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The Complaint Under the Federal Rules of Civil Procedure

THE COMPLAINT UNDER THE FEDERAL RULES OF PROCEDURE

Introduction

In an effort to effect uniformity in federal and state procedure the Conformity Act[1] was adopted in 1872. It provided that in actions at law in the Federal courts the practice and pleadings should conform to the rules of procedure then in force in the state where the Federal court was sitting. The result was that in some states the pleadings were liberally construed while in others the rule of strict construction was applied to the pleadings[2] and the art of pleading in the various federal courts required a diversity of skill and knowledge commensurate with the diversity of state practice. The uniformity at which this Act was directed was never realized in its application and in 1934 Congress authorized the Supreme Court to formulate rules of procedure for the District Courts.[3] The purpose and scope of pleading under these Federal Rules of Civil Procedure have been expressed in many diverse ways[4] but the theme of each expression is keynoted by such terms as "efficiency", "simplicity", "expedition of the business of the court" and "to do substantial justice rather than decide cases upon the technicalities."[5] From these expressions it is evident that the effort of the formulators of the Code was directed toward an obliteration of the particularistic and archaic rules governing Common Law pleading and "judicially interpreted" Code pleading. The requirements necessary for a good complaint have been generally liberalized. But the provisions of the Rules are so broad that the ultimate determination of what requisites the pleader in a Federal court must fulfill rests with the judiciary and the determination will be strict or liberal, depending upon how far the judge will follow the spirit of the Rules of Procedure.[6]

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1. 28 U. S. C. A. § 724. Proceedings in Equity were specifically excluded from the operation of this Act and they were subsequently controlled by the Equity Rules, 28 U. S. C. A. following § 723 (1912). Both suits at law and proceedings in Equity are now controlled by the Federal Rules of Civil Procedure.

2. Many other points of conflict were existent by virtue of the elasticity of the Conformity Act and the fact that its application was discretionary in certain instances. See Transcontinental Ins. Co. v. Stanton, 74 F. (2d) 935 (C. C. A. 7th, 1935); Perry v. Standard Oil Co., 15 F. Supp. 563 (S. D. Miss. 1936); Isberian v. Mourad, 83 F. (2d) 728 (C. C. A. 7th, 1936); *In re* East Contra Costa Dist., 10 F. Supp. 175 (N. D. Calif. 1935).

3. 48 STAT. 1064, 28 U. S. C. A. (1934) § 723 (b).

4. Clark and Moore, *A New Federal Civil Procedure* (1935) 44 YALE L. J. 387, 1291; Dobie, *The Federal Rules of Civil Procedure* (1939) 25 VA. L. REV. 261; Clark, *The Bar and Recent Reform of Federal Procedure* (1939) 25 A. B. A. J. 22; Wheaton, *Federal Rules of Civil Procedure Interpreted* (1939) 25 CORN. L. Q. 28; Giesy v. American Nat. Bank, 31 F. Supp. 524 (D. C. Ore. 1940); Wheeler v. Lientz, 25 F. Supp. 939 (W. D. Mo. 1939); Moore v. Illinois Central R.R., 24 F. Supp. 731 (E. D. Tex. 1938); 1 MOORE, FEDERAL PRACTICE (1938) iii.

5. FED. RULES CIV. PROC. 1, 28 U. S. C. A. following § 723 (c) states the purpose of the rules as: "They shall be construed to secure the just, speedy, and inexpensive determination of every action."

6. Dean Charles E. Clark, a member of the Advisory Committee which formulated the

Form of Complaint

Rule 8 provides that a pleading[7] shall contain: "(1) A short and plain statement of the grounds upon which the court's jurisdiction depends. . . . " The original jurisdiction of the Federal courts is a limited one[8] and it is therefore necessary for a party who seeks to invoke that jurisdiction to show the court upon what grounds the jurisdiction rests. He must show in his pleadings, "affirmatively and distinctly, the existence of whatever is essential to federal jurisdiction."[9] Where the plaintiff seeks to invoke the jurisdiction of the court on the ground of diversity of citizenship an allegation that "he is a citizen of a certain state and domiciled therein" sufficiently sets forth the ultimate fact of citizenship.[10] Where it is necessary to allege the existence of a jurisdictional amount, an allegation that the matter in controversy exceeds, exclusive of interests and costs, the sum of $3,000 is sufficient.[11] The sum claimed by the plaintiff is controlling if the claim is made in good faith, unless it appears to a legal certainty that the claim is really less than the jurisdictional amount. In such event the court will dismiss for lack of jurisdiction.[12] However, while the rules require only a short statement of jurisdiction and the construction of the allegations is liberal, it is sometimes necessary to plead the jurisdictional facts in greater detail in order to bring the case within the limited scope of the federal court's jurisdiction.[13] The requirement of pleading the basis of jurisdiction is

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rules pointed out the dangers of a "legalistic approach" to the rules. Clark, *The Bar and Recent Reform of Federal Procedure* (1939) 25 A. B. A. J. 22, 23; Dobie, *The Federal Rules of Civil Procedure* (1939) 25 VA. L. REV. 261; Ford, *More Expeditious Determination of Actions under the Federal Rules of Civil Procedure* (1940) 1 F. R. D. 223. See Tahir Erk v. Glenn L. Martin Co., 116 F. (2d) 865, 870 (C. C. A. 4th, 1941); Securities Exchange Comm. v. Timetrust, Inc., 28 F. Supp. 34, 41 (N. D. Calif. 1939).

7. This includes any pleading which is a claim for relief whether it is an original claim, counterclaim, cross-claim or third-party claim. FED. RULES CIV. PROC. 8 (a), 28 U. S. C. A. following § 723 (c). But note that where a counterclaim necessarily arises out of the same transaction as that sued upon by the plaintiff it is not necessary to allege any grounds for federal jurisdiction.

8. 28 U. S. C. A. § 41. This statute sets forth the particular grounds of the jurisdiction of a Federal District Court.

9. Gates v. Graham Ice Cream Co., 31 F. Supp. 854 (D. C. Neb. 1940).

10. Watters v. Ralston Coal Co., 25 F. Supp. 387 (M. D. Pa. 1940). An allegation of residence is not essential but an allegation of residence alone, without setting forth citizenship, is insufficient. Fowler v. Baker, 32 F. Supp. 783 (M. D. Pa. 1940). See FED. RULES CIV. PROC., Official Form, No. 2.

11. Connecticut Gen. Life Ins. Co. v. Cohen, 27 F. Supp. 735 (E. D. N. Y. 1939); Sun Oil Co. v. Pfeiffer, 1 F. R. D. 119 (W. D. Okla. 1939). See FED. RULES CIV. PROC., Official Form, No. 2.

12. Sparks v. England, 113 F. (2d) 579 (C. C. A. 8th, 1940).

13. In a class suit where the plaintiff seeks to invoke the jurisdiction of a federal court on the grounds of diversity of citizenship he must show that he is the representative of a class so numerous as to make it impracticable to bring them all before the court and

essential and if the complaint contains no allegation of jurisdictional facts as required by Rule 8a (1), and the defendant does not raise the issue or urge the lack of jurisdiction, the court will consider the issue of its own accord.[14] But such a defect is not fatal. The rules permit liberal amendment and where the allegations in a complaint do not sufficiently show jurisdiction it may be amended.[15]

The second provision of Rule 8 (a) provides that a complaint shall contain: "(2) a short and plain statement of the claim showing that the pleader is entitled to relief. . . . " It has generally been conceded that the intent of this subdivision is that any plain statement which shows in simple, concise and direct averments, that the pleader is entitled to relief, is sufficient to fulfill the requirements of this section.[16] The Rules relegate to oblivion the technical forms of pleading[17] and substitute in their place brief, clear and simple statements of the essential elements upon which the claim rests.[18]

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that the suit by the plaintiff will insure an adequate representation of all the persons and that the right sought to be enforced is joint or common to all. Moreschi v. Mosteller, 28 F. Supp. 613 (W. D. Pa. 1939).

Where the defendant was engaged in "commerce" an allegation that plaintiffs were employed by defendant is not sufficient to show that they were engaged in "commerce" so as to bring them within the provisions of the Federal Employers Liability Act. It was necessary for them to further allege that they were engaged in manufacturing, processing or handling goods in commerce. Gates v. Graham Ice Cream Co., 31 F. Supp. 854 (D. C. Neb. 1940).

14. Bender v. Connor, 28 F. Supp. 903 (D. C. Conn. 1939).

15. Horne v. Hammond Co., 155 U. S. 393 (1894); Betzoldt v. American Ins. Co., 47 Fed. 705 (E. D. Mich. 1891); Moreschi v. Mosteller, 28 F. Supp. 613 (W. D. Pa. 1939). In Radio Wire Co. v. Bartniew, (S. D. N. Y.—Opinion ‡12,726) where the plaintiff sought to compel the transfer of stock on a corporation's books, the court held that the allegation of jurisdictional amount was insufficient and that it "may not permit amendment". The court states that the case of McEldowney v. Card, 193 Fed. 475 (E. D. Tenn. 1911) is not *contra.* And yet the court in that case, at page 483, said: "The authority of the trial court to permit, in the exercise of its discretion, amendments to the pleadings making necessary jurisdictional averments . . . is well settled." In the Radio Wire case the court distinguishes the latter case by stating that the "court had jurisdiction as a fact to its own knowledge . . . ", but it is to be noted that the court in the McEldowney case expressly said that "this defect in the pleadings is not supplied by any other portion of the record."

16. Sierocinski v. E. I. DuPont & Co., 103 F. (2d) 843 (C. C. A. 3rd, 1939); Securities & Exchange Comm. v. Timetrust, Inc., 28 F. Supp. 34 (N. D. Calif. 1939); Tahir Erk v. Glenn L. Martin Co., 116 F. (2d) 865 (C. C. A. 4th, 1941); Ford, *Federal Rules of Civil Procedure* (1940) 1 F. R. D. 315, 317.

17. Tahir Erk v. Glenn L. Martin Co., 116 F. (2d) 865, 870 (C. C. A. 4th, 1941).

18. In Van Dyke v. Broadhurst, 28 F. Supp. 737 (M. D. Pa. 1939) the Court said: "Under liberal construction of these rules to avoid dismissal for failure to state a claim on which relief may be had, it is necessary only to allege sufficient facts to apprise the opposing party of the nature of the claim which will be proved and technicalities in

The third subdivision of Rule 8 (a) provides that the complaint shall contain: "(3) a demand for judgment for the relief to which he (the plaintiff) deems himself entitled." Under this subdivision either legal or equitable relief may be demanded in the alternative or different forms of relief may be demanded cumulatively.[19] This requirement of pleading a demand for judgment, while it is not part of the plaintiff's claim for relief, is essential. However, the plaintiffs' recovery is not limited to the nature of the relief demanded. He may obtain any form of relief to which he is entitled on the basis of the facts proven at the trial even though he has not demanded such relief.[20] Thus, recovery is had, not on the basis of the plaintiff's allegations of damages or his theory of damages, but on the basis of facts shown at the trial and relief should be denied only when the plaintiff is entitled to none under the facts proved.[21]

Under the Federal Rules a complaint need not be verified by the party or by the attorney unless the action is brought under a statute which requires the pleadings therein to be verified.[22] However, every complaint must be signed by an attorney of record who is held to strict accountability and such signing constitutes a certification by him that: " . . . he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay."[23]

Claim for Relief

"The modern philosophy concerning pleadings is that they do little more than indicate generally the type of litigation that is involved. A generalized summary of the case that affords fair notice is all that is required."[24] This

pleading are no longer observed."

See also FED. RULES CIV. PROC., Official Forms, Nos. 3-18. The purpose of these forms is merely to indicate the simplicity and conciseness which is desired by the Rules and the mere fact that they are copied will not bar a dismissal of a complaint for insufficiency. Washburn v. Moorman Mfg. Co., 25 F. Supp. 546 (S. D. Calif. 1938).

A more detailed discussion of the requirements of Rule 8a (2) will be found *infra* pp. 255-267.

19. Catanzaritti v. Bianco, 25 F. Supp. 457 (M. D. Pa. 1938); 1 MOORE, FEDERAL PRACTICE (1938) 457.

20. Nester v. Western Union Tel. Co., 25 F. Supp. 478 (S. D. Calif. 1938) *aff'd* 106 F. (2d) 587 (C. C. A. 9th, 1939); Catanzaritti v. Bianco, 25 F. Supp. 457 (M. D. Pa. 1938); Dobie, *The Federal Rules of Civil Procedure* (1939) 25 VA. L. REV. 261, 264.

But where a judgment is entered by default the plaintiff is not entitled to any relief different from that which is asked for in the demand for judgment. FED. RULES CIV. PROC. 54 (c), 28 U. S. C. A. following § 723 (c). See Dobie, *The Federal Rules of Civil Procedure* (1939) 25 VA. L. REV. 261, 264, n. 11.

21. Nester v. Western Union Tel. Co., 25 F. Supp. 478 (S. D. Calif. 1938), *aff'd* 106 F. (2d) 587 (C. C. A. 9th, 1940), *rev'd on other grounds,* 309 U. S. 582 (1940).

22. FED. RULES CIV. PROC. 11, 28 U. S. C. A. following § 723 (c).

23. FED. RULES CIV. PROC. 11, 28 U. S. C. A. following § 723 (c); Foster Wheeler Corp. v. American Surety Co., 25 F. Supp. 225 (E. D. N. Y. 1938).

24. Securities & Exchange Comm. v. Timetrust, Inc., 28 F. Supp. 34, 41 (N. D. Calif. 1939).

view, adopted by the Federal Rules,[25] contemplates liberality in the construction of a plaintiff's claim for relief. And commendably following the spirit of the rules the courts have not been disposed to disapprove a pleading on any technical bases.[26] They have dealt with the substance and not with the form in construing a complaint.[27]

1. *Sufficiency of Complaint*

As a general rule the Federal courts have attempted to examine the sufficiency of the plaintiff's claim, not in the light of past adjudications, but engendered with the enlightened spirit of the Federal Rules, they have adopted a new approach to their examination. Many cases have weighed the sufficiency of claims for relief and while it is true that some cases seem to disregard the new liberality in construction, the vast majority of them have adhered to the trend of simplicity which the Federal Rules seek to effectuate. An examination of some of these cases will serve to indicate the courts' adherence to the policy of simplicity.

In an action for personal injury where the plaintiff alleged as negligent acts the manufacturing and distributing of a dynamite cap "in such a fashion that it was unable to stand the crimping which defendant knew it would be subjected to," the defendant argued that it was not put on notice by the complaint whether it was to meet a claim of warranty, misrepresentation, or of faulty construction. The court denied a motion to dismiss for insufficiency and held the complaint to be sufficient even though it did not set forth any specific act of negligence.[28] It has also been held that a mere general charge of negligence, without specification in the claim, in a negligence action was sufficient.[29]

Where an action was brought against the defendants for violations of the Sherman Anti-Trust Act and the charges alleged extended over a period of two years the court denied many requests of the defendant contained in his motion to make more definite and certain under Rule 12 (e).[30] The court said: "Necessarily in applying Rule 12 (e) the court must take into consideration the nature and complexity of the suit. Preparation of the proper pleading for trial in this suit requires a statement of matters and their relation to each other far more extensive from that in a simple pleading on contract or in negligence. The court has been conscious of this. It has sought to be liberal

25. FED. RULES CIV. PROC. 8 (f), 28 U. S. C. A. following § 723 (c) provides: "All pleadings shall be so construed as to do substantial justice."

26. Neumann v. Faultless Clothing Co., 27 F. Supp. 810 (S. D. N. Y. 1939); Gray v. Schoonmaker, 30 F. Supp. 1019 (N. D. Ill. 1940).

27. Securities & Exchange Comm. v. Timetrust, Inc., 28 F. Supp. 34 (N. D. Calif. 1939).

28. Sierocinski v. E. I. Du Pont & Co., 103 F. (2d) 843 (C. C. A. 3d, 1939). The District Court had granted the motion to dismiss.

29. Hardin v. Interstate Motor Freight System, Inc., 26 F. Supp. 97 (S. D. Ohio 1939).

30. United States v. Schine Chain Theatres, Inc., 1 F. R. D. 205 (W. D. N. Y. 1940).

in acting upon the demands. Defendants however, have ample opportunity, under other provisions of the rules, to procure information as to many matters concerning . . . their demands."[31] In another action brought for violation of the Sherman Act, the court in dismissing the complaint for insufficiency said: "Plaintiff, in a very general manner alleges 'that the defendant exhibitors have combined with each other . . . to unreasonably restrain interstate trade and commerce in motion picture films and to monopolize and attempt to monopolize the first and second run exhibition of feature run pictures . . . in violation of Sections 1 and 2 of the Sherman Act in the following manner.' Then follows allegations with respect to the manner in which these were made and carried into effect. But these allegations are of a general nature and the violations alleged are more conclusions of the pleader than statements of fact."[32] The court tested the sufficiency of the complaint by determining whether it stated a "cause of action"[33] and seemed to overlook the theory established by the new rules with respect to the function of a pleading. The purpose and scope of pleadings under the Rules is merely to give notice[34] to the adverse party of the nature of the "claim for relief" and to give him sufficient information to prepare a responsive pleading.[35] The mere fact that the allegations are general[36]

31. *Id.* at 208.

32. United States v. Griffith Amusement Co., 1 F. R. D. 229, 230 (W. D. Okla. 1940).

33. The words "cause of action" were deliberately omitted from the provisions of Rule 8a (2) because by the process of judicial interpretation they have come to represent that fine detail and particularity in pleading which the formulators of the Rules were seeking to avoid and an examination of the complaint upon this basis can well be criticized. See White v. Holland Furnace Co., 31 F. Supp. 32 (S. D. Ohio 1939); Wright v. Brush, 115 F. (2d) 265, 268 (C. C. A. 10th, 1940).

34. "The whole theory with respect to the function of pleadings is changed. Under the Equity practice the function was to plead facts and frame the issues. Under the new rules the purpose of the pleading is to give notice of what an adverse party may expect to meet." Montgomery, *Changes in Federal Practice* (1940) 1 F. R. D. 337, 339. See also Van Dyke v. Broadhurst, 28 F. Supp. 737 (M. D. Pa. 1939); Sunderland, *The New Federal Rules* (1938) 45 W. VA. L. Q. 5. Pike and Willis, *Federal Deposition—Discovery Procedure* (1939) 38 COL. L. REV. 1179 sets forth the theory in these words: "The new Federal Rules of Civil Procedure do not proceed upon the assumption that the function of pleading is to prepare the case for trial. It is recognized that the 'issue pleading' of the common law does not sift out the real issues, the 'fact pleading' of the codes the real facts. The generality of allegations contemplated by the new rules indicates the influence of the newer concept of 'notice pleading': the object of the complaint is to indicate to the defendant which grievance is being pressed." This theory of notice pleading, while it has not been rejected, has been modified to the extent that pleading under the Rules constitutes something more than mere notice and yet something less than fact pleading. See Johnson v. Occidental Ins. Co., 1 F. R. D. 554 (D. C. Minn. 1941); Ford, *The Federal Rules of Civil Procedure* (1940) 1 F. R. D. 315, 316; 1 MOORE, FEDERAL PRACTICE (1938) 548.

35. Marcus v. Hess, 1 F. R. D. 282 (W. D. Pa. 1940).

36. In construing a complaint the Supreme Court said: "While these allegations are general we cannot say they are inadequate." Stevens v. Foster & Kleiser Co., 311 U. S. 255 (1940). See Tahir Erk v. Glenn L. Martin Co., 116 F. (2d) 865 (C. C. A. 4th, 1941).

or that the pleader has set forth conclusions[37] should not defeat a claim for relief upon a motion to dismiss for insufficiency or subject the complaint to a motion to make more definite and certain unless it does not reasonably apprise the defendant of the nature of the claim.

Where plaintiff brought an action on the theory of restitution alleging that, "defendant became indebted to plaintiff upon an implied contract for the exclusive use of the photograph and name of plaintiff's steer, 'Big Jim', in the advertising of defendant's animal food products" the court held that there was no fact stated which would support the conclusion of "implied contract" to pay.[38] Plaintiff had copied his complaint from the official forms[39] and it would seem that the allegations, while they are conclusions, are within the scope of the spirit of the Rules and are sufficient to put the adverse party on notice of the nature of the claim against him. However the granting of the motion to dismiss may, perhaps, be justified upon the basis that the complaint did not allege any facts but consisted solely of a conclusion of law.[40]

In an action on an employment contract where the plaintiff alleged the contract, the terms thereof, the amount of compensation agreed upon, and performance, the court held the complaint to be sufficient even though plaintiff failed to allege the sales made or to otherwise show that the commissions sued for were earned.[41]

Evidence from the circuit court of appeal indicates even more strongly and authoritatively the courts' determination to adhere to the liberal spirit of the Rules. In every case, except one, the lower courts had dismissed the complaint for insufficiency and in each case the action was reversed and the complaint held sufficient by the circuit courts. In *Sparks v. England*[42] the court, in sustaining the sufficiency of a complaint, set forth the basic principles which should govern the determination of whether the complaint sufficiently states a "claim for relief." The court said: "The Rules of Civil Procedure do not require that a plaintiff shall plead every fact essential to recover the amount which he claims. The requirement is, 'a short and plain statement of the claim

37. Whether or not conclusions of the pleader would satisfy the requirements of a complaint under the new rules was one of the most controversial points before the formulators of the Rules. And since the adoption of the Rules some of the district courts have permitted them to be pleaded and others have rejected them. 1 MOORE, FEDERAL PRACTICE (1938) 546-553; Ford, *Federal Rules of Civil Procedure* (1940) 1 F. R. D. 315-317; Sunderland, *The New Federal Rules* (1938) 45 W. VA. L. Q. 5, 12; Brogdex Co. v. Food Machinery Corp., 29 F. Supp. 698 (D. C. Del. 1939); Zimmerman v. National Dairy Products Corp., 30 F. Supp. 438 (S. D. N. Y. 1939); Lewis v. United States, 27 F. Supp. 894 (E. D. Tenn. 1939); McLeod v. Cohen-Erichs Corp., 28 F. Supp. 103 (S. D. N. Y. 1939).

38. Washburn v. Moorman Mfg. Co., 25 F. Supp. 546 (S. D. Calif. 1938).

39. See note 16 *supra*.

40. Ford, *Federal Rules of Civil Procedure* (1940) 1 F. R. D. 315, 316.

41. Neumann v. Faultless Clothing Co., 27 F. Supp. 810 (S. D. N. Y. 1939).

42. 113 F. (2d) 579 (C. C. A. 8th, 1940).

showing that the pleader is entitled to relief. . . .' The appendix of forms accompanying the rules illustrates how simply a claim may be pleaded and with how few factual averments. This court has consistently disapproved of the practice of terminating litigation, believed to be without merit, by the dismissal of complaints for informality or insufficiency. If it is conceivable that, under the allegations of his complaint, a plaintiff can, upon a trial, establish a case which would entitle him to the relief prayed for, a motion to dismiss for insufficiency of statement ought not to be granted."[43] *Tahir Erk v. Glenn L. Martin Co.*,[44] represents, perhaps, an outpost in the expression of liberality beyond which the courts will not go in construing the Federal Rules of Procedure. In upholding the sufficiency of the complaint and reversing the Federal district court's decision to dismiss, the court said, ". . . we do not intend to indicate that the instant complaint should be used as a future model. We clearly recognize the indefiniteness of the various allegations stated therein, but . . . we feel that our actions are controlled by both the letter and spirit of the applicable Rules of Civil Procedure. . . ."[45] In *Simmons v. Peavey-Welsh*,[46] the circuit court sustained the district court's dismissal of the complaint. The decision does not, however, represent any departure from the liberal trend of the circuit courts. Plaintiff sued on contract and the allegations of the complaint, which were numerous and complex, were supplemented by many attached exhibits which clearly showed the absence of any contract between the parties. The complaint itself stated a claim for relief but the exhibits attached thereto, which are controlling, expressly negatived the assertion of the existence of a contract.[47]

Since the adoption of the Federal Rules it appears that the sufficiency of only one complaint has been passed upon by the Supreme Court. That Court, like the circuit courts, has not failed to indicate that liberality in the construction of pleadings is the order of the day. In *Stevens v. Foster & Kleiser Company*,[48] where the complaint alleged "a conspiracy to drive billposting companies out of business by monopolizing advertising sites and controlling trade in posters in violation of Section 7 of the Sherman Anti-Trust Act", the Court held that the complaint sufficiently stated a claim for relief despite the generality of the allegations and the plaintiff's failure to aver that it was unable to obtain posters elsewhere. The language of the Court was: "While these

43. *Id.* at 581.

44. 116 F. (2d) 865 (C. C. A. 4th, 1941).

45. *Id.* at 870.

46. 113 F. (2d) 812 (C. C. A. 5th, 1940).

47. It might be further noted that this complaint, although filed before the effective date of the Rules of Procedure, was tested under the Rules and it might have been subject to a motion to strike since it violated the requirement that a pleading be simple, concise and direct. See Chambers v. Cameron, 29 F. Supp. 742 (N. D. Ill. 1939); Michelson v. Shell Union Oil Corp., 26 F. Supp. 594 (D. C. Mass. 1939).

48. 311 U. S. 255 (1940).

allegations are general we cannot say they are inadequate."[49]

From the cases it is evident that the effect of the rules, in purpose and application, was to eliminate the technical requirements for a good complaint and substitute in their place liberal provisions requiring brevity, clarity and simplicity in statement of a claim. A valid and just claim is no longer defeated at the outset for a mere defect in pleading. "The philosophy which the rules seek to inculcate seems to be that the ends of justice may be attained more surely and more expeditiously by directing principal attention to the realities and by giving less consideration to mere formalities."[50]

2. *Separation of Claims*

In accord with the abandonment of technicality, the provisions of the Federal Rules relative to the separate statement of claims for relief are more liberal than similar provisions of the most advanced Code states.[51] Rule 10 (b) provides that: (1) there shall be a separate statement, in numbered paragraphs, of each set of circumstances which constitute an averment in the claim; and that (2) there shall be a separate count for each claim founded upon a separate transaction or occurrence. These requirements are similar to those in force in the various Code states but they are subject to a further qualification which completely distinguishes them from the rigid, absolute provisions for separate statement in the state Codes. The rule further provides, by way of qualification, that the contents of each averment or paragraph shall be limited to a statement of a single set of circumstances, "as far as practicable."[52] The other qualification, which refers to the separate statement of claims, provides for a separation "whenever a separation facilitates the clear presentation of the matters set forth."[53] The purpose of this provision is to clarify the pleadings so that the position of the pleader is clear. Separate paragraphing is mandatory and each paragraph must contain a single set of circumstances which support the allegation unless this is not "practicable."[54] Several cases have required separate claims to be separately stated and numbered[55] but in each case the pleadings were confusing and the direction to separately state served to effec-

49. *Id.* at 261.

50. Ford, *Federal Rules of Civil Procedure* (1940) 1 F. R. D. 315, 318.

51. *Cf.* N. Y. RULES CIV. PRAC. 90; N. J. PRAC. ACT RULES 17, 36; CONN. GEN. STAT. (1930) § 5513.

52. FED. RULES CIV. PROC. 10 (b), 28 U. S. C. A. following § 723 (c).

53. *Ibid.*

54. One writer has stated that "separate paragraphing is required only as far as is practicable." 1 MOORE, FEDERAL PRACTICE (1938) 605. But it would seem that separate paragraphing was mandatory and the qualification applies only as to stating a single set of circumstances in the same allegation.

55. Ingenuities Corp. v. Trau, 1 F. R. D. 578 (S. D. N. Y. 1941); Bicknell v. Loyd-Smith, 25 F. Supp. 657 (E. D. N. Y. 1938); Dellefield v Blockdel Realty Co., 1 F. R. D. 42 (S. D. N. Y. 1939); Parts Mfg. Corp. v. Weinberg, 1 F. R. D. 329 (S. D. N. Y. 1940).

tuate the purpose of the rule. The court will order the claims to be separately stated and numbered only when it will serve to clarify the issues and to facilitate a clear presentation and understanding of the matter set forth.[56]

3. Facts to be Pleaded

In phrasing Rule 8 (a) the formulators departed from the usual wording of the codes adopted by the states. The rule provides for a "short and plain statement of the claim showing that the pleader is entitled to relief." Unlike the provisions of most practice codes[57] there is lacking such terms as "cause of action" and "ultimate facts." The words "cause of action" have, by judicial interpretation, come to represent certain technical standards and requirements which the formulators of the rules sought to avoid and it was to release the claim from this cincture of technicality surrounding statements of causes of action that the words were omitted from the phraseology of the rule.[58] The incorporation of such phrases as "ultimate facts", "material facts" and "substantial facts" into the practice codes of the states gave rise to innumerable fine distinctions between evidentiary facts, ultimate or operative facts and conclusions of law.[59] Such phraseology was wisely omitted from the applicable provisions of the Federal Rules since it represented certain standards of particularity and technicality[60] which it was the avowed purpose of the formulators to avoid.[61]

The failure of the rules to expressly require a statement of "facts" has been criticized upon the premise that by omitting the requirement of stating ultimate facts upon which relief should be granted, the new rules "imply that the factual element heretofore regarded as essential to the statement of a cause of action has been discarded and under the new rules is not a material factor in the test of a good pleading."[62] It should not be concluded, however, that there

56. Westmoreland Asbestos Co. v. Johns-Manville Corp., 113 F. (2d) 114 (C. C. A. 2d, 1940); 1 MOORE, FEDERAL PRACTICE (1938) 607. Where a cause of action is alleged and different statements in the complaint are set forth in separate paragraphs as separate grounds therefor, separate counts are not required. Cowen v. Braun, 1 F. R. D. 43 (S. D. Iowa 1938); Grauman v. City of New York, 31 F. Supp. 172 (S. D. N. Y. 1939).

57. IND. STAT. ANN. (Burns, 1933) § 2-1004; OHIO GEN. CODE ANN. (Page, 1926) § 11305; UTAH REV. STAT. ANN. (1933) § 104-7-2; CALIF. CODE CIV. PROC. (Deering, 1935) § 426; MO. REV. STAT. (1929) § 764.

58. White v. Holland Furnace Co., 31 F. Supp. 32 (S. D. Ohio 1939).

59. Cook, *Statements of Fact in Code Pleading* (1921) 21 COL. L. REV. 416.

60. *Id.* at 423.

61. "What have been thought to be the objects of pleading—the narrowing of issues, the revelation of facts—will be served by several devices more precisely adapted to their fulfillment: . . ." Pike and Willis, *Federal Deposition—Discovery Procedure* (1939) 38 COL. L. REV. 1179. The broad scope of the discovery procedure provided by the federal rules presents the lawyer with a wide access to all the facts necessary to a proper preparation for trial and eliminates the necessity for encumbering the pleadings with such facts.

62. Ford, *Federal Rules of Civil Procedure* (1940) 1 F. R. D. 315. See Edmunds, *The New Federal Rules of Civil Procedure* (1938) 4 JOHN MARSHALL L. Q. 291.

is to be no factual element required in the statement of a claim under these rules. The courts have consistently required statements of fact in the claim and have ruled out conclusions of law and evidentiary facts as improper vehicles for the purpose of alleging a claim for relief.[63] In *Lewis v. United States,* the court said: "Under settled rules applicable to pleadings, the petition must contain a statement of facts, as distinguished from mere conclusions of the pleader, which show the existence of a cause of action."[64] In other cases the courts have held that the mere fact that the allegations are conclusions of law does not subject them to a motion to strike.[65] Such rulings are in accord with the views of many of the authorities[66] and it would seem that allegations in a complaint based on conclusions rather than facts should be sufficient. It has been said that "it will be unfortunate if the courts interpret the new rule as limiting the vehicles which one may use to state causes of action. . . . Facts, both final and evidentiary, and legal statements should be available for the task."[67]

As a general rule the courts have not required evidentiary facts to be pleaded in an effort to particularize the claim and in some cases they have expressly disapproved of such allegations and have stricken them from the complaint on motion.[68] However, the fact that a complaint violates the rules as to

63. Holland v. Majestic Radio & Television Corp., 27 F. Supp. 990 (S. D. N. Y. 1939); Purdue v. United Gas Public Service Co., 28 F. Supp. 847 (W. D. La. 1939); McCampbell v. Warrich Corp., 109 F. (2d) 115 (C. C. A. 7th, 1940); Abouaf v. Spreckels Co., 26 F. Supp. 830 (N. D. Calif. 1939); Lewis v. United States, 27 F. Supp. 894 (E. D. Tenn. 1939); Gilbert v. General Motors Corp., 1 F. R. D. 101 (S. D. N. Y. 1940); Engler v. General Electric Co., 32 F. Supp. 913 (S. D. N. Y. 1939).

64. 27 F. Supp. 894 (E. D. Tenn. 1939).

65. United States v. Johns-Manville Corp., 1 F. R. D. 548 (N. D. Ill. 1941); French v. French Paper Co., 1 F. R. D. 531 (W. D. Mich. 1941); Samuel Goldwyn Inc. v. United Artists Corp., 35 F. Supp. 633 (S. D. N. Y. 1940); Cater Construction Co., Inc. v. Mischwitz, 111 F. (2d) 971 (C. C. A. 7th, 1940). In Brogdex Co. v. Food Machinery Corp., 29 F. Supp. 698 (D. C. Del. 1939), the court permitted conclusions of law to be pleaded since they showed the relation of the facts to one another and since they were so combined with the facts as to render their separation impractical.

66. Professor Sunderland, a member of the Advisory Committee which formulated the Rules says: "The real test of a good pleading under the new rules is not . . . whether the allegations would be deemed good at common law. The test is whether information is given sufficient to enable the party to prepare for trial. A legal conclusion may serve the purpose of pleading as well as anything else if it gives the proper information." Sunderland, *The New Federal Rules* (1938) 45 W. VA. L. Q. 5, 12. See Ford, *Federal Rules of Civil Procedure* (1940) 1 F. R. D. 315-317, where it is said that because "the statement or averment includes a conclusion of law is no grounds for a motion to strike. . . ." See also Wheaton, *The Federal Rules Interpreted* (1939) 25 CORN. L. Q. 28, 35.

67. Wheaton, *The Federal Rules Interpreted* (1939) 25 CORN. L. Q. 28, 35.

68. Cater Construction Co. v. Mischwitz, 111 F. (2d) 971 (C. C. A. 7th, 1940); Sierocinski v. E. I. Du Pont & Co., 103 F. (2d) 843 (C. C. A. 3d, 1939); Shultz v. Manufacturers and Traders Trust Co., 1 F. R. D. 53 (W. D. N. Y. 1939); Adams v.

simplicity of statement by setting forth much evidentiary matter does not make the entire pleading subject to a motion to strike where the allegations necessary to authorize relief are present.[69]

The rules require simple, direct and concise statements of a claim and it would seem that where irrelevant and immaterial matter was alleged it would violate this provision of the rules.[70] The courts have stricken such matter from the complaint on motion upon that basis.[71] But it is also true that the purpose of the rules is to expedite the trials of actions and if the complaint is subject to a motion to strike immaterial matter in all cases that will only serve to delay the action. Immaterial matter should be the subject of a motion to strike only where it is harmful to the adverse party or where it affects the substance of the claim.[72] In *Westmoreland v. Johns-Manville Corp.*,[73] the court enunciated the rule that: "The mere presence of redundant and immaterial matter, not affecting the substance, is not in itself sufficient grounds for granting a motion to strike such matter from the complaint. Further, that where no harm will result from immaterial matter not affecting the substance the court should hesitate to disturb a pleading."[74]

4. Pleading Special Matters

Rule 9 of the Federal Rules enumerates seven matters which must be specially pleaded.

Capacity:[75] A party is not obliged to specifically allege his capacity to sue. Where a party is suing in a representative capacity it is good practice to indicate in the title of the action in what capacity he is suing, but it is no longer necessary for him to specifically allege such capacity. If the defendant wishes to raise the issue of capacity he must do so by a specific averment which shall affirmatively attack the plaintiff's right to sue.[76] An exception to this rule

Hendel, 28 F. Supp. 317 (E. D. Pa. 1939); Securities & Exchange Comm. v. Universal Service Ass'n, 106 F. (2d) 232 (C. C. A. 7th, 1939).

69. Myers v. Beckman, 1 F. R. D. 99 (E. D. Okla. 1940).

70. FED. RULES CIV. PROC. 12 (f) provides that a party may move to strike redundant, immaterial, impertinent or scandalous matter from any pleading or the court may strike it on its own initiative.

71. Engler v. General Electric Co., 32 F. Supp. 913 (S. D. N. Y. 1939); Jablow v. Agnew, 30 F. Supp. 718 (S. D. N. Y. 1939); Dellefield v. Blockdel Realty Co., 1 F. R. D. 42 (S. D. N. Y. 1939).

72. Westmoreland Asbestos Co. v. Johns-Manville Corp., 30 F. Supp. 389 (S. D. N. Y. 1939); Securities & Exchange Comm. v. Timetrust, Inc., 28 F. Supp. 34 (N. D. Calif. 1939); Meek v. Miller, 1 F. R. D. 162 (M. D. Pa. 1940); Kraus v. General Motors Corp., 27 F. Supp. 537 (S. D. N. Y. 1939).

73. 30 F. Supp. 389 (S. D. N. Y. 1939).

74. *Id.* at 392.

75. Rule 9 (a).

76. This is different than the practice in most code states where it is necessary to

exists, however, where it is necessary to allege capacity as the basis of jurisdiction.[77]

Fraud, Mistake, Condition of Mind:[78] Where a complaint alleges fraud or mistake the pleader must state with particularity the circumstances which constitute the fraud or mistake.[79] However, where a general allegation of fraud is made it will be sufficient if the other parts of the complaint show acts alleged to constitute fraud.[80] Where it is necessary to show the condition of mind of a person it is sufficient to plead such conditions of mind as malice, intent and knowledge by general allegations. And thus, while it is well established that fraud may not be alleged generally, the intent to defraud need not be specifically averred but a general allegation will be sufficient.[81]

Conditions Precedent:[82] The provision which controls the pleading of conditions precedent is similar to that governing allegations of capacity. It is sufficient to generally allege, without specification, the performance or occurrence of conditions precedent.[83] If the adverse party wishes to challenge the

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allege capacity but there is no burden of proving the capacity unless the defendant denies the allegation. See N. Y. RULES CIV. PRAC. 93; MINN. STAT. (Mason, 1927) § 9271; ARIZ. REV. CODE ANN. (Struckmeyer, 1928) § 3743; IOWA CODE (1935) § 11207; WIS. STAT. (1939) § 328.31.

77. A corporation must allege the state of incorporation where the jurisdiction of the action is based on diversity of citizenship between the parties. Marshall v. B. & O. R.R. Co., 16 How. 314 (U. S. 1853). A suit against the Federal Government can be maintained only by permission of the United States, and then only in the manner and under the restrictions presented by the enabling statute. Capacity to sue in such a case is a jurisdictional fact and must be specifically alleged. Jewel v. United States, 27 F. Supp. 836 (W. D. Ky. 1939).

78. FED. RULES CIV. PROC. 9 (b), 28 U. S. C. A. following § 723 (c).

79. Shultz v. Manufacturers and Traders Trust Co., 1 F. R. D. 53 (W. D. N. Y. 1939); McCarthy v. Schumacher, 1 F. R. D. 8 (S. D. N. Y. 1939); Zimmerman v. National Dairy Products Corp., 30 F. Supp. 438 (S. D. N. Y. 1939); Herman v. Mutual Life Ins. Co., 108 F. (2d) 678 (C. C. A. 3d, 1939); Putinsky v. Commercial Union Assur. Co., 1 F. R. D. 440 (S. D. N. Y. 1940); Brown v. Fire Ass'n of Philadelphia, 1 F. R. D. 450 (S. D. N. Y. 1940). See 1 MOORE, FEDERAL PRACTICE (1938) 586-589.

80. E. I. Du Pont v. Du Pont Textile Mills, Inc., 26 F. Supp. 236 (M. D. Pa. 1939).

81. In Love v. Commercial Casualty Ins. Co., 26 F. Supp. 481 (S. D. Miss. 1939), the court held that a general charge that a letter was maliciously written without alleging further facts showing malice was sufficient.

82. FED. RULES CIV. PROC. 9 (c), 28 U. S. C. A. following § 723 (c). *Cf.* MINN. STAT. (Mason, 1927) § 9273; N. D. COMP. LAWS ANN. (1913) § 7461; WASH. REV. STAT. ANN. (Remington, Supp. 1934) § 288; CAL. CODE CIV. PROC. (Deering, 1935) § 457; KAN. GEN. STAT. ANN. (Corrick, 1935) § 60-743; N. Y. RULES CIV. PRAC. 92. Under these code provisions the party must plead "due" performance of the conditions precedent while this requirement was omitted from Rule 9 (c) of the federal rules.

83. Where plaintiff failed to allege performance of conditions precedent and sought to remedy the defect by affidavit the court said: "The rules even construed most liberally

allegation he must do so specifically and with particularity.[84] The conditions precedent referred to in this rule are the conditions going to create liability or those which construct a legal capacity to sue, and it does not require any allegation that procedural requirements have been fulfilled.[85]

Official Document or Act: "In pleading an official document or act it is sufficient to aver that the document was issued or the act done in compliance with the law."[86]

Judgment:[87] Where plaintiff seeks to plead a foreign or domestic judgment or decision it is sufficient to allege such judgment without showing that the court from which it issued had jurisdiction to render it. The rule applies to a "judicial or quasi-judicial tribunal, or of a board or officer . . ." and therefore the rulings of administrative boards may be pleaded in the same manner as the judgment of a court.

Time and Place:[88] The provisions of the rules relative to allegations of time and place operate to make all such averments material matters for the purpose of testing the sufficiency of the complaint.[89] Such allegations were generally immaterial at common law except where they were, in fact, essential elements of a plaintiff's cause of action and in such case the failure to properly allege the time or place precluded a party from introducing evidence of a different character at the trial. Under the federal rules all such averments are material but the harsh result at common law has been abrogated by the principle of liberal amendment adopted by the rules.[90]

Special Damages: The rules recognize the distinction between general and special damages. Rule 9 (g) provides: "When items of special damage are claimed, they shall be specifically stated."[91]

Contributory Negligence: The matter of pleading and proving contributory negligence is not one of the elements which must be specially pleaded within

do not permit such looseness of procedure." Landau v. Wolverine Hotel Co., 23 F. Supp. 705 (N. D. Ill. 1940).

84. United States v. R. L. Dixon & Bro., Inc., 36 F. Supp. 147 (N. D. Tex. 1940).

85. Snyder v. Le Roy Dal Co., Inc., 1 F. R. D. 362 (S. D. N. Y. 1940).

86. FED. RULES CIV. PROC. 9 (d), 28 U. S. C A. following § 723 (c).

87. FED. RULES CIV. PROC. 9 (e), 28 U. S. C. A. following § 723 (c).

88. FED. RULES CIV. PROC. 9 (f), 28 U. S. C. A. following § 723 (c).

89. In Miller Co. v. Hyman, 28 F. Supp. 312 (E. D. Pa. 1939), the court granted the defendant's motion for a more specific statement of a claim, stating that: "It is a fundamental rule of pleading that dates of the expenditure of monies claimed to be recoverable from the defendant or of a doing of work for the cost of which the defendant is charged to be liable be furnished in the plaintiff's pleading." *Id.* at 313.

90. See 1 MOORE, FEDERAL PRACTICE (1938) 595.

91. See Radio Television Corp. v. Bartniew Dist. Corp., 32 F. Supp. 431 (S. D. N. Y. 1940); Gray v. Schoonmaker, 30 F. Supp. 1019 (E. D. Ill. 1940).

the terms of Rule 9. The federal rules provide that it is an affirmative defense which must be affirmatively set forth by the defendant.[92] Despite this procedural treatment of the burden of pleading contributory negligence by the Supreme Court in formulating the rules an important question has arisen as to whether the matter of pleading and proving freedom from contributory negligence in a federal court is substantive or procedural where the jurisdiction of the court is based on diversity of citizenship. The question arose in the case of *Francis v. Humphrey*,[93] where the court granted a motion to dismiss the complaint for insufficiency because the plaintiff had failed to allege his freedom from contributory negligence. The court had before it the question of whether it should apply Rule 8 (c) of the federal rules or the law of the state on pleading and proving contributory negligence under *Erie v. Tompkins*.[94] The court concluded that the plaintiff's duty to plead freedom from contributory negligence was part of the substantive law of the state[95] and that it was, under the *Tompkins* case, controlling.[96] Much criticism has been leveled at this decision upon the basis that it destroys the uniformity of procedure so desirously achieved by the Federal Rules in formulation.[97] It is indeed representative of an enigma peculiarly characteristic in the law where perfection is had in conception but imperfection is the result of application. Despite this criticism, however, it now seems well established that where state law is applicable and the burden of proof is there placed on one party such burden is a matter of substantive law and cannot be shifted by application of the Federal Rules of Procedure.[98] In any event, where state law provides that the plaintiff must

92. FED. RULES CIV. PROC. 8 (c), 28 U. S. C. A. following § 273 (c).

93. 25 F. Supp. 1 (E. D. Ill. 1938).

94. 304 U. S. 64 (1938).

95. To sustain this conclusion the court cited Walters v. City of Ottawa, 240 Ill. 259, 88 N. E. 651 (1909), and Cullen v. Higgins, 216 Ill. 78, 74 N. E. 698 (1905). Both of these cases assert the plaintiff's duty to plead freedom from contributory negligence. It is difficult to see how they control the conclusion that it is part of the substantive law of that state, since the court, without going into the question of substance or procedure, merely reiterates the rule that the plaintiff must plead freedom from contributory negligence.

96. In view of the court's determination that it was a matter of substance, Rule 8 (c) could not control since it is provided by the authorizing statute that the federal rules "shall neither abridge, enlarge nor modify the substantive rights of any litigant." 48 STAT. 1064, 28 U. S. C. A. § 723 (b).

97. See Clark, *The Tompkins Case and the Federal Rules* (1940) 1 F. R. D. 417; Yankwich, *Jurisdiction and Procedure of the Federal District Courts* (1940) 1 F. R. D. 453, 471; Comment (1939) 37 MICH. L. REV. 1249; (1939) IOWA L. REV. 609; (1939) 34 ILL. L. REV. 106. See also (1939) 27 GEO. L. J. 375 which supports the conclusion of the court.

98. Francis v. Humphrey, 25 F. Supp. 1 (E. D. Ill. 1938); Schopp v. Muller Dairies, Inc., 25 F. Supp. 50 (E. D. N. Y. 1938); Cities Service Oil Co. v. Dunlap, 308 U. S. 208 (1939), *revs'g* 101 F (2d) 314 (C. C. A. 5th, 1939) (holding that burden of proof was a substantive matter). See 1 MOORE, FEDERAL PRACTICE (1940 Supp.) 571. For cases with a

plead and prove his freedom from contributory negligence and the district court has jurisdiction on the ground of diversity of citizenship the pleader will insure his complaint against the successful attack of a motion to dismiss for insufficient statement of a claim if he alleges freedom from contributory negligence.

Conclusion

The purpose of the Federal Rules of Civil Procedure, which is efficiency and liberality in procedure, and more particularly, clarity and simplicity of statement in pleading,[99] has not been frustrated or sidetracked by the federal courts.[100] The Rules, liberal in conception, have remained liberal in application. While it is true that some of the district courts have adhered to a common law policy of technicality and particularity, cases from the circuit courts such as the *Sierocinski*,[101] *Sparks*,[102] and *Tahir*[103] cases have forecast the new liberality which should guide the judges' approach to the examination of the complaint. If wisely and judicially administered this subordination of craftsmanship in pleading to simplicity and conciseness in the statement of a claim will ultimately effect a more just settlement of a grievance and will eliminate the web of technicality surrounding the procedural aspect of the law which has so often been decried by the lawyer and layman alike.

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contrary approach to the question of substance and procedure see Guardian Life Ins. Co. v. Glum, 106 F. (2d) 592, 595 (C. C. A. 3d, 1939); Summers v. Hearst, 23 F. Supp. (S. D. N. Y. 1938).

99. See note 4 *supra*.

100. Yankwich, *Jurisdiction and Procedure of the Federal District Courts* (1940) 1 F. R. D. 453, 490.

101. 103 F. (2d) 843 (C. C. A. 3d, 1939).

102. 113 F. (2d) 579 (C. C. A. 8th, 1940).

103. 116 F. (2d) 865 (C. C. A. 4th, 1941).