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THE COMPLAINT IN CODE PLEADING¹

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PLEADING FACTS

One of the most important changes of the New York Code of Pleading and Practice of 1848, so at least the code makers believed, was to be found in the requirement that there should be stated "in ordinary and concise language" the *facts* constituting each cause of action or defense. It is true that the common law declaration contained allegations which set forth the pleader's cause in a general way at least; but the emphasis under the common law system of pleading was placed, not so much on getting the facts on record, but rather upon forcing the opposing parties by their successive pleadings to arrive at a single definite issue. In accordance with the natural tendency of all procedural processes towards standardization and formalism, common law pleading had come in large measure to consist of formal general statements which did not set forth the details of the pleader's case. The codifiers considered this to be a real and serious defect, and they termed their cure for it "the key of the reform" they were advocating.² Elsewhere in their code they adapted the existing equity practice to their purpose. In equity pleading very great detail of the kind termed "evidence" was incorporated in the pleadings, due in part to the rules whereby the plaintiff might force the defendant to a discovery of his proof in his answer, and in part to the general requirement of equity that all the evidence must be made a matter of record. The codifiers concluded that for the blended system they proposed, the *evidential* facts should

¹ This article with some modifications and additions will appear as a chapter on The Complaint in a book on Code Pleading to be published by the West Publishing Company, St. Paul, Minnesota. The writer acknowledges special indebtedness to his colleague, Professor Walter Wheeler Cook, for suggestions as to the nature of *facts*.

² First Report of Commissioners on Practice and Pleadings, N. Y. 1848, sec. 118, note, at 137-147.

be omitted, the *ultimate* facts, rather than the legal conclusions, should be stated, and the pleadings should not go on until a single formal issue was reached, but should terminate in any event with the reply.³

Law, Facts and Evidence Distinguished

Apparently the codifiers considered the distinction between law, facts and evidence to be more easily drawn than has proved to be the case. It should be noted, however, that they did not so much overemphasize the distinction as has been done in the later code pleading. They laid stress also on the use of "ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what was intended."⁴ And they said: "It will hardly be possible to reduce questions to all their elements before trial. What ultimate questions may arise, cannot be known till the evidence is disclosed. The most skillful pleading will lead only to an approximation greater or less according to the nature of the original questions."⁵ But at any rate their ideal of pleading facts, as it has been worked out, has proven probably the most unsatisfactory part of their reform.⁶ This is due in part to the fact that the distinction, if existent at all, is not clear cut and obvious, in part to the attempt to apply rigid rules to a matter where flexibility is a necessity, and in part to the inherent difficulties of the problem. For here we have the heart of all pleading difficulties. The pleader himself may not know his case before the evidence is produced; and if he does, he will hardly desire to give it away in advance.⁷ His opponent, and to a certain extent at least the court, will naturally wish to tie him down to a definite declara-

³ *Ibid.* at 141, 142.

⁴ *Ibid.* sec. 120; N. Y. Laws, 1848, ch. 379, sec. 120: "The complaint shall contain: . . . 2. A statement of the 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." Similar expressions were made as to the answer and the reply. *Ibid.* sec. 128, 131. For the modern somewhat abbreviated version, see N. Y. C. P. A. 1921, sec. 255.

⁵ First Report, 144.

⁶ See Works, *Juridical Reform* (1919) 45; Pound, BOOK REVIEWS (1919) 33 HARV. L. REV. 326; Cook, *Statements of Fact in Pleading under the Codes* (1921) 21 COL. L. REV. 416; COMMENTS (1923) 32 YALE LAW JOURNAL, 483; Sims, *The Problem of Reforming Procedure* (1912) 21 *ibid.* 215, citing 13 Enc. Brit., 9th ed. 763; Sunderland, *The Michigan Judicature Act of 1915* (1916) 14 MICH. L. REV. 441, 551; NOTE AND COMMENT (1910) 8 MICH. L. REV. 400; Costigan, *The Spirit of Code Pleading* (1917) 11 ILL. L. REV. 517.

⁷ First Report, 141: " . . . There has been a constant struggle of the pleaders and the courts, to evade their own rules. They made them and they defend them as the means of eliciting the precise point in dispute, and they seek every means in their power, to conceal it under the most general allegations."

tion before trial. Absolutely to reconcile these two opposing positions is impossible; all the court can do is to attempt a reasonable middle ground between them.

Later code provisions have tended even more to emphasize the pleading of facts, and to omit the leavening admonition that ordinarily understandable language must be used.⁸ Often now the emphasis is placed on the *material* facts.⁹ The distinction has been dwelt upon by text writers, especially by Pomeroy, who stated in a well known phrase that it was the "dry naked actual facts" which were to be pleaded.¹⁰ And the result has been cases almost without number upon the point.¹¹ It is quite common that an allegation should be held bad as being a statement of law only.¹² The stating of evidence, while subject to criticism, is

⁸ A usual form of expression is that of the "plain and concise statement" of the New York Code, N. Y. C. C. P. sec. 481; *cf.* N. Y. C. P. A. 1921, sec. 241. See also the following; "A statement of the facts constituting the cause of action, in ordinary and concise language." Calif. C. C. P. 1923, sec. 426. For substantially the original New York provision see the Indiana statute, Burn's Ann. Sts. 1914, sec. 343, and *James v. State Life Ins. Co.* (1925, Ind.) 147 N. E. 533. Indiana has probably, however, been as strict as any state in its requirement of detailed allegations. The practice has been somewhat modified by statute. See COMMENTS (1923) 32 YALE LAW JOURNAL, 484, 486; *infra* note 12.

⁹ English Judicature Act, O. 19, r. 4: "Every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defense, as the case may be, but not the evidence by which they are to be proved, . . ." N. Y. C. P. A. 1921, sec. 241: "Every pleading shall contain a plain and concise statement of the material facts, without unnecessary repetition, on which the party pleading relies, but not the evidence by which they are to be proved." N. J. P. A. [1912, am'd 1913, r. 17 (a)] requires a statement of the "issuable" facts. In 1904 the New York legislature required "a plain, precise and unequivocal statement", but the former language was restored in 1905. Note to N. Y. C. P. A. 1921, sec. 241. *Cf.* Conn. Gen. Sts. 1918, sec. 5637: "All pleadings shall contain a plain and concise statement of the material facts on which the pleader relies, but not of the evidence by which they are to be proved"; Conn. Prac. Blk. (1922) 283, sec. 181: "Acts and contracts may be stated according to their legal effect, but in so doing the pleading should be such as fairly to apprise the adverse party of the state of facts which it is intended to prove." In connection with the provision that failure by the defendant to deny a material allegation is an admission of its truth, the codes often define a material allegation as one essential to the claim and which could not be stricken from the pleading without leaving it insufficient—a definition not helpful here.

¹⁰ Pomeroy, *Code Remedies* (4th ed. 1904) 560, 561. *Cf. Musser v. Musser* (1920) 281 Mo. 649, 221 S. W. 46 that the ultimate facts to be pleaded "are nothing more than issuable, constitutive, or traversable facts essential to the statement of the cause of action," (holding a statement of the law of a foreign state to be a mere legal conclusion).

¹¹ Many of these cases are collected in the Am. Dig., *Pleading*, sec. 8, pars. 1-22. For cases on the improper pleading of evidence, see *ibid.* sec. 11.

¹² An interesting illustration on which the courts have divided is the

not so often held to render the pleading bad, since the court itself will draw the ultimate conclusion where it is the one necessarily following from the allegations made.¹³

A few examples may serve to make the problem clearer. Thus an allegation that one who is actually an assignee of a bond sues as "holder" thereof is held insufficient as an allegation of law only.¹⁴ An allegation that one is "entitled" to possession of specific property is open to the same objection.¹⁵ On the other hand, the allegation that one is the owner of and entitled to the possession of property sufficiently alleges a fact.¹⁶ But allega-

question whether it is a sufficient allegation of consideration of a contract to say that there was a "valuable consideration." See note 25, *infra*. In *Grossman v. Schenker* (1912) 206 N. Y. 466, 100 N. E. 39, that it was "mutually agreed" is held an allegation of fact. So also in *Fisher, Brown & Co. v. Fielding* (1895) 67 Conn. 91, 103, 34 Atl. 714, of the allegation that a foreign court "duly adjudged" that the defendant should pay a certain sum of money. By statute now in Indiana, "all conclusions stated" must be held allegations of fact unless attacked by motion. Ind. Acts 1913, ch. 322, sec. 1, am'd 1915, ch. 62, sec. 1. See COMMENTS, *loc. cit. supra* note 8.

¹³ That evidential matter should rarely be stricken, see *Hoff v. Kauffman* (1925, Pa.) 128 Atl. 120; *Donovan v. Davis* (1912) 85 Conn. 394, 82 Atl. 1025; *cf. Gulf, C. & S. F. Ry. v. Cities Service Co.* (1920, D. C. Del.) 270 Fed. 994. Where the "necessary" inference from the facts stated is that which will sustain the action, the complaint is not demurrable. *Illinois Steel Co. v. Ostrowski* (1902) 194 Ill. 376, 62 N. E. 822; Am. Dig., *supra* note 11, sec. 9. This inference must, however, be a "necessary" one, from the facts alleged, *i.e.* a reasonably obvious one, apparently. *De Cordova v. Sanville* (1915) 214 N. Y. 662, 108 N. E. 1092, reversing (1914, 1st Dept.) 165 App. Div. 128, 150 N. Y. Supp. 709, on the dissenting opinion of Mr. Justice Ingraham below (action for a loan; the possibility of a gift or other transfer of the money was not negated by the allegations). *Cf. McCaughey v. Schuette* (1896) 117 Calif. 223, 46 Pac. 666 and *Reicher v. Trade Bank* (1924, Sup. Ct.) 124 Misc. 166, 207 N. Y. Supp. 179; *infra* note 33. In *Kellog v. Berkshire Bldg. Corp.* (1925, Sup. Ct.) 211 N. Y. Supp. 623, an affidavit in support of a motion for summary judgment failed because it stated the *ultimate* and not the *evidentiary* facts ("that by reason of the failure of the defendant to show title to the aforesaid premises free from material defect, the said loan was not consummated").

¹⁴ *Smith v. Dean* (1853) 19 Mo. 63. But see *Trembath v. Berner* (1925, N. Y.) 148 N. E. 729. *Cf. Laing v. Hudgens* (1913, Sup. Ct.) 82 Misc. 388, 143 N. Y. Supp. 763. An allegation that the bond was "assigned" or "transferred" to the plaintiff would seem sufficient. *Holland v. Grote* (1908) 193 N. Y. 262, 266, 86 N. E. 30; 1 Bradbury, *Forms of Pleading* (1917) 102; Conn. Prac. Bk. (1922) 361; Bullen & Leake, *Precedents of Pleadings* (7th ed. 1915) 64. *Cf. Kelley v. Kelley* (1913) 9 Ala. App. 306, 63 So. 740.

¹⁵ *Sheridan v. Jackson* (1878) 72 N. Y. 170; *infra*, note 34; *cf. Scofield v. Whitelegge* (1872) 49 N. Y. 259; *Saalberg v. Cellofilm Corp.* (1924, Sup. Ct.) 203 N. Y. Supp. 104 (that profits earned "entitled" P to the sum demanded is a mere conclusion).

¹⁶ *Payne v. Treadwell* (1860) 16 Calif. 221; *Farmers' Bank v. Davis* (1919) 93 Or. 655, 665, 184 Pac. 275; *George Adams & Frederick Co. v. South Omaha Nat. Bank* (1903, C. C. A. 8th) 123 Fed. 641; *Pace v. Cran-*

tions that defendants made an agreement to convey realty to the plaintiff, that defendants delivered their deed of grant to the plaintiff and that the defendants now refuse to deliver possession were held merely evidentiary in a suit for possession, since the ultimate fact of ownership and right to possession was not stated.¹⁷ The same court has held that an allegation of insolvency is an allegation of fact,¹⁸ while an allegation of insurable interest is an allegation of a conclusion of law.¹⁹ Another able court criticized counsel for not appreciating that a finding of a transfer as in fraud of creditors was a finding of fact not to be retried on appeal,²⁰ while at the same time it held the contrary of a finding of capacity (mentality) to make a gift.²¹ Allegations that the plaintiff is a corporation,²² that the defendant received the money from the plaintiff in trust for certain purposes,²³ that defendant "became indebted" to plaintiff and "executed to him a mortgage"²⁴ have all been held conclusions of law. There is a conflict in the cases over the nature of the allegation "for a valuable consideration."²⁵ The same is true of the allegation

dell (1905) 74 Ark. 417, 86 S. W. 812. Cf. *Mason v. Mason* (1906) 219 Ill. 609, 76 N. E. 692. See Am. Dig., *supra* note 11, sec. 8 (11).

¹⁷ *McCaughy v. Schuette*, *supra* note 13, criticized note 33, *infra*. See also *Reicher v. Trade Bank*, *supra* note 13.

¹⁸ *State v. Neff* (1881) 74 Ind. 146; *Chicago, and S. E. Ry. v. Kenney* (1901) 159 Ind. 72, 62 N. E. 26.

¹⁹ *Franklin Life Ins. Co. v. Sefton* (1876) 53 Ind. 380; *American Mut. Life Ins. Co. v. Mead* (1906) 39 Ind. App. 215, 79 N. E. 526. Cf. *Penn Mutual Life Ins. Co. v. Wiler* (1885) 100 Ind. 92 ("near relative").

²⁰ *Hine v. McNerney* (1922) 97 Conn. 308, 116 Atl. 610. The question on appeal of reviewing facts, not law, is similar to the pleading problem here under discussion.

²¹ *Farley v. Fitzsimmons* (1922) 97 Conn. 372, 116 Atl. 606. Cf. *Humphrey v. Mottier and Harris* (1911) 48 Ind. App. 469, 96 N. E. 33; *Riggs v. American Tract Society* (1881) 84 N. Y. 330; *Physio-Medical College v. Wilkinson* (1886) 108 Ind. 314, 9 N. E. 167.

²² *Brooksville R. R. v. Byron* (1899) 20 Ky. Law, 1941, 50 S. W. 530. Cf. *E. T. Burrowes Co. v. Rapid Safety Filter Co.* (1906) 49 Misc. 539, 97 N. Y. Supp. 1048; *Baum v. Stephenson* (1908) 133 Mo. App. 187, 113 S. W. 225 (partnership). But see N. Y. C. C. P., sec. 1775; N. Y. Rules Civ. Prac. r. 93, and cases thereunder.

²³ *Francis v. Gisborn* (1905) 30 Utah, 67, 83 Pac. 571; *Alexander v. Fidelity Trust Co.* (1914, E. D. Pa.) 215 Fed. 791; *Metropolitan Trust Co. v. Columbus S. and H. R. R.* (1899, C. C. S. D. Ohio) 93 Fed. 689, 692.

²⁴ *Cooper v. McKee* (1905) 121 Ky. 287, 89 S. W. 203. Cf. *Sampson v. Grand Rapids S. F. Co.* (1900, 3d Dept.) 55 App. Div. 163, 66 N. Y. Supp. 815; *Nealis v. Marks* (1905, Sup. Ct.) 96 N. Y. Supp. 740; *Sparks v. Ducas* (1908, 1st Dept.) 123 App. Div. 507, 108 N. Y. Supp. 546. Cf. *Irwin v. Insurance Co. of N. A.* (1911) 16 Calif. App. 143, 116 Pac. 294; *contra: Gillespie v. Page* (1910) 87 S. C. 82, 68 S. E. 1044; cases in Am. Dig., *supra* note 11, sec. 8 (5). Cf. also *Hussey v. Smith* (1875) 1 Utah, 241.

²⁵ See Cook, *supra* note 6, referring to the conflict in the lower New York courts settled by *California Packing Corp. v. Kelly* (1920) 228 N. Y. 49, 126 N. E. 269, holding the allegation to be a statement of fact. See also

that a person is an "heir" of an owner.²⁶ Examples of a similar nature can easily be multiplied.²⁷

The Distinction One of Degree Only

On the other hand, text writers more recently have pointed out the illusory nature of the distinction between facts, law and evidence.²⁸ The ultimate facts are supposed to be somewhere between the law and the evidence. But facts do not easily disentangle themselves from conclusions or from details. The pleader is attempting to restate or reconstruct past happenings, and, like individuals generally, he may be garrulous or he may be taciturn, he may be talkative or he may be reticent. That is to say, he may put in all the details and thus give "evidence"; or he may state only broad conclusions and pass final judgments of guilt or error, and thus plead "law". Our real problem is, how specific must the pleader be? And when the issue is one of variance between pleading and proof, how far may he shift his position after he has chosen one?

It should further be noted that the attempted distinction between facts, law and evidence, viewed as anything other than a convenient distinction of degree, seems philosophically and logically unsound. We think of "facts" as things definite and concrete, as representations of past events now a part of history and thus fixed and unchangeable. Actually the stating of facts involves a mental process of *selecting* from among observed phenomena those which are important *in view of our particular purpose*, and *interpreting them in the light of that purpose*.²⁹

Brennan v. Standard Wood Heel Co. (1925, Sup. Ct.) 211 N. Y. Supp. 649. *Contra: Leach v. Rhodes* (1874) 49 Ind. 291. See cases collected in Am. Dig., *supra* note 11, sec. 8 (4).

²⁶ Statement of fact: *Dibble v. Winter* (1910) 247 Ill. 243, 248, 93 N. E. 145; *Physio-Medical College v. Wilkinson*, *supra* note 21; *Ricknor v. Clabber* (1903) 4 Ind. T. 660, 76 S. W. 271. Statement of law: *Stephani v. Stephani* (1894) 75 Hun, 188, 26 N. Y. Supp. 1039; *Reiners v. Brandhorst* (1879, N. Y. Sup. Ct.) 59 How. Prac. 91; *Cohen v. Doran* (1909) 58 Fla. 418, 51 So. 282; *Long v. Dufur* (1911) 58 Or. 162, 113 Pac. 59; *Heaton v. Buhler* (1910) 60 Tex. Civ. App. 423, 127 S. W. 1078; *Combs v. Cardwell* (1915) 164 Ky. 542, 175 S. W. 1009. Compare *Montz v. Schwabacher* (1904) 119 Ky. 256, 83 S. W. 569, with *Craig v. Welch-Hackley Coal & Oil Co.* (1903) 25 Ky. Law, 232, 73 S. W. 1035, 74 S. W. 1097. See Am. Dig., *supra* note 11, sec. 8 (14).

²⁷ See general references, *supra* note 11.

²⁸ Cook, *supra* note 6; Hohfeld, *Fundamental Legal Conceptions* (1923) 32, 33; Isaacs, *The Law and the Facts* (1922) 22 COL. L. REV. 1; COMMENTS, *op. cit. supra* note 8. Cf. Cunningham, *Textbook of Logic* (1924) ch. 19.

²⁹ Cf. Cunningham, *op. cit. supra* note 28, *The Hypothesis: c.g.* at 239, distinguishing between *fact*, *hypothesis*, *theory and law*; ". . . what we call a *fact* is after all an hypothesis so generally accepted that no one questions it"; at 247, ". . . facts do not speak for themselves . . .

The selection of such data, with reference say to an automobile accident, as made by a lawyer would differ from that made by a newspaper reporter or a doctor. Now the lawyer's selection is obviously made to back up some legal theory. In a certain view, therefore, the lawyer is foolish if he tries to state anything but law, *i. e.*, to select the data to show that his client should recover. To criticize him for doing this by saying that he is stating legal conclusions is beside the point. What we really are saying is, either that he ought to give us more data, *i. e.*, his allegations are too general, or that the data which he has selected proceeding on one theory are too dissimilar to be available for another theory he wishes later to advance, *i. e.*, that there is a variance between pleading and proof.

If we take as our test the requirement of fair notice of the pleader's cause,³⁰ it must follow that our solution should vary with the case presented. A statement, to be condemned as a conclusion of law on one occasion, may be an operative fact or an evidential fact on another. To take a common and striking example, the statement that B is "the wife of A" is an ordinary way of reporting what seems to the speaker to be a fact. Obviously it involves a legal conclusion, often the decision of exceedingly intricate legal problems.³¹ Where A, and B, his wife, having been injured in the same accident, are each suing for damages, the marriage is unimportant; but this would not be true, if, as is still law in many jurisdictions, A has an action for loss of services of his wife. If A and B are in divorce proceedings, the marriage is a necessary event in the chain leading to the judgment of divorce; and if B is claiming a share of A's estate as his "common law" wife, the question of marriage is a conclusion to be drawn by the judicial tribunal from facts presented to it. The particularity of allegation should vary with the question at issue.

The same general principle should govern the question of variance between pleading and proof. The data selected and interpreted to back up one theory of recovery may be so unlike the data to back up another theory that the shift seems unfair to the opponent. As pointed out later, however, in discussing the necessity of a "theory of the pleadings", it must be borne in

the facts speak the language that our interests, quickened by a fertile imagination and enriched by intimate contact, bring to them."

³⁰ For a discussion of modern views of the functions of pleading, see Clark, *History, Systems and Functions of Pleading* (1925) 11 VA. L. REV. 517, 542-4, pointing out the present emphasis upon the *notice* function—notice of each material fact of the pleader's cause, rather than merely general notice of the case, as in the so-called "notice pleading" referred to below.

³¹ Jessel, M. R., in *Eaglesfield v. Marquis of Londonderry* (1876) L. R. 4 Ch. Div. 693, 702, discussed by Cook, *supra* note 6. Cf. as to heirship, note 26.

mind that the pleader's ultimate theory is that his client should have judgment in his favor, that these others are but subordinate theories to that end, and that a shift in merely the subordinate theory when the main theory is known will perhaps rarely be an unfair surprise to the defendant.³²

It should also follow that considerable latitude should be allowed the pleader. Rarely should a pleading be condemned for being over-specific; and then the objection should be considered one of form merely—undue verbosity, repetition, etc.—rather than one of substance.³³ On the other hand, generalities of allegation should not be objectionable in themselves so long as reasonably fair notice of the pleader's cause of action is given. The matter should be one within the fair discretion of the trial court in most cases. No rule of thumb is possible; but in general it may be said that the pleader should not content himself with alleging merely the final and ultimate conclusion which the court is to make in deciding the case for him. He should go at least one step further back and allege the circumstances from which this conclusion directly followed.³⁴

Since the question whether the complaint fairly gives notice is one so largely dependent on particular facts and circumstances, it is possible by examples merely to suggest the method of approach rather than to point to definite rules. There are, of

³² See discussion, *infra*.

³³ It seems possible to distinguish—as the cases apparently do not—between specific detailed allegations and evidential allegations; the latter being of facts which render the specific facts highly probable under the circumstances and thus justify the trier of facts in concluding that the specific facts exist. Thus in *Reicher v. Trade Bank*, *supra* note 13, a suit against a bank for failure to honor the plaintiff's check, an allegation that the defendant notified the plaintiff of the deposit of funds to his credit was merely evidence that it actually did have the funds. Perhaps, in view of the desirability of tying both parties down to the essential issue in the case, which is not the bank's admission, but whether it actually had the funds, it may be proper to consider such a form of pleading undesirable. On the other hand, in *McCaughey v. Schuette*, *supra* note 13, the plaintiff set up in detail certain facts showing a conveyance of land to him, and sought possession of the land. The court held the complaint bad as showing the *evidentiary* facts, but not the ultimate facts of ownership or right to possession. But did he not show just that aggregate of facts—in detail—which the law recognizes as giving a right to possession? That is, he stated the real issue and the parties may profit by the detail which he used. Even in the first instance, where the conclusion from the evidentiary facts is the "necessary" one (*i.e.* a reasonably obvious one, see note 13 *supra*) it is perhaps doubtful whether an attempt by the court to pin the parties down closer to the issue is worth while.

³⁴ Thus in *Sheridan v. Jackson*, *supra* note 15, a suit for rents and profits of realty, the plaintiff alleged that on a certain date he was "entitled to the possession of, and the rents, issues and profits" of the realty. This was held a conclusion and the complaint defective since "It does not allege that he owned or ever possessed the premises, or that he owned the rents."

course, certain more or less standardized cases. Perhaps as illustrative a situation as any, is that of pleading negligence, where the courts have differed markedly as to their conceptions of fair notice of the pleader's case.³⁵ A few special cases may be referred to, merely by way of example. In an action against a city the plaintiff alleged that the city had allowed a certain street to get out of repair so that there existed in it a large hole in the paving, that she was riding her bicycle on the street, and having no knowledge of the defect in the street and not seeing it, she "struck said defective, unsafe, and out of repair street, and by reason of said street being out of repair as aforesaid, defective and unsafe, she was thrown violently from her bicycle upon the brick pavement of said street," etc. The court on appeal held the pleading bad since it did not show that it was the defect in the street which caused the fall. In other words, she struck the defective street, but not necessarily the defect in the street.³⁶ It would seem but a reasonable construction to hold that it was the hole in the street which the plaintiff struck; but even beyond that, if she was thrown in trying to avoid the accident, it would seem that the court and the defendant are given sufficient general notice of the nature of the accident and that the particular details asked for by the court are not necessary at the pleading stage of the trial. Again a plaintiff alleged that between certain dates his assignor "performed certain labor for and on behalf of the defendant, and furnished to the employees of the defendant, at defendant's special instance and request, certain board, food, and lodging, and goods, wares, and merchandise" of a specified value. This was held fatally defective, although had the allegations been that the assignor, "at the defendant's request, performed certain labor for the defendant and furnished him certain board," etc., it would have been sufficient.³⁷ The

³⁵ See the writer's comment, *op. cit. supra* note 8, *passim*; also (1924) 33 YALE LAW JOURNAL, 559.

³⁶ *City of Logansport v. Kihm* (1902) 159 Ind. 68, 64 N. E. 595; "It does not appear that the appellee 'struck' the street at or near the defective part thereof, nor that her bicycle struck the dangerous cavity, nor that it ran into or across the hole, nor that the hole in the street had any connection whatever with the accident. . . . The averment 'that, by reason of the street being out of repair, she was thrown from her bicycle' leaves the cause of the accident entirely to conjecture. Was she attempting to guide her bicycle around the obstruction? Or did she stop it suddenly to avoid running into it? Did she ride into the defective place in the street, and did the fall or obstruction cause the bicycle to turn over? Or did she attempt to leap from the wheel when she found she could not steer it around the dangerous spot? None of these questions is answered by the first paragraph of the complaint." Cf. COMMENTS, *loc. cit. supra* note 8.

³⁷ *Conrad National Bank v. Great Northern Ry.* (1900) 24 Mont. 178, 61 Pac. 1. The court's reasoning is that the labor is not alleged to have been furnished at the request of the defendant, due to the position of the

difference between the two from the standpoint of fair notice seems inconsiderable. A man sued his former fiancée claiming that "conditionally upon the defendant's fulfillment of her said promise to marry" him, he gave her certain jewelry, which she now refuses to return to him, although she has repudiated her promise to marry him. The court held that the complaint was defective, since it failed to show that the defendant knew of the condition, or agreed to return the jewelry if she failed to marry him. Since a gift is a bi-party transaction, it would seem that the dissenting judges were justified in their view that "the ultimate fact of conditional gift" was sufficiently pleaded.³⁸ Surely the defendant had fair notice of the plaintiff's claim. In all these and similar cases the court is viewing the allegations from an attempted standard of strict and logical accuracy, and not from the more practical one whether the facts upon which the plaintiff plans to rely are actually set forth with reasonable clearness. Reference may also be made to the case of *Jackson v. Strong*,³⁹ where the plaintiff had counted on a contract as showing a partnership relation and the defendant had relied on the same contract as showing a relation of employer and employee. Since the defendant's view was held correct, the plaintiff's complaint was in effect considered insufficient. The writer has criticized this view on the ground that notice only of the facts of the contract, not its legal interpretation, was required. This indicates how the present problem is connected with our fundamental views as to the union of law and equity and the abolition of forms of action.⁴⁰

Stating the Defendant's Duty and His Breach Thereof

The statement made above that the pleader in alleging his facts should go at least one step further back than the conclusion which he asks the court to draw in his favor will be a little clearer upon reference to an analysis made elsewhere. A lawsuit is brought to enforce a right in the plaintiff and a duty in the defendant. In the usual case we have here a remedial right

clause in the sentence, and hence no responsibility is shown for that portion of the demand; and as to the board, etc., this was furnished to third parties at defendant's request, and here no promise to pay is inferred from the mere request.

³⁸ *Rosenberg v. Lewis* (1924, 1st. Dept.) 210 App. Div. 690, 206 N. Y. Supp. 353, criticized in (1925) 25 COL. L. REV. 237. This case may perhaps be compared with *Reicher v. Trade Bank*, *supra* notes 13, 33, where there was a real failure to allege anything but evidentiary facts. Even there, however, the conclusion from such facts seems so reasonably obvious that the decision may, perhaps, be questioned.

³⁹ *Jackson v. Strong* (1917) 222 N. Y. 149, 118 N. E. 512.

⁴⁰ For a general discussion, see Clark, *The Union of Law and Equity* (1925) 25 COL. L. REV. 1.

as distinguished from a so-called primary right, the breach of which has led to the remedial right. Thus, in an ordinary action for breach of contract it is said that after the making of the contract the plaintiff has a contractual right to the defendant's performance of this promise, and the defendant a duty thereto. Upon breach by the defendant of his duty in this respect, there then arises a remedial right in the plaintiff to damages.⁴¹ Such analysis of a cause is not possible in every case, as, for example, in a suit for partition, or to probate a will. Except for these more or less unusual cases, it can be made and is helpful. In pleading the cause it would generally not be sufficient to state the final right-duty relationship which is enforced in the action, that is, the remedial rights and duties. It would be necessary to state the facts showing the original primary right and the defendant's breach, and leave it to the court to draw the ultimate conclusion that the remedial duty is owed. Hence, it is quite usual to find in the cases statements that it is necessary for the pleader to set forth facts showing the plaintiff's substantive right, the defendant's breach thereof, and the resulting damage to the plaintiff.⁴²

Stating the Causal Connection

Where the defendant's act or omission is not the only operative fact to give rise to the remedial right-duty relation, but the further fact of damage to the plaintiff is a necessary element, it is important to show the causal connection between the defendant's act or omission and the resulting damage. This is strikingly illustrated in negligence cases. It is a common occurrence for pleaders to state the defendant's act or omission and the damage to the plaintiff without alleging directly that the latter resulted from the former. Thus, in the case above discussed, where a

⁴¹ See Hohfeld, *supra* note 28, at 36-38; Corbin, *Legal Analysis and Terminology* (1919) 29 YALE LAW JOURNAL, 163, 167; Corbin, *Rights and Duties* (1924) 33 YALE LAW JOURNAL, 501. The use of the concept "primary right" as determining the extent of the cause of action was criticized in Clark, *The Code Cause of Action* (1924) 33 YALE LAW JOURNAL, 817. Its use in the present connection as pointing out the successive steps to be alleged seems decidedly useful.

⁴² *Muncie Pulp Co. v. Davis* (1904) 162 Ind. 558, 562, 70 N. E. 875; *Chicago & Erie R. R. v. Lain* (1908) 110 Ind. 84, 83 N. E. 632, a strict ruling that the defendant's duty was not shown; see COMMENTS, *op. cit. supra* note 8. See also Pomeroy, *op. cit. supra* note 10, at 553; 6 Standard Enc. Proc. 671, 2. The comparison of an action to a syllogism is a favorite one. It is said that the major premise is a rule of law, not to be pleaded; the minor premise, the facts of the case making the rule of law applicable (these alone are to be pleaded); and the conclusion is the judgment of the court. *New York, N. H., and H. R. R. v. Hungerford* (1902) 75 Conn. 76, 52 Atl. 487; Bliss, *Code Pleading* (3d ed. 1894) 230-234; Gibson, *The Philosophy of Pleading* (1893) 2 YALE LAW JOURNAL, 18.

bicyclist was injured on a defective street, the objection raised by the court to the complaint was that it did not allege that the injury to the plaintiff was caused by the defect in the street.⁴³ Again, where the defendants maintained a bridge in a defective and unsafe condition and the bridge gave way without fault to the plaintiff, injuring him, the complaint was demurrable for failure to allege that the falling of the bridge was due to the condition in which it was maintained.⁴⁴ An omission of this kind, while fatal to the sufficiency of the complaint, is generally due to the carelessness of the pleader, for it is a very simple matter to put in words showing that "by reason of" the defendant's act the plaintiff was caused the damage in question.⁴⁵

Pleading According to Legal Effect

It is frequently stated in the cases, and sometimes provided in the codes, that acts and contracts may be stated according to their legal effect.⁴⁶ The rule is perhaps most often applied in the case of written instruments such as contracts, which may be stated according to their legal meaning, *e.g.*, that by his promissory note, the defendant "promised to pay".⁴⁷ This in effect permits a summary of the instrument in the pleading. It should be noted, however, that this rule really adds no different concept to that which we already have. The question is one of degree of particularity of allegation; the final conclusion of the existence of the remedial right-duty relation is for the court and not the pleader; but the steps leading to this conclusion may be stated by giving the legal effect of such steps.⁴⁸ Philosophically speaking one can plead no other way.⁴⁹

⁴³ *City of Logansport v. Kihm*, *supra* note 36, criticised in text.

⁴⁴ *Berry v. Dole* (1902) 87 Minn. 471, 92 N. W. 334; *cf. Kelly v. Town of Darlington* (1893) 86 Wis. 432, 57 N. W. 51 ("by reason, entirely, of the insufficiency, want of repair, and defects aforesaid, of and in said bridge"; complaint sufficient).

⁴⁵ Mr. Carmody in his model complaint (N. Y. Practice, 157) seems to have failed to observe this requirement; the complaint may perhaps be saved by application of the doctrine of *res ipsa loquitur*.

⁴⁶ "Acts and contracts may be stated according to their legal effect, but in so doing the pleading should be such as fairly to apprise the adverse party of the state of facts which it is intended to prove." Conn. Prac. Bk., (1922) sec. 181, p. 283. N. J. P. A. 1912, rule 21. The section goes on to provide, rather curiously, that where an act is done by an agent, that fact should be stated. See *contra: Weide v. Porter* (1876) 22 Minn. 429; *Slevin v. Reppy* (1870) 46 Mo. 606; *cf. Helena National Bank v. Rocky Mt. Tel. Co.* (1898) 20 Mont. 379. For additional cases on pleading according to legal effect, see Am. Dig., *supra* note 11, sec. 10; for the rule at common law see Stephen *Pleading* (Williston's ed. 1895) *428-*430.

⁴⁷ Compare *Estes v. Desnoyers Shoe Co.* (1900) 155 Mo. 577, 56 S. W. 316 with *Kidder v. Port Henry Iron Ore Co.* (1911) 201 N. Y. 445, 94 N. E. 1070.

⁴⁸ See discussion *supra* at 268, 269, text.

⁴⁹ See *supra* at 264-266, text, on the selection and interpretation of data.

Use of Forms

Even though the facts and circumstances of each case should largely determine the degree of particularity of allegation required, yet, since there are so many recurring sets of facts litigated in our courts, the methods of allegation will naturally tend to become standardized. There is a decided advantage in this in that it saves the time of the pleader and of the court in deciding whether a particular form of complaint is sufficient. Hence, the use of standard forms is very desirable. As pointed out in the next section, it should be possible in a code state to use well recognized common law forms. It is even desirable that the judges should prepare suggestive forms which may be available to the bar, although not absolutely required. The success of some of the more simple practice codes, notably the Connecticut Practice Act of 1879, has been attributed in large measure to the fact that the courts have prepared forms for use in all the more ordinary cases. This example might well be followed generally in code states.⁵⁰

Notice Pleading

A yet more general form of allegation, called "notice pleading", is in use in a few courts and has been advocated for general adoption. Under this system the pleading, such as it is, simply makes a very general reference to the happening out of which the case arose, and no attempt is made to state the details of the cause of action. This system seems to have worked well in certain courts, especially where the matters are more or less standardized in themselves. It is probably doubtful whether this form of pleading will be adopted generally for all courts, at least at the present time. The prevailing idea at the present time seems to be that notice should be given of all the operative facts going to make up the plaintiff's cause of action, except, of course, those which are presumed or may properly come from the other side.⁵¹

THE CERTAINTY REQUIRED OF A PLEADING—USE OF COMMON
LAW PRECEDENTS

The common law rules designed to produce certainty in the pleadings, and by consequence, certainty or particularity in the

⁵⁰ See references to the forms in the Conn. Prac. Bk. in Cook, *op. cit. supra* note 6; COMMENTS, *op. cit. supra* note 8. See also as to forms in the English and Michigan practice, Sunderland, *op. cit. supra* note 6; Sims, *op. cit. supra* note 6. Forms are given in, among others, the Alabama, Florida, Maryland, Massachusetts, Missouri, New Jersey, and Tennessee statutes. 6 Standard Enc. Proc. 729, 730; 2 Mass. Gen. Laws, 1921, ch. 231, sec. 147.

⁵¹ See Clark, *op. cit. supra* note 30, at pages 543, 544, referring to Whittier, *Notice Pleading* (1918) 31 HARV. L. REV. 501, and other articles.

issue, are very numerous. The famous statement in Stephen probably gives a good idea of the nature of those rules.⁵² Whatever was alleged must be alleged with certainty; and an example given is that in pleading performance of conditions in a contract. It is not sufficient to say that the party has performed the contract, but he must show specifically the time, place and manner of performance.⁵³ In accordance with this general idea it was held that the pleadings must have certainty of time and place. This was true even where the matter in question was not a material part of the issue. Thus, in general, one time might be alleged and another proved.⁵⁴ So when any right or authority was set up in respect of realty or personalty, some title to the property must be alleged; the pleadings "must show title".⁵⁵ So the pleadings must specify quality, quantity and value with particularity, they must give the names of persons; and, where the party is justifying an act under some authority he must show that with particularity.⁵⁶

Beyond these general rules it was attempted to formulate a statement of degrees of certainty, certain forms of pleading requiring a higher degree of certainty than others. Thus we have the classic division by Lord Coke of certainty into three degrees: (1) certainty to a common intent; (2) certainty to a certain intent in general; (3) certainty to a certain intent in every particular. While these degrees were formally defined with seeming care,⁵⁷ the distinction was only one of relative particularity. "In modern times it comes down to little more than this, that in certain disfavored actions, such as actions for defamation, and in certain disfavored defenses, such as dilatory pleas, more facts must be alleged to make out a *prima facie* case or repel hostile construction than in ordinary cases".⁵⁸

Certain exceptions to the general requirement of certainty were recognized. Thus, a general mode of pleading was allowed when great prolixity was thereby avoided. No greater particularity was required than the nature of the thing pleaded could conveniently admit of, and hence where the circumstances constituting a cause were so numerous and minute that the party pleading was not and could not be acquainted with them, less certainty

⁵² Stephen, *op. cit. supra* note 46, at *315-413.

⁵³ *Ibid.* at *370.

⁵⁴ *Ibid.* at *329. Cf. *Dominelli v. Markowski* (1925, Del.) 128 Atl. 527.

⁵⁵ Stephen, *op. cit. supra* note 46, at *341. Title must be particularly and specifically alleged according to the recognized precedents and it would not be sufficient to state the mere conclusion that the party had title. The rule seems less strictly applied under the codes.

⁵⁶ *Ibid.* at *332, *338, *365.

⁵⁷ For definition see Shipman, *Common Law Pleading* (Ballantine's ed. 1923) 498.

⁵⁸ *Ibid.* at 499.

was required. The same was true when the allegations from the other side must reduce the matter to certainty, and also in the case when the facts lay more in the knowledge of the adverse party than of the party pleading. Likewise, less particularity was necessary in the statement of matters of inducement or aggravation than in the main allegation.⁵⁹

Use of Common Law Precedents in Code Pleading

The precedents worked out at common law under the rules of certainty deal with the problem of pleading which we are considering, namely, that of particularity of allegation. Since the question is fundamentally the same, it would seem that the common law decisions would be at least highly suggestive, even if not absolutely binding under the code. This is probably the attitude of most courts, although objection is made by some.

Most of the codes expressly abolished the forms of pleading at the common law and provided that the sufficiency of the pleading should be determined by the code and not otherwise.⁶⁰ A clear intention was thus expressed that the common law precedents should not be binding upon the cases under the code. Just how far this rule extended, however, has not seemed clear to the courts. Some judges have felt that the common law distinctions were inherent and fundamental and could not be changed, and hence they have tended to follow common law precedents very directly. On the other hand, other judges have felt that they could break away almost entirely from these common law rules.⁶¹ The difference in attitude among judges has been striking.⁶² It would seem, however, that a middle ground is the

⁵⁹ *Ibid.* at 501-506; Stephen, *op. cit. supra* note 46, at *379 *et seq.* For application of similar rules in code pleading, see *Chicago, St. L. & P. R. R. v. Wolcott* (1895) 141 Ind. 267, 39 N. E. 451; *Equitable Acc. Ins. Co. v. Stout* (1893) 135 Ind. 444, 33 N. E. 623.

⁶⁰ *Loc. cit. supra* note 2. N. Y. C. C. P. sec. 513 (omitted as "unnecessary" in the N. Y. C. P. A.; see note to N. Y. C. P. A. sec. 241). Alaska, Sts. 1913, sec. 886; Ark., Dig. Sts. 1921, sec. 1026, 1184; Calif., C. C. P. 1923, sec. 421; Colo., C. C. P. Comp. Laws, 1921, sec. 53; Idaho, Comp. Sts. 1919, sec. 6684; Burn's Ann. Ind., Sts. 1914, sec. 341; Iowa, Comp. Code, 1919, sec. 7190; Kan., Rev. Sts. 1923, 60-702; Carroll's Ky. Code, 1919, sec. 88; Minn., Gen. Sts. 1923, sec. 9249; Mo., Rev. Sts. 1919, sec. 1219; Mont., Rev. Code C. P. 1921, sec. 9126; Neb., Comp. Sts. 1922, sec. 8606; N. M., Ann. Sts. 1915, sec. 4102; N. C., Cons. Sts. 1919, sec. 527; N. D., Comp. Laws, 1913, sec. 7439; Ohio Gen. Code, 1921, sec. 11302; Olda., Comp. Sts. 1921, sec. 263; Or., C. C. P. 1920, sec. 64; Porto Rico, Rev. Sts. 1911, sec. 5084; S. C., C. C. P. 1922, sec. 397; S. D., Rev. Code, 1919, sec. 2344; Utah, Comp. Laws, 1917, sec. 6563; Wash., Comp. Sts. 1922, sec. 255; Wis., Sts. 1921, sec. 2644; Wyo., Comp. Sts. 1920, sec. 5646.

⁶¹ *Cf.* Clark, *op. cit. supra* note 40.

⁶² Prof. E. R. Sunderland gives a good resumé of the cases in his introduction to *Cases on Code Pleading* (1913) 7-15. Thus with *Bush v. Proc-*

proper one to take. The codifiers undoubtedly intended to get away from the formal distinctions of the common law forms of action. But this may still be done and yet the forms of allegation, made familiar by long usage in the courts, need not be discarded. This has appeared most strikingly in connection with the use of the so-called common counts which many code pleaders thought should be rejected with the adoption of code pleading. Their use was so familiar to lawyers and apparently so convenient, however, that they were not discarded.⁶³ It would seem, therefore, that the common law rules as to particularity of allegation, since they have become familiar to pleaders in general, should be considered at least in point under code pleading, and, subject to the more flexible nature of code pleading which puts less of a premium on formalism, should furnish satisfactory precedents.⁶⁴ Beyond this it might well be held that any form of pleading which through long usage under the common law or elsewhere has been held to give sufficient notice should be considered to be sufficient under code pleading rules.⁶⁵ For example it would seem that the allegations used in the old declaration of trespass on the case, omitting the repetition and the synonymous words used, should furnish a proper basis for the modern code action of negligence.⁶⁶

MATTERS WHICH MAY BE OMITTED

Even though the code requires that the facts constituting the cause of action shall be stated in the complaint, the rule has

ser (1854) 11 N. Y. 347, compare *Knowles v. Gee* (1850, N. Y. Sup. Ct.) 8 Barb. 300, 4 How. Pr. 316.

⁶³ 34 L. R. A. (N. S.) 364, note; L. R. A. 1918 F. 437, note; *cf.* COMMENTS, *op. cit. supra* note 8.

⁶⁴ Cases are cited by Prof. Sunderland, *op. cit. supra* note 62; see especially *People v. Ryder* (1855) 12 N. Y. 433; *Mobley v. Cureton* (1874) 6 S. C. 49; *Lassiter v. Roper* (1894) 114 N. C. 17, 18 S. E. 946; *Huston v. Tyler* (1896) 140 Mo. 252, 36 S. W. 654, 41 S. W. 795. See also *supra* note 62.

⁶⁵ See Shipman, *The Aid of the Earlier Systems* (1898) 7 YALE LAW JOURNAL, 197, stating that the use of any form good under the common law will be found good under the codes. *Cf. Hill v. Barrett* (1853, Ky.) 14 B. Mon. 67. "The rule of pleading at common law was that the declaration must allege 'all the circumstances necessary for the support of the action, and contain a full, regular and methodical statement of the injury which the plaintiff has sustained, with such precision, certainty and clearness that the defendant, knowing what he is called upon to answer, may be able to plead a direct and unequivocal plea; and that the jury may be able to give a complete verdict upon the issue, and the court, consistently with the rules of law, may give a certain and distinct judgment upon the premises.' *Read v. Smith*, 1 Allen, 519, 520. The rule so stated is the same under the Practice Act, now G. L. c. 231, sec. 7, cl. 2. *Prentiss v. Barnes*, 6 Allen, 410, 411." *Davis v. Snyder* (1925, Mass.) 147 N. E. 30. This might well have been said by a code state court.

⁶⁶ COMMENTS, *op. cit. supra* note 8.

nevertheless come down from common law pleading and has been applied under the code, that certain matters of the kind which the law will conclude from the other facts pleaded, or of which the court has judicial knowledge, or which lie in the knowledge more of the defendant than the plaintiff, need not be set forth even though they are material operative facts. Thus, facts which the law presumes need not be stated. This would include matters such as the presumption of innocence of crime or fraud and the like.⁶⁷ Again, facts necessarily implied from those alleged need not be stated. This rule has been considered in connection with the matter of pleading so-called evidential facts from which the court may draw the conclusion of the existence of the remedial right-duty relation.⁶⁸ And a very large and important class of facts of which the court takes judicial knowledge, that is, which the court is already presumed to know, need not be stated.⁶⁹

It is axiomatic that the plaintiff need not set forth matters of defense, that is, matters which legally should come from the other side.⁷⁰ What matters should legally come from the other side

⁶⁷ Stephen, *op. cit. supra* note 46, at *391; Shipman, *op. cit. supra* note 57, at 513; cases collected in Am. Dig., *supra* note 11, sec. 7. That presumptions of law need not be pleaded see Ark. Dig. Sts. 1921, sec. 1221; Burn's Ann. Ind. Sts. 1914, sec. 383; Kan. Rev. Sts. 1923, sec. 60-750; Carroll's Ky. Code, 1919, sec. 119; Mo. Rev. Sts. 1919, sec. 1259; Neb. Comp. Sts. 1922, sec. 8648; N. M. Ann. Sts. 1915, sec. 4150; Throckmorton's Ohio Gen. Code, 1921, sec. 11331; Okla. Comp. Sts. 1921, sec. 309; Wyo. Comp. Sts. 1920, sec. 5673.

⁶⁸ See Stephen, *op. cit. supra* note 46, at *390; Shipman, *op. cit. supra* note 57, at 512; cases collected in Am. Dig., *supra* note 11, sec. 7. A usual form of statement is that a complaint states a cause of action even though an essential fact be omitted, if its existence is necessarily inferred from the existence of other facts specifically alleged. *Cf. Duryce v. Vriars* (1897) 18 Wash. 55, 50 Pac. 583; *Soule v. Weatherby* (1911) 39 Utah, 530, 118 Pac. 833. As already pointed out, the complaint may be held defective in form as pleading evidential and not ultimate facts. In any event the inference must be a necessary one. See *supra* notes 13, 33.

⁶⁹ Shipman, *op. cit. supra* note 57, at 508; Bliss, *op. cit. supra* note 42, at 291-316; so provided by many codes. Iowa, Comp. Code, 1919, sec. 7271, also codes cited *supra* note 67. For cases collected see Am. Dig., *supra* note 11, sec. 6. The allegation of a fact contrary to that of which the court takes judicial knowledge, will be disregarded. *Cooke v. Tallman* (1874) 40 Iowa, 133; *Wadham's Oil Co. v. Tracy* (1909) 141 Wis. 150, 123 N. W. 785; *Chavez v. Times-Mirror Co.* (1921) 185 Calif. 20, 195 Pac. 666; *Rome Ry. & Light Co. v. Keel* (1907) 3 Ga. App. 769, 60 S. E. 463. For certain interesting cases, see *Masline v. New York, N. H. & H. R. R.* (1920) 95 Conn. 702, 111 Atl. 639; *Soule v. Bon Ami Co.* (1922, 2d Dept.) 201 App. Div. 794, 195 N. Y. Supp. 574, *aff'd* 275 N. Y. 609. This case is criticised as going too far in (1923) 23 Col. L. Rev. 75; (1923) 8 Corn. L. Quart. 146.

⁷⁰ This is the common law rule. Shipman, *op. cit. supra* note 57, at 510, 511; Stephen, *op. cit. supra* note 46, at *387. But not the equity rule. Keigwin, *Cases on Equity Pleading*, 31, 37. Of the many code cases see *Western Union Telegraph Co. v. Henley* (1901) 157 Ind. 90, 60 N. E. 632;

are of course problems to be considered in detail. Suppose, however, that the pleader states in his complaint matters which, according to the precedents, are to be considered matters of defense coming properly from the other side. What is the effect of such method of pleading? The question may come up in two ways. First, if the complaint does not go further and avoid such matters of defense, is it demurrable? Secondly, if the defendant fails to answer such matters of defense, has he thereby admitted them or are they to be considered entirely immaterial allegations having no place in the complaint? The strict common law view, followed apparently by some authorities under the code, which was contrary to the equity practice, would seem to say that the allegation is not only unnecessary but improper, and therefore to be treated as immaterial.⁷¹ The other view taken is that though unnecessary it is not improper and may be considered, therefore, a material part of the complaint. Hence, the complaint is demurrable if it does not go further and set forth facts avoiding the defense.⁷² Furthermore, the allegations, being considered material, must be answered as such by the defendant.⁷³ Since the object of pleading under the code is to give adequate notice to the opposing party and to the court of the case upon which the pleader relies, it would seem that the earlier the pleader more completely sets forth his position, the more the pleading ob-

Royal Ins. Co. v. Schwing (1888) 87 Ky. 410, 9 S. W. 242; *Kansaburo Ohsaki v. Ahern* (1923) 61 Calif. App. 787, 215 Pac. 714; *Todd v. Bradley* (1923) 99 Conn. 307, 122 Atl. 68. Cases collected in Am. Dig., *supra* note 11, sec. 67.

⁷¹ *Shipman, op. cit. supra* note 57, at 510; *Lush v. Russell* (1850) 5 Exch. 203; *Canfield v. Tobias* (1863) 21 Calif. 349; *List v. Kortepeter* (1866) 26 Ind. 27 (apparently no longer law in Indiana, see notes 72, 73, *infra*); *Scottish Nat. Ins. Co. v. Adams* (1905) 122 Ill. App. 471; *Hammott v. Porter* (1922) 71 Colo. 511, 208 Pac. 452; *Murphy v. National City Bank* (1922, 1st Dept.) 203 App. Div. 571, 196 N. Y. Supp. 859 (without citing the N. Y. cases given in note 72, *infra*); cf. *Smythe v. Tomlinson* (1913, Sup. Ct. Spec. T.) 140 N. Y. Supp. 840; *Kornhauser v. Ulin* (1919, Sup. Ct. Spec. T.) 175 N. Y. Supp. 700 (relying on authorities that defenses need not be anticipated); *Linton v. Unexcelled Fireworks Co.* (1891) 124 N. Y. 533, 27 N. E. 406; *Newell v. Newell* (1920) 68 Colo. 505, 192 Pac. 505; *Brocklehurst v. Potter & Marsch* (1916) 225 Mass. 3, 113 N. E. 646; cases collected in Am. Dig., *supra* note 11, sec. 67. For the equity practice see Keigwin, *supra* note 70, at 31, 37.

⁷² *Mallow v. Eastes* (1913) 179 Ind. 267, 100 N. E. 836; *Johnson v. Harrison* (1912) 177 Ind. 240, 97 N. E. 930; *Calvo v. Davies* (1878) 73 N. Y. 211; *Sternstein v. Heit* (1919, 1st Dept.) 186 App. Div. 45, 173 N. Y. Supp. 808; *Western Travelers' Acc. Ass'n v. Tomson* (1905) 72 Neb. 661, 103 N. W. 695; *Jamison v. McMillen* (1920) 26 N. M. 231, 190 Pac. 726; *James v. Maddox* (1922) 153 Ga. 208, 111 S. E. 731; *Wright v. Hix* (1919) 203 Ala. 425, 83 So. 341. Cf. *Furlong v. White* (1921) 51 Calif. App. 265, 196 Pac. 903.

⁷³ *Bowlus v. Phenix Ins. Co.* (1892) 133 Ind. 106, 32 N. E. 319; *Whetstone v. Beloit Straw Board Co.* (1890) 76 Wis. 613, 45 N. W. 535.

jective has been obtained. Hence, the latter view, following the equity rather than the common law practice, would seem the more desirable under code pleading.

PLEADING DIRECTLY AND TRUTHFULLY

Closely akin to the question of specificness of allegation just considered is the problem of enforcing directness and truthfulness in pleading. That pleadings should be true seems obvious. Otherwise they do not fulfill any of their functions; they serve to conceal and mislead, not to clarify and explain. Hence a wilfully false pleading is disposed of summarily.⁷⁴

But the problem ordinarily arises—and here it touches the problem considered in the previous section—when the pleader is not absolutely certain either of his facts or his law. It is all very well to say that theoretically he should be certain of both. Practically, however, as any lawyer knows, he often cannot be sure how his evidence will develop until it is all in. Nor can he often be sure until that time which of various legal theories he should adopt for his case. And so we have the struggle between the court and the pleader; the court trying to force the pleader to a clear and definite statement, and the pleader trying to protect himself to cover the chance development of his case.

It has been well developed by Professor Gregory Hankin, in an article dealing with this general subject,⁷⁵ that we can hardly expect the pleader to be more definite and certain on paper than he is in his own mind. Where he is uncertain as to what the trial will develop, he naturally will be vague and indefinite. On the other hand, we should not put a premium upon ignorance, so that the pleader who knows the least about his case will be most protected by his pleading. The true rule would seem to be that, except for intentional or reckless misstatements, there should be no penalty upon inconsistency and vagueness on the ground of lack of truthfulness of the statement; but that we should still apply the requirement of reasonably fair notice of his case so that the court's objective standard of certainty shall be met.⁷⁶

At common law the rule that pleadings should be true was recognized, though apparently not often enforced by direct proceedings. The modern technique of striking the pleading as sham and frivolous, while perhaps available, seems not to have been highly developed.⁷⁷ But there were well recognized rules to secure directness and prevent obscurity and confusion in plead-

⁷⁴ See authorities, *infra* note 77.

⁷⁵ Hankin, *Alternative and Hypothetical Pleading* (1924) 33 YALE LAW JOURNAL, 365.

⁷⁶ See discussion, *supra* text, p. 265 *et seq.*

⁷⁷ Stephen, *op. cit. supra* note 46, at *488-490; Shipman, *op. cit. supra* note 57, at 523, 524; See also opinion of Page, J. in *Hanna v. Mitchell* (1922, 1st Dept.) 202 App. Div. 504, 196 N. Y. Supp. 43, *aff'd* (1923) 235 N. Y.

ing. The common law point of view and its gradual modification under the more liberal codes is well illustrated by a particular one of these rules, namely the prohibition against pleading in the alternative which may profitably be considered in some detail.

Pleading in the Alternative

Pleading in the alternative may occur as to the subject matter of the cause or defense, or as to the parties. The development of the rule as to joinder of parties in the alternative will not be discussed in this connection.⁷⁸

At common law pleading in the alternative was not permissible. Thus, an allegation that the defendant wrote and published, or *caused* to be written and published, a certain libel, was bad for uncertainty.⁷⁹ Under the codes the general rule is considered to be the same,⁸⁰ but it is subject to the modification hereinafter noted.

Now the difficulty is that the pleader often cannot know, and cannot reasonably be expected to know, which of two or more alternatives is the correct one. This is particularly true as to the details of the injury of breach which often are known only to the defendant in advance of trial. The problem is the one already discussed of the degree of certainty which may fairly be required of the pleader. To enforce the rule as harshly as at common law is unfairly to trap the pleader beyond any requirement of fair notice to the defendant. Hence one of the most simple, desirable and effective improvements upon the common law rules is the adoption of the rule permitting allegations in the alternative.⁸¹ This has been done by statute or rule of court in England, under the Federal Equity Rules and in at least six jurisdictions in this country.⁸² In apparently at least

534, 139 N. E. 724; *General Investment Co. v. Interborough Rapid Transit Co.* (1923) 235 N. Y. 133, 139 N. E. 216.

⁷⁸ See (1925) 35 YALE LAW JOURNAL, 113; (1924) 33 *ibid.* 328; (1922) 35 HARV. L. REV. 466; (1918) 31 *ibid.* 1034.

⁷⁹ Shipman, *op. cit.* at 519, 520, and cases cited; Stephen, *op. cit.* at *426; Hankin, *op. cit. supra* note 75.

⁸⁰ *McCrossin v. Noyes Bros. & Cutler* (1919) 143 Minn. 181, 173 N. W. 566; Hankin, *op. cit. supra* note 75; (1924) 34 YALE LAW JOURNAL, 103; (1919) 33 HARV. L. REV. 244. Cases are collected Am. Dig., *supra* note 11, sec. 20. The remedy is a motion to make more specific, under the more liberal view. *Southern Ry. v. Wahl* (1924, Ind.) 145 N. E. 523; but see *Cohn v. Graber* (1922, 1st Dept.) 201 App. Div. 264, 194 N. Y. Supp. 233.

⁸¹ (1923) 33 YALE LAW JOURNAL, 109; (1924) 34 *ibid.* 103; Hankin, *op. cit. supra* note 75; Clark, *op. cit. supra* note 41, at 825, 826.

⁸² Eng. Ann. Prac. 1924, Order 19, Rules 4, 24; Fed. Eq. Rule 30; Conn. Prac. Bk. (1922) sec. 174, p. 282; Carroll's Ky. Code, 1919, art. 113, sec. 4; 2 Mass. Gen. Laws, 1921, ch. 231, sec. 37; 1 Mo. Rev. Sts. 1919, sec. 1254; N. J. Comp. Sts. (1st supp. 1911-15) 1215, art. 170, rule 153; N. M. Ann. Sts. 1915, art. 4141, sec. 75; (1924) 34 YALE LAW JOURNAL, 103.

ten more it is permitted by judicial decision.⁸³ When the true nature of the problem is recognized, the arbitrary form of the rule ought to be made to yield in all states, even without legislative aid.⁸⁴

Even at common law it was possible substantially to evade the harsh effects of the rule by stating the same cause of action in several counts, setting forth in the various counts the different positions the pleader might desire to take. A question has been made whether under the codes such a practice is permissible. Even if permissible, the practice is cumbersome and confusing, and should not be made necessary by arbitrary rules out of place under code practice.⁸⁵

Pleading Hypothetically or Otherwise Ambiguously

Likewise at common law, and probably under the codes generally, it has been considered improper to plead hypothetically, *e.g.*, that if a certain fact was so, then such and such results followed. In fact, there seems even less of a tendency to relax the rule against hypothetical pleading than to relax the corresponding rule against alternative pleading.⁸⁶ But as Professor Hankin

⁸³ *Sloss-Sheffield Co. v. Pilgrim* (1915) 14 Ala. App. 346, 70 So. 301; *Pacetti v. Georgia Ry.* (1909) 6 Ga. App. 97, 64 S. E. 302; but see *Rochling's Sons Co. v. Southern Power Co.* (1914) 142 Ga. 464, 83 S. E. 138; *Farmers' Bank of Arispe v. Arispe Mercantile Co.* (1908) 139 Iowa, 246, 117 N. W. 672; *Coleman v. Teddlie* (1901) 106 La. 192, 30 So. 99; *Dick v. Hyer* (1916) 94 Ohio St. 351, 114 N. E. 251; *Chicago, R. I. & P. Ry. v. McIntire* (1911) 29 Okla. 797, 119 Pac. 1008; *Turney v. Southern Pacific Co.* (1904) 44 Or. 280, 75 Pac. 144; *City of San Antonio v. Potter* (1903) 31 Tex. Civ. App. 263, 71 S. W. 764; *Rasmussen v. McKnight* (1883) 3 Utah, 315, 3 Pac. 83; (1924) 34 YALE LAW JOURNAL, 103; *cf. Bank of Saluda v. Feaster* (1910) 87 S. C. 95, 68 S. E. 1045. In spite of a little difference of opinion the New York rule seems in accord. *Kass v. Garment Center Realty Co., Inc.* (1924, 1st Dept.) 209 App. Div. 647, 205 N. Y. Supp. 94 (claim for reformation of a lease "because of mutual mistake or mistake of the lessee and fraud of the lessor"); *Munn v. Cook* (1890, N. Y. Sup. Ct.) 24 Abb. N. C. 314-357; *Mutual Life Ins. Co. v. McCurdy* (1907, 1st Dept.) 118 App. Div. 815, 103 N. Y. Supp. 829; *Hasberg v. Moses* (1903, 1st Dept.) 81 App. Div. 199, 80 N. Y. Supp. 867; *contra: Cohn v. Graber*, *supra* note 80 (the defendant "caused or permitted"). *Cf. Heaphy v. Eidlitz* (1921, 1st Dept.) 197 App. Div. 455, 189 N. Y. Supp. 431. Where the allegations are in the alternative, each alternative must be sufficient. *Johansson v. Kemp* (1925, 1st Dept.) 207 N. Y. Supp. 468; *Farmers' Bank v. American Surety Co.* (1924, Ky.) 265 S. W. 505; (1919) 33 HARV. L. REV. 244. It is not clear, however, why the insufficient alternative should not be rejected as surplusage.

⁸⁴ See references, *supra* note 81.

⁸⁵ See Clark, *op. cit. supra* note 81; (1925) 34 YALE LAW JOURNAL, 879, 884. Hence the case of *Heaphy v. Eidlitz*, *supra* note 83, requiring a separate statement, seems unjustified.

⁸⁶ *Emison v. Owyhee Ditch Co.* (1900) 37 Or. 577, 62 Pac. 13; *Strack Plush Co. v. Talcott* (1908, 2d Dept.) 129 App. Div. 14, 113 N. Y. Supp. 214; cases cited in (1924) 33 YALE LAW JOURNAL, 377-379; Bliss, *op. cit.*

has also shown in this connection, the two situations seem essentially similar. In each case the problem involves the degree of certainty which the pleader has in his own mind. If he is not absolutely certain that a particular set of facts is the correct statement of his cause, naturally he will want to frame his allegations contingently to provide for the existence of that set of facts and for the existence of some other set of facts.⁸⁷ Consequently it seems that the same rule should apply to hypothetical pleading as to alternative pleading. There should be no arbitrary rule holding such pleadings improper, but the questions in each case should be these, first, of the pleader truthfully stating his own position, and second, of fair notice under all the circumstances.

Similar principles should apply to other cases of ambiguous or doubtful pleadings prohibited by express rule of the common law. These included also pleadings which were said to be "insensible" or "repugnant", "argumentative" or "by way of recital".⁸⁸ The common law prohibition against "duplicity" or double pleading, repeated in a very few codes, would also seem to be of the same character.⁸⁹

NECESSITY OF A THEORY OF THE PLEADINGS

The requirement of a theory of the pleading is thus stated by the Indiana court, which has perhaps most consistently enforced it:

supra note 42, at 463; Shipman, *op. cit. supra* note 57, at 519. But see *Eppinger v. Kendrick* (1896) 114 Calif. 620, 46 Pac. 613; *Zeidler v. Johnson* (1875) 38 Wis. 335. Hypothetical denials are prohibited in Connecticut (Conn. Prac. Bk. 1922, p. 291, rule 203) and New Jersey (N. J. Prac. Act, 1912, rule 33).

⁸⁷ Hankin, *op. cit. supra* note 75.

⁸⁸ For statements of these common law rules see Stephen, *op. cit.* at *14 *et seq.*; Shipman, *op. cit.* at 517-520, 407-409. The rules have been applied in code pleading cases. Thus an argumentative allegation (as by alleging that A was at X at a time specified in order to show that he was not then at Y) or one by the way of recital ("whereas A promised B," etc.) has been held improper. *Mallott v. Sample* (1904) 164 Ind. 645, 74 N. E. 245 (changed by statute in 1913, Burn's Ann. Sts. 1914, sec. 343a; Acts 1915, ch. 42, 51); *Thompson v. Read* (1909, Sup. Ct.) 63 Misc. 235, 118 N. Y. Supp. 452; Bliss, *op. cit. supra* note 42, at 463, 464 ("A recital is not a statement, but is introductory to a statement"). But see *Fuller Desk Co. v. McDado* (1896) 113 Calif. 360, 45 Pac. 694. A pleading so ambiguous that no recovery is possible on any theory of the complaint is bad. *Wahle v. Great Northern Ry.* (1910) 41 Mont. 326, 109 Pac. 713; Bliss, *op. cit.* at 459. So also if the various allegations are wholly repugnant, inconsistent and destructive of one another. Bliss, *op. cit.* at 461. For cases collected see Am. Dig., *op. cit. supra* note 11, sec. 17-22. Defects of this general kind usually are considered waivable, objection to be taken only by motion. Cf. *Battrell v. Ohio River Ry.* (1890) 34 W. Va. 232, 12 S. E. 699.

⁸⁹ Duplicity is the relying upon more than one matter which would constitute a sufficient ground of action of the same demand or a sufficient

"It is an established rule of pleading that a complaint must proceed upon some definite theory, and on that theory the plaintiff must succeed, or not succeed at all. A complaint cannot be made elastic so as to take form with the varying views of counsel".⁹⁰

In order that the pleader may fulfill this requirement, he obviously must have a definite conception of the facts of the case and of the law upon which he relies. Ordinarily every good lawyer should have this of any case which he is willing to bring to court. In fact if he has no theory of recovery to suggest to the court he probably had better not sue, for he can hardly expect the court to work one out when he cannot. But a real problem arises when it is necessary to shift one's position at the trial of the case. This may occur even with the best prepared case, where the facts do not develop as hoped for; or it may occur when the law is complex or unsettled, and the pleader has adopted a theory which he finds the court does not accept. A good pleader

defense of a single claim. It was at variance with the common law purpose of securing a single issue. Shipman, *op. cit.* at 521-523; Stephen, *op. cit.* at *285-313, lxxii. Thus allegations in assumpsit relying on two promises, one to pay a sum certain, the other to pay *quantum meruit*, were held bad for duplicity and also for repugnancy. *Hart v. Longfield* (1703, K. B.) 7 Mod. 148. For modern code provisions, see Mo. Rev. Sts. 1919, sec. 1242; N. M. Ann. Sts. 1915, sec. 4128. A single paragraph in a complaint charging both negligence and wilfulness has been held improper. *Green v. Eden* (1900) 24 Ind. App. 583, 56 N. E. 240. See *Orr v. Cooledge* (1903) 117 Ga. 195, 43 S. E. 427; *Scott v. Taylor* (1910) 231 Mo. 654, 132 S. W. 1149; cases collected, Am. Dig., *supra* note 11, sec. 64. The objection in equity of "multifariousness" is now considered in the same category. *Scott v. Taylor*, *supra*. The case of *State v. Scott* (1903) 171 Ind. 349, 86 N. E. 409 holding that plaintiff cannot proceed on two distinct theories in the same paragraph of his complaint illustrates how closely the rule against double pleadings involves the principle of the "theory of the pleadings" criticized *infra*.

⁹⁰ *Mescall v. Tully* (1883) 91 Ind. 96, 99; *Oolitic Stone Co. v. Ridge* (1908) 169 Ind. 639, 83 N. E. 246; *Chicago, etc. Ry. v. Collins* (1924, Ind. App.) 143 N. E. 712; *H. J. Raymond Co. v. Robert Royalty Co.* (1914) 5 Alaska, 184; *Jones v. Winsor* (1903) 22 S. D. 480, 118 N. W. 716; *Sorensen v. School District* (1913) 122 Minn. 59, 141 N. W. 1105; cases cited *infra* notes 95-97. For a discussion of the problem and review of the cases, see Whittier, *The Theory of a Pleading* (1908) 8 COL. L. REV. 523; Alberts-worth, *The Theory of the Pleadings in Code States* (1921) 10 CALIF. L. REV. 202, reprinted in (1922) 94 CENT. L. JOUR. 389, 406; Scott, *Progress of the Law—Civil Procedure* (1919) 33 HARV. L. REV. 242; NOTES (1918) 32 HARV. L. REV. 166; NOTES (1911) 24 HARV. L. REV. 480; 50 L. R. A. (N. S.) 3. For another point of view, see (1910) 8 MICH. L. REV. 315; D'Arcy, "Theory of Case" (1910) 70 CENT. L. JOUR. 294, 311, 402, 455; *The Theory of the Pleading in Code States* (1922) 95 *ibid.* 125. The rule is here stated as to the complaint; logically it would seem just as applicable to answers and other pleadings, and this is so held in Indiana but is not clear elsewhere. *Colglazier v. Colglazier* (1888) 117 Ind. 460, 464, 20 N. E. 490, 491; Whittier, *op. cit.* at 534.

will naturally try to protect himself against such contingencies which may occur at the trial. Hence here again our problem is the same one previously discussed—how definite shall we compel the pleader to be in advance of the actual trial?⁹¹

So far as the plaintiff's theory of his case means the legal position taken by his counsel—and this is generally its meaning—it would seem clear that this is not a part of the complaint. This conclusion follows from the code ideal of stating the facts, not the law, the prayer for relief constituting no part of the cause of action. If the plaintiff is only to be expected to state the past occurrences between the parties, and the court is then to grant him such relief as those occurrences justify, it should be immaterial that he called his action one of tort whereas the court thought it was one of contract—or one in "equity" whereas the court thought it one "at law". This has been ruled many times by able courts.⁹² So far as the plaintiff's theory involves a particular set of facts, he is bound by those he alleged. Yet as we have seen in this article he should be allowed sufficient leeway in alleging the facts generally so that he may protect himself against the minor variations in the witnesses' stories which may develop at the trial. With freer permission given by the more liberal modern code rules to set forth the facts in alternate form he can properly be held to prove the material facts he has chosen to allege.⁹³ Therefore he should not be forced to fulfill any requirement of having and maintaining a

⁹¹ The problem is discussed in the previous sections. It is sometimes suggested that the privilege of amendment will protect the pleader and hence he may be required to follow one theory until he amends to state another. Cf. *D'Arcy, op. cit. supra* note 90. Where a pleader can amend, he normally will and should do so, to keep the record clear, unless it means delay in getting the case on the calendar for trial. But the problem whether a shift of position is permissible is substantially the same, whether the record is formally cleared up or not. In *Walrath v. Hanover Fire Ins. Co.* (1915) 216 N. Y. 220, 110 N. E. 426; the amendment was permitted by the lower court at the trial and yet the appellate court said it was error thus to depart from the original theory of the case. This ruling is followed in *Struzewski v. Farmers' Fire Ins. Co.* (1919) 226 N. Y. 338, 123 N. E. 661. Moreover the question often arises in the appellate court where an amendment has not been made below. The present problem is not the same as the recognized rule of appellate review that claims not made in the trial court will not be considered on appeal.

⁹² See cases cited *infra* notes 95-97. Good examples are *Conaughty v. Nichols* (1870) 42 N. Y. 83; *Logan v. Freerks* (1905) 14 N. D. 127, 103 N. W. 426; *Metropolis Mfg. Co. v. Lynch* (1896) 68 Conn. 459, 36 Atl. 832; and *Brown v. Baldwin* (1907) 46 Wash. 106, 89 Pac. 483, where the court says, "An applicant for justice is not to be turned out of the temple of justice, scourged with costs, because he happened to come in at one door instead of another."

⁹³ See discussion, *supra* text, p. 278 *et seq.*

single legal theory of his pleadings; he should be held only to the ideal of reasonably fair notice of the facts of his case.

Although these principles have been often stated in the cases and are applied in many, perhaps the majority, of code states, a great deal of difficulty has been made of the problem by several jurisdictions. Some, such as Indiana, have attempted to enforce such a requirement fairly consistently.⁹⁴ Others have vacillated, perhaps more recently tending to the more liberal view.⁹⁵ New York started with the more liberal view, but went to the other extreme. The cases have since been conflicting, with perhaps the most prevailing recent tendency, one coincident with a general recrudescence of strict pleading in that jurisdiction, being to apply the theory of the pleading doctrine.⁹⁶ Other

⁹⁴ See *supra* note 90, and authorities cited in Whittier, *op. cit. supra* note 90, at 528 *et seq.*; Albertsworth, *op. cit. supra* note 90, at 207-209. Quite curiously the court of appeals has recently ruled without discussion that it is an immaterial variance to shift to a claim for breach of an unexecuted contract from a claim on an executed contract. *Franklin Bank v. Roekeler Lumber Co.* (1925, Ind. App.) 147 N. E. 722. See also *Carpenter Const. Co. v. Scoonover* (1925, Ind. App.) 148 N. E. 429. Professor Albertsworth includes in the same category as Indiana the following: New York, Missouri, Nebraska, Minnesota, South Dakota, Kentucky and New Mexico. *Op. cit. supra* note 90. As might be expected, however, from the course of pleading decisions generally, the decisions in one state often represent conflicting tendencies. Cf. *Morrill v. Alexander* (1919, Mo. App.) 215 S. W. 764, not requiring a theory of the pleadings, and the diverse decisions in New York, *infra* note 96.

⁹⁵ Cf. *Supervisors v. Decker* (1872) 30 Wis. 624; *Pierce v. Carey* (1875) 37 Wis. 232; and *Dessert Lumber Co. v. Wadleigh* (1899) 103 Wis. 318, 79 N. W. 237, with *Bieri v. Fonger* (1909) 139 Wis. 150, 120 N. W. 862 and *Bruheim v. Stratton* (1919) 145 Wis. 271, 129 N. W. 1092. The following are given by Albertsworth, *op. cit. supra* note 90, at 212-219, as states now tending to the more liberal view, Wisconsin, Kansas, *Cockrell v. Henderson* (1909) 81 Kan. 335, 105 Pac. 443; *United States Tire Co. v. Kirl*: (1918) 102 Kan. 418, 170 Pac. 811; California, *Bell v. Bank of Calif.* (1903) 153 Calif. 234, 94 Pac. 889; South Carolina, *Furman v. Tuxbury Land & Timber Co.* (1918) 112 S. C. 71, 99 S. E. 111; Arkansas, *Crowder v. For-dyce Lumber Co.* (1910) 93 Ark. 392, 125 S. W. 417. The opposite tendency seems to be shown in *Gallegos v. Sandoval* (1909) 15 N. M. 216, 106 Pac. 373 compared with *Kingston v. Walters* (1908) 14 N. M. 363, 93 Pac. 700.

⁹⁶ For the early liberal view see *Conaughty v. Nichols*, *supra* note 92; *Wright v. Hooker* (1851) 10 N. Y. 51; *Emery v. Pease* (1859) 20 N. Y. 62; Whittier, *op. cit. supra* note 90, at 529-532. The stricter view came with *Ross v. Mather* (1872) 51 N. Y. 108 and *Barnes v. Quigley* (1874) 59 N. Y. 265; Whittier, *op. cit. supra* at 531. This is also stated in *Walrath v. Hanover Fire Ins. Co.*, *supra* note 91, followed in *Jackson v. Strong*, *supra* note 39; *Struzewski v. Farmers' Fire Ins. Co.*, *supra* note 91; *Blackwell v. Glidden Co.* (1924, 1st Dept.) 208 App. Div. 317, 203 N. Y. Supp. 380; *Poth v. Washington Sq. M. E. Church* (1923, 1st Dept.) 207 App. Div. 219, 201 N. Y. Supp. 776, and other recent cases. Cf. *Williamson v. Atlas Powder Co.* (1925) 208 N. Y. Supp. 301, where the majority and the minority could not agree on the legal theory of the case, but the complaint was ordered dismissed. For more liberal views, see *Post v. Holzinger*

advanced code states seem always to have followed the view developed above.⁹⁷

At common law the forms of action by placing an arbitrary limit upon the matters to be considered in a single action to a certain extent required the symmetry of pleading which seems the ideal of the stricter code states. Beyond that, however, there seems at the earlier common law to have been no requirement of a theory of the pleadings,⁹⁸ although a trace of the doctrine is found after the return of strict pleading following upon the adoption of the Hilary Rules of 1834.⁹⁹ The development of the idea in code pleading was apparently due largely to judges trained in the common law who were seeking a logical justification for enforcing the strict rules made necessary by that system.¹⁰⁰

(1925, App. Div.) 208 N. Y. Supp. 287; *Graham v. Graham* (1909, 3d Dept.) 134 App. Div. 777, 119 N. Y. Supp. 1013; *Connor v. Philo* (1907, 3d Dept.) 117 App. Div. 349, 102 N. Y. Supp. 427.

⁹⁷ These are included in Albertsworth, *op. cit. supra* note 90, at 219, 222; Connecticut, Colorado, Washington, North Dakota, North Carolina, Nevada, Oregon, Idaho, Oklahoma, Iowa, Ohio, Montana, Arizona, Wyoming. See *supra* note 92, also *Knapp v. Walker* (1900) 73 Conn. 459, 47 Atl. 655; *Cole v. Jerman* (1904) 77 Conn. 374, 59 Atl. 425; *Grimes v. Greenblatt* (1910) 47 Colo. 495, 107 Pac. 1111; *Outlook Farmers Elevator Co. v. American Surety Co.* (1924, Mont.) 223 Pac. 905; *Coulter v. Coulter* (1923) 73 Colo. 144, 214 Pac. 400; *Arnold v. Arnold* (1924) 110 Ohio St. 416, 144 N. E. 261; cases cited Albertsworth, *loc. cit.* Cf. *McMillan & Co. v. Dent* (1907) 1 Ch. 107, 113, a case of alternative plaintiffs; which suggests the question how far the most modern rules such as pleading in the alternative will be effective if the courts are to adhere to the doctrine of the theory of the pleadings.

⁹⁸ *Charnley v. Winstanley* (1804, K. B.) 5 East, 266; *Le Bret v. Papillon* (1804, K. B.) 4 East, 502; *Williamson v. Allison* (1802, K. B.) 2 East, 446. See Whittier, *op. cit. supra* note 90, at 525, 526.

⁹⁹ *Thom v. Bigland* (1853) 8 Exch. 724, 731, a case of allegations of fraud; for similar cases in equity see Whittier, *op. cit. supra* note 90, at 526, 528. A stricter rule seems to have been applied where fraud was alleged.

¹⁰⁰ The original New York cases of *Ross v. Mather* and *Barnes v. Quigley*, *supra* note 96, were cases where fraud was alleged. No recovery could then be had in contract. Professor Keigwin, in arguing that the distinctions required by the forms of action, were inherent and fundamental, suggests the effect of the forms in requiring the plaintiff to have a theory of his case and states that the abolition of those forms does not blot out the distinctions which must now be preserved through the doctrine of the theory of the pleading. Keigwin, *Cases in Common Law Pleading* (1924) 274-284. Similar views are expressed by D'Arcy, *op. cit. supra* note 90, and W. T. Hughes in *Datum Posts of Jurisprudence* (1907) *passim*, and in (1912) 44 CHICAGO LEGAL NEWS, 125, 134. The suggestion seems clearly modern philosophizing and not a contemporaneous view of common law pleading. It is not found in Chitty. Cf. Chitty, *Pleading* (5th ed.) *109, *110. Nor is it found in Stephen. Cf. Stephen, *op. cit.* at *491-*500 on the merits of common law pleading. The freedom in issuing new writs before the time when common law pleading became formal shows little of

It may again be noted that since *facts* do not exist apart from some hypothesis of the pleader, and since any "pleading of the facts" means a selection and interpretation of data according to some idea of the pleader,¹⁰¹ the problem is not whether a pleading must have a theory. It must, or else be a meaningless jumble. The problem is whether a theory originally chosen as a step in the process of convincing the court of the soundness of the client's case may be abandoned for another theory chosen for the same purpose. Viewed as merely a step in the entire process, such a shift, at least where not too drastic, is not unfair to the opponent.

THE DEMAND FOR JUDGMENT

The codes require the plaintiff to insert in his complaint "a demand of the judgment to which the plaintiff supposes himself entitled".¹⁰² At common law the plaintiff could not recover greater damages than he had laid in his formal conclusion or *ad damnum* clause.¹⁰³ In equity it was the practice for the complainant to claim the special relief to which he supposed himself entitled and to add a prayer for general relief. If the prayer for special relief was insufficient, the court would then grant such relief as the complainant was entitled to by the case made in the stating part of the bill.¹⁰⁴ Most of the codes contain a provision, coming from the original Field Code, substantially as follows:

"Where there is no answer, the judgment shall not be more favorable to the plaintiff than that demanded in the complaint. Where there is an answer, the court may permit the plaintiff to take any judgment consistent with the case made by the complaint and embraced within the issues".¹⁰⁵

such inherent differences. Compare the number of writs in Maitland's articles (1889) 2 HARV. L. REV. 97, 167, 212.

¹⁰¹ See discussion, *supra* text, p. 264 *et seq.*

¹⁰² See codes cited notes *supra* 4, 8. Likewise, where the defendant deems himself entitled to an affirmative judgment by reason of his counterclaim, he must demand the judgment in his answer. N. Y. C. P. A., 1921, sec. 270; N. Y. C. C. P., sec. 509.

¹⁰³ Stephen, *op. cit.* at 474; *Watkins v. Morgan* (1834, K. B.) 6 C. & P. 661.

¹⁰⁴ Van Zile, *Equity Pleading & Practice*, sec. 46. It is often stated that the court under the prayer for general relief cannot grant relief inconsistent with the prayer for specific relief, although the real question seems to be whether the defendant was unfairly surprised. See *Blue v. Blue* (1922) 92 W. Va. 574, 116 S. E. 134; 30 A. L. R. 1169, with note 1175.

¹⁰⁵ N. Y. C. P. A., 1921, sec. 479; C. C. P., sec. 1207. *Cf.* First Report, *supra* note 2, sec. 231: "The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case, the court may grant him any relief consistent with the case made by the complaint, and embraced within the issue." Ariz. Rev. Sts. 1913, sec. 549; Colo. C. C. P. 1921, sec. 187; Calif. C.

In Kentucky the restriction on the relief to that prayed for applies where no "defense" is filed;¹⁰⁶ in Kansas, Ohio, Oklahoma and Wyoming it applies if the defendant *fails to appear*,¹⁰⁷ and in Missouri it applies upon the *default* of the defendant.¹⁰⁸

The wording of the original code, still followed in most jurisdictions, was most unfortunate in applying the restriction to the case where no *answer* has been filed. It seems quite clear that the codifiers contemplated the case where the defendant did not appear and defend. It was only fair that the defendant if he chose should let the case go by default, secure in the knowledge of the extent of the relief to be entered against him; and only where he had appeared to defend was it proper to go beyond this. That this was the idea of the codifiers is shown by their express statement as well as by their use elsewhere of the word "answer" in a broader sense than the pleading technically called the answer.¹⁰⁹ Hence "answer" should have been given a

C. P. 1923, sec. 580; Idaho, Comp. Sts. 1919, sec. 6829; Burn's Ann. Ind. Sts. 1914, sec. 394; Iowa, Code, 1924, sec. 11573; Minn. Gen. Sts. 1923, sec. 9392; Mont. Rev. Code, 1921, sec. 9316; Nev. Rev. Laws, 1912, sec. 5241; N. C. Cons. Sts. 1919, sec. 606; N. D. Comp. Laws, 1913, sec. 7680; S. C. Code, 1922, sec. 598; Utah, Comp. Laws, 1917, sec. 6857; Wis. Sts. 1921, sec. 2886; Porto Rico, Comp. Rev. Sts. 1911, sec. 5175.

¹⁰⁶ Kentucky, Carroll's Code, 1919, sec. 90; "but if defense be made, he may have judgment for other relief, under a prayer therefor." Hence a prayer for general relief seems requisite. A demurrer has been held not a defense under this statute. *Board Sinking Fund Comrs. v. Mason & Foard Co.* (1897) 19 Ky. Law, 771, 41 S. W. 548.

¹⁰⁷ Kan. Rev. Sts. 1923, 60-2501; Ohio Gen. Code, 1921, sec. 11281; Okla. Comp. Sts. 1921, sec. 233; Wyo. Comp. Sts. 1920, sec. 5623, providing for the form of the summons and adding "If the defendant fails to appear judgment shall not be rendered for a larger amount and the costs."

¹⁰⁸ Mo. Rev. Sts. 1919, sec. 1531. Cf. secs. 1524, 1528. This has been held, however, not to justify other relief than that claimed where the defendant has only demurred. *Rush v. Brown* (1890) 101 Mo. 586, 14 S. W. 735. In Connecticut the relief is restricted to that demanded "upon a default," but "a proper amendment" of the demand for judgment is necessary to the awarding of other relief. Conn. Prac. Bk. (1922) p. 298, n. 237. There may be a demurrer to the prayer for relief. *Ibid.* p. 292, n. 207. Where a complaint is amended so as to call for legal instead of equitable relief, the defendant shall have "a reasonable opportunity to claim trial by jury." Conn. Gen. Sts. 1918, sec. 5673. Under this practice the form of the demand or prayer becomes more important than under the usual code practice, although amendments are freely allowed. Conn. Gen. Sts. 1918, sec. 5668-5673.

¹⁰⁹ See *First Report*, *supra* note 2, sec. 231, note: "It will be recollected that the plaintiff is required to state, in his complaint, the relief to which he supposes himself entitled. It will sometimes happen, that he mistakes that relief; if he do so, and the defendant do not appear, judgment ought to be given for that only, which the plaintiff has demanded. If both parties appear, and the whole controversy be gone into, there seems to be no reason, why the plaintiff should not have the relief to which he is entitled, though he may have mistaken it in his complaint." In the original code there was no provision for formal entry of appearance by the

broadier meaning than the filing of the technical answer, and should have referred to any step taken by the defendant to defend, such as the filing of a demurrer or motion. The decisions especially in New York have been conflicting on this point, with perhaps the present tendency, in that state at least, to apply the restriction unless the defendant has filed an answer.¹¹⁰ As in-

defendant as under the present system. The defendant submitted to the jurisdiction of the court by filing some "pleading" (including not merely an answer but also a demurrer or motion). Hence default of appearance was only made by failing to file an *answering pleading*. In the summons the defendant was required "to answer the complaint and serve a copy of his answer" within 20 days. *Ibid.* sec. 107. The plaintiff was also to insert a notice in the summons that in an action on contract for the recovery of money, he would take judgment for a sum specified "if the defendant fail to answer the complaint" and in other actions, "that if the defendant fail to answer the complaint, the plaintiff will apply to the court for the relief demanded in the complaint." *Ibid.* sec. 108. In *ibid.* sec. 201, 202, provisions are made for "judgment upon failure to answer," stating that "judgment may be had, if the defendant fail to answer the complaint, as follows," etc. Obviously "answer" here would include demurrers and motions. See *Atchison, T. and S. F. R. R. v. Lambert* (1912) 31 Okla. 300, 121 Pac. 654; Ann. Cas. 1913 E. 329, with note 331; *Starr v. Francis* (1840, N. Y. Sup. Ct.) 22 Wend. 633. It should have been given the same meaning in the statute, *supra* note 105. In most of the codes the provisions as to the form of the summons and the taking of judgment by default follow New York. In Minnesota, however, a default is taken where no answer or demurrer is received. Minn. Gen. Sts. 1923, sec. 9256, a provision apparently inconsistent with the general restriction. *Ibid.* sec. 9392; *supra* note 105. As to the object of the prayer as notice so that a default may safely be suffered, see *United States v. Sloan Shipyards Corp.* (1919, W. D. Wash.) 270 Fed. 613; *City of Parsons v. Parsons Water Supply & Power Co.* (1919) 104 Kan. 294, 178 Pac. 438.

¹¹⁰ That "answer" includes demurrers or motions, see *Johnson v. Kelly* (1874, N. Y. Sup. Ct.) 2 Hun, 139; *Mackey v. Auer* (1876, N. Y. Sup. Ct.) 8 Hun, 180; *Sims v. Farson* (1913, 3d Dept.) 157 App. Div. 38, 141 N. Y. Supp. 673; *Townsend v. Whitacre* (1920, 1st Dept.) 190 App. Div. 716, 180 N. Y. Supp. 368; *Port v. Holzinger* (1925, 2d Dept.) 212 App. Div. 124, 208 N. Y. Supp. 287; cf. *James v. Schafer* (1924, Calif.) 233 Pac. 70; *Lane v. Gluckauf* (1865) 28 Calif. 288; *Hansford v. Holdam* (1878, Ky.) 14 Bush, 210; *Jackson v. Straebe* (1922) 150 Minn. 329, 185 N. W. 290. *Contra*: *Kelly v. Downing* (1870) 42 N. Y. 71, 77; *Edison v. Girvan* (1883, N. Y. Sup. Ct.) 29 Hun, 422; *Cody v. First Nat. Bank* (1901, 1st Dept.) 63 App. Div. 199, 71 N. Y. Supp. 277; *Black v. Vanderbilt* (1902, 1st Dept.) 70 App. Div. 16, 74 N. Y. Supp. 1095; *Fidelity Trust Co. v. Intern'l Ry.* (1922, Sup. Ct. Spec. T.) 118 Misc. 227, 193 N. Y. Supp. 726; *Chadbourn v. Mayer* (1924, 1st Dept.) 207 App. Div. 754, 202 N. Y. Supp. 805; *Daly v. Sobieski* (1924, Sup. Ct. Spec. T.) 123 Misc. 176, 204 N. Y. Supp. 546; *McDonald v. Skinner* (1925, Sup. Ct.) 124 Misc. 545, 209 N. Y. Supp. 219; *Gosselin Corp v. Mario Tapparelli Fu Piatro, Inc.* (1920, 1st Dept.) 191 App. Div. 580, 181 N. Y. Supp. 883, *aff'd* (1920) 229 N. Y. 596, 129 N. E. 922; *Standard Film Serv. Co. v. Alexander Film Corp.* (1925) 209 N. Y. Supp. 924; *Buena Vista Fruit & Vineyard Co. v. Tuohy* (1895) 107 Calif. 243, 40 Pac. 386; *Mariner v. Milisch* (1921) 45 Nev. 193, 200 Pac. 478. See (1924) 24 COL. L. REV. 286; (1924) 33 YALE LAW JOURNAL, 881.

licated by the statutes above referred to, a slight change in the wording of the code would remove the difficulty.¹¹¹ As it now stands, the New York courts have tended to make a technical construction of a complaint and then to throw it out on the defendant's motion to dismiss, even though it shows a proper case for some relief. Thus on a complaint for specific performance, it is ruled that failure to allege that there is no adequate remedy at law makes the claimed relief inappropriate, and that since no answer has been filed, the case cannot be retained to award damages.¹¹² Such rulings make a jest of the fusion of law and equity.

Relief upon the Defendant's Default

Where the defendant has defaulted—or by the more technical rule, failed to answer—he is entitled to rely upon the plaintiff's demand as showing the extent of the judgment against him. Consequently, any excess of judgment over that demanded, or any different kind of judgment, is absolutely null and void, and may be attacked in a collateral proceeding. The part of the judgment covered by the demand is valid.¹¹³

Relief Where the Defendant has Contested

Where the defendant has appeared, or by the stricter rule, has filed his answer, it is well settled that the demand does not limit the judgment. Then according to the code the plaintiff may take any judgment consistent with the case made by the complaint and embraced within the issues.¹¹⁴ Thus an excess of damages over that claimed may be given.¹¹⁵ Or where the plaintiff has

¹¹¹ See the statutes cited *supra* notes 106-108.

¹¹² See recent New York cases *supra* note 110; (1924) 33 YALE LAW JOURNAL, 881; Clark, *op. cit.* *supra* note 41.

¹¹³ *Sache v. Wallace* (1907) 101 Minn. 169, 112 N. W. 386; 11 L. R. A. (N. S.) 803, note; *Reynolds v. Stockton* (1891) 140 U. S. 254, 11 Sup. Ct. 773; *Griffith v. Hubbard* (1896) 9 S. D. 16, 67 N. W. 850. But see *Jones v. Jones* (1891) 78 Wis. 446, 47 N. W. 728; *Mach v. Blanchard* (1902) 15 S. D. 432, 90 N. W. 1042; *Foley v. Foley* (1898) 120 Calif. 33, 52 Pac. 122. Cf. *Gum-Elastic Roofing Co. v. Mexico Pub. Co.* (1895) 140 Ind. 158, 39 N. E. 443 with *Unfried v. Heberer* (1878) 63 Ind. 67.

¹¹⁴ See code provisions, *supra* note 105; *Emery v. Pease*, *supra* note 96; *Marquat v. Marquat* (1855) 12 N. Y. 336; *Doctor v. Reiss* (1917, 1st Dept.) 180 App. Div. 62, 167 N. Y. Supp. 193; *Minneapolis Red Lake etc. Ry. v. Brown* (1906) 99 Minn. 384, 109 N. W. 817; *United States F. & G. Co. v. Nash* (1912) 20 Wyo. 65, 121 Pac. 541, 124 Pac. 269; *Donovan v. McDevitt* (1907) 36 Mont. 61, 92 Pac. 49; *Loutzenhiser v. Peck* (1916) 89 Wash. 435, 154 Pac. 814. Cf. *Hoffman v. Pacific Coast Const. Co.* (1918) 37 Calif. App. 125, 173 Pac. 776, where there was no prayer at all.

¹¹⁵ *Lane v. Gluckauf*, *supra* note 110; *Bozarth v. McGillicuddy* (1898) 19 Ind. App. 26, 47 N. E. 397, 48 N. E. 1042; but cf. *West Kentucky Coal Co. v. Davis* (1910) 138 Ky. 667, 128 S. W. 1074; *Martin v. Brown* (1912)

prayed for alimony, he may be awarded a divorce if the facts justify it.¹¹⁶ A very usual case is where relief of an equitable nature has been prayed; the courts will award damages or vice versa. The hesitation shown by some courts at different times to apply this rule wholeheartedly is due not so much to any difficulty as to the demand but to a confusion as to the union of law and equity and the meaning of a cause of action.¹¹⁷

Relation of the Demand for Judgment to the Cause of Action

Following from the principles just stated, as well as from the general ideas of code pleading, it seems almost universally considered that the demand for judgment is no part of the cause of action.¹¹⁸ This matter has been considered elsewhere in connection with the nature of the cause of action where it was concluded that the idea of the code was that the plaintiff should state the facts giving ground for societal action through the courts, that these constituted the cause of action and that the legal conclusion to be drawn from these facts, while it was to be asked for by the plaintiff in his demand for judgment, yet was actually to be drawn by the court. The court's view of the law, not the pleader's, was to govern, even where the judgment was favorable to the plaintiff.¹¹⁹ Hence in general the demand for judgment plays no part in the interpretation of the cause of action.¹²⁰ But the question has arisen, where the statement of the cause of action has been considered doubtful or ambiguous, whether the prayer for relief may not be resorted to, in order to solve the doubt. It seems quite clear that only as a last resort is this method of construction of the pleader's cause to be made.¹²¹ But a considerable number of cases have held that as stated by the

162 Mo. App. 223, 144 S. W. 1115; *Cumming v. Lawrence* (1910) 87 S. C. 457, 69 S. E. 1090; *Beraneck v. Beraneck* (1902) 113 Wis. 272, 89 N. W. 146.

¹¹⁶ *Smith v. Smith* (1903) 67 Kan. 841, 73 Pac. 56. Cf. *Coquillard v. Coquillard* (1916) 62 Ind. App. 489, 113 N. E. 481 (suit for partition treated as proceeding to convert land into a fund).

¹¹⁷ Clark, *op. cit. supra* note 41.

¹¹⁸ *Marquat v. Marquat*, *supra* note 114; *Musgrove v. Macon Co. Bank* (1914) 187 Mo. App. 483, 174 S. W. 171; *Burnham-Hanna-Munger Dry Goods Co. v. Hill* (1912) 17 N. M. 347, 128 Pac. 62; *Durham v. Pasco* (1924, N. M.) 227 Pac. 599; *South Bend Chilled Plow Co. v. Cribb Co.* (1900) 105 Wis. 443, 81 N. W. 675. Cases cited *supra* notes 114-116; cases collected Am. Dig. *Judgments*, sec. 252, *Pleading*, sec. 72. See Clark, *op. cit. supra* note 40, at 829; Clark, *op. cit. supra* note 41, at 4, 5. A different view is expressed by McCaskill, *Actions and Causes of Actions* (1925) 34 YALE LAW JOURNAL, 614, criticised by the writer in (1925) 34 YALE LAW JOURNAL, 879.

¹¹⁹ *Idaho Irr. Co. v. Dill* (1914) 25 Idaho, 711, 139 Pac. 714.

¹²⁰ *Corry v. Gaynor* (1871) 21 Ohio St. 277; *Easley v. Prewitt* (1866) 37 Mo. 361.

¹²¹ See cases in preceding and following notes.

New York Court of Appeals, "the relief asked for must solve the doubt because there is no other solution."¹²² At first blush this would seem not unreasonable; but in view of the results reached, it may, perhaps, be doubted whether it should be permissible even in this limited class of cases to look to the demand for judgment to ascertain the meaning of the complaint. The effect seems, in any such case, to be that the relief is restricted to that claimed, contrary to the provisions of the code.¹²³ In fact the cases applying this principle seem to be in the main cases where the court is applying the improper "theory of the pleadings" doctrine.¹²⁴ Thus it may be trying to determine whether the cause is "legal" or "equitable" and only be able to do this by resort to the prayer for relief. Under the code the question should not be this, but should be simply whether the plaintiff has stated any ground for judicial relief.¹²⁵ If the court is fairly in doubt about this the better method would seem to be to treat the statement of the cause itself as too indefinite, rather than to resort to the prayer for relief.¹²⁶

Since the demand for judgment is no part of the cause, a demurrer will not lie to it on the ground that the relief prayed for is not proper.¹²⁷ In general, also, no amendment of it is necessary, although it has been permitted. This seems justified since it enables the plaintiff to get the legal conclusion he supports on record.¹²⁸

¹²² *O'Brien v. Fitzgerald* (1894) 143 N. Y. 377, 38 N. E. 371; *Cobb v. Smith* (1868) 23 Wis. 261; *North Side Loan etc. Bldg. Soc. v. Nakielski* (1906) 127 Wis. 539, 106 N. W. 1097; *Frick v. Freudenthal* (1904, Sup. Ct.) 90 N. Y. Supp. 344; *Aid v. Bowerman* (1925, Wash.) 232 Pac. 297; Am. Dig., *supra* note 11, sec. 72. Cases are referred to in Whittier, *op. cit. supra* note 90, at 527, 528.

¹²³ This is also strikingly shown in the writings of Prof. McCaskill (see *supra* note 118) where the learned writer advocates resort to the prayer for relief to determine and limit the right involved.

¹²⁴ See discussion by Whittier, *op. cit. supra* note 90.

¹²⁵ See articles cited *supra* note 118.

¹²⁶ A complaint is defective for failure to give the *facts*, not the legal conclusion; and the court should be forced to say either that the facts are lacking or that the complaint is sufficient. Otherwise it is likely to hold the plaintiff to a particular legal theory indicated by the prayer.

¹²⁷ *Sommer v. Ehrgott* (1920, 2d Dept.) 193 App. Div. 663, 184 N. Y. Supp. 802; *Jordan v. Schaefer* (1918) 40 S. D. 140, 166 N. W. 547; *Lowry v. Dutton* (1867) 28 Ind. 473; *Baldrige v. Ryan* (1924 Mo.) 260 S. W. 536, see *supra* note 110. For the Connecticut rule *contra* see *supra* note 108.

¹²⁸ *Grand Island S. & L. Assn. v. Moore* (1894) 40 Neb. 686, 59 N. W. 115; *Newman v. Covenant Mut. Ins. Assn.* (1889) 76 Iowa, 56, 40 N. W. 87; *Donovan v. McDevitt*, *supra* note 114; *Walsh v. McKeen* (1888) 75 Calif. 519, 17 Pac. 673; *Burd v. Downing* (1923) 60 Calif. App. 490, 213 Pac. 287; *Culver v. Rodgers* (1877) 33 Ohio St. 537. That an amendment is not necessary see *Snehoda v. First Nat. Bank* (1924) 115 Kan. 836, 224

Relief in the Alternative

At common law parties plaintiff or defendant could not be joined in the alternative, and claims could not be made against two persons on the ground that either one or the other was liable. While this has also been the general view under the code, yet the modern more liberal codes make express provision for such joinder. Hence under these codes, unlike the older ones, the demand for such judgments may properly be in the alternative.¹²⁹

We have further seen that much the same progression has taken place with reference to the matter of alleging the facts constituting the cause of action in the alternative, the more advanced result here being reached by many courts without modification of the code itself.¹³⁰ Where facts are so alleged, often the ultimate remedy to be applied will remain the same.¹³¹ But in other cases, it may be appropriate that alternate relief should be claimed based upon an alternate construction of the cause of action. This is sometimes expressly authorized in the code.¹³² In any event it seems that it should follow from general permission to plead in the alternative, since such permission gives the authority for the statement of the facts in the alternative, and thereafter, under the code theory, the court should apply the proper judgment to the facts, whichever alternative is proved. The demand for judgment is simply the pleader's suggestion to the court.¹³³ And since it was argued above that pleading in the alternative should be permitted without express court rule, so likewise it is believed that demands for judgment in the alternative should be considered proper under the ordinary codes.

Pac. 914; but see *Beraneck v. Beraneck*, *supra* note 115; *Connecticut*, *supra* note 108.

¹²⁹ Cf. N. Y. C. P. A., 1921, sec. 211: "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." See also *supra* note 78.

¹³⁰ See discussion *supra* text, p. 278 *et seq.*

¹³¹ Cf. cases cited, *supra* note 83.

¹³² Conn. Prac. Bk. (1922) p. 282, sec. 17; N. J. Prac. Act, 1912, Rule 37; Eng. Jud. Act, Order 20, Rule 6; *Craft Refrigerating Mach. Co. v. Quinipiac Brewing Co.* (1893) 63 Conn. 551, 29 Atl. 76.

¹³³ So held in *Hiatt v. Parker* (1883) 29 Kan. 765; *Lillard v. Brannin & Brand* (1891) 91 Ky. 511, 16 S. W. 349. *Contra: Thames v. Clesi* (1919, Tex. Civ. App.) 208 S. W. 195 (not unless alternative counts are set out); *Pensenneau v. Pensenneau* (1855) 22 Mo. 27 (a state where pleading in the alternative is expressly authorized by the code); *supra* note 82. Cf. *Durant v. Gardner* (1860, N. Y. Sup. Ct.) 19 How. Pr. 94. Cf. the quite usual prayer for specific performance or damages. *Barlow v. Scott* (1861) 24 N. Y. 40; *Konnerup v. Frandsen* (1894) 8 Wash. 551, 36 Pac. 493. So in general equitable relief may be prayed in the alternative. *Bailey v. Chilton* (1921) 106 Neb. 795, 184 N. W. 939; *Worth v. Knickerbocker Trust Co.* (1910) 152 N. C. 242, 67 S. E. 590; *Reiger v. Turley* (1911) 151 Iowa, 491, 131 N. W. 866; *Keigwin*, *supra* note 70, at 65.