conference affords the judge a superior chance to find out the parties' theories of action and defense.

Those who drafted the federal rules did not invent either discovery or the pretrial conference. Discovery has ancient roots and was a well-recognized procedure in equity long before the codes. And equity provided devices for discovery and depositions in aid of an action or defense at law. Those who framed the original codes found an important role for discovery in the system they set up. The New York Code of 1848 abolished the separate equitable bill of discovery and substituted for it simplified procedures for obtaining discovery by motions and depositions. The Commissioners found these provisions to be "in harmony with the whole spirit of [their] design; which is, to get at the facts in a legal controversy by the shortest possible way . . ."<sup>106</sup> But the codifiers overlooked the fact that substantive limitations on the equitable devices severely hampered their usefulness for the purpose of getting at the facts of the controversy;<sup>107</sup> while they did simplify the procedure, they failed to extend limits upon what could be discovered. And these limitations continued to curtail the usefulness of discovery in most, but not all, American jurisdictions until the advent of the federal rules.<sup>108</sup> By abolishing the most serious of these limitations, the rules gave the *coup de grace*

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105. See statements of Judge Clark in AMERICAN BAR ASSOCIATION, PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES OF CIVIL PROCEDURE 44, 242, 245 (1939), quoted in James, *The Revival of Bills of Particulars Under the Federal Rules*, 71 HARV. L. REV. 1473, 1474 n.9, 1479 n.32 (1958).

106. FIRST REPORT OF COMMISSIONERS 241.

107. See sources cited in notes 6, 7, 8 *supra*.

108. See Ragland, *op. cit. supra* note 8.

to the last valid reason for *requiring* detailed pleading.<sup>109</sup>

In short, then, the federal rules share with the codes some of the most important pleading objectives. Both systems look to the complaint to give the defendant and the court accurate factual notice. Neither system seeks to tie the pleader down to a single legal theory. Under both systems a plaintiff is entitled to the benefit of any legal theory—the “whole law of the land”—applicable to the facts he has alleged. The principle difference is the emphasis of the federal rules on breadth and simplicity of the factual notice required. This is probably not inconsistent with the purpose of the original codes. But the emphasis is new and a new justification for broad pleading is provided by setting up broad discovery machinery and the pretrial conference. This combination, it is hoped, will achieve a reasonable balance between the claims of substantive justice and the need, in a finite world under an adversary system, to give advance notice of what will be litigated.

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109. A pleader may find it to his advantage to use greater detail than the rules require, as where he wishes to invite the determination before trial of the legal sufficiency of his claim. The rules leave the pleader perfectly free to do this. See, e.g., *Dale Sys., Inc. v. Time, Inc.*, 116 F. Supp. 527 (D. Conn. 1953); *Dale Sys., Inc. v. General Teleradio*, 105 F. Supp. 745 (S.D.N.Y. 1952), where this was done.