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CODE PLEADING: THE AID OF THE EARLIER SYSTEMS.

In the preface to Professor Tyler's edition of Stephen on Pleading, it is stated that "it is especially important that the students of law be trained in common law practice, and be convinced of its wisdom as a means of administering justice, in order that as men who influence public opinion they may if possible, gradually restore common law pleading to its former efficiency in the courts. At all events their training in common law pleading will enable them, in States where it is established, to relieve in some measure the administration of justice from the embarrassments with which it has been environed by codes. For a knowledge of common law pleading is not only of importance in States where wisdom has retained it, but also in States where it has been abolished." While the value of the knowledge thus advocated should always be clearly apparent to those whose preparatory studies in the law have included the common law and equity methods, it is by no means as fully recognized by those whose legal training has been entirely under the code system. The views of Professor Tyler above quoted may be taken as true at the present time to the extent that the importance of the common law training still exists as fully as it did thirty-seven years ago, though not entirely for the reasons then advanced, and that, to either the student or the practising lawyer, such training cannot but be beneficial for the reason that, with but one single exception, it is believed, and aside from formal and technical requirements, there is no rule regulating the substance of pleadings under the codes which is not either taken directly from the older system, or framed by analogy in

the application of the same principles. The experience of the past thirty years has demonstrated that the codes have by no means brought about that perfect completeness and simplicity in all forms of legal procedure hoped for and predicted by their supporters, and expected, perhaps, during the earlier years of their adoption. Much has been written by way of judicial opinion to elucidate and determine what rule of guidance should be followed under their apparently clear and simple provisions, often with but little effect beyond disposing of the particular controversy, and not a little has been put forth by text-writers to the same end, though not always with a full measure of success. There has also been some discussion as to the meaning of certain requirements of the codes which, while apparently plain, have involved in their application much confusion and doubt. No one, however, it is believed, has at any recent time denied the importance, or at least the benefit, of the common law and equity training to the lawyer practicing under the codes, and it is the purpose of the writer to endeavor to indicate some of the points of contact between the earlier and later systems, as well as the indirect influence exerted by the former in the presentment of controversies for judicial determination.

While it is true that under the methods now pursued the law schools generally place the study of the common law system at the commencement of the course on pleading, and while lawyers without a law school training, but whose practice began far enough back for them to be affected by the older methods, recognize its importance, it is also true that students to some extent regard both systems as practically obsolete so far as code procedure is concerned, and many lawyers, not graduates of any law school, are not only of the same opinion but often have no knowledge whatever of either, their studies having been limited to the acquisition of such of the provisions of the particular act as would enable them to obtain admission to the bar and thereupon "hang out a shingle." It is not intended to make any general criticism upon the members of the profession, but in noticing the course of trials of civil causes in courts proceeding under the codes, it will often be evident that the pleadings in the different suits have apparently been drawn with a main object of economizing both time and labor, and with but slight attempts toward any logical or concise method of statement. So true is this at times that it would seem as if the end in view had been to reverse the cardinal principle that the pleading should be framed for the proper information of the defendant

as to the case to be established against him in evidence, and instead of thus informing him to mislead and confuse him to such an extent as to render him helpless when actually confronted by the testimony at the trial. The method of statement followed (I refer only to the statement of the *facts* constituting either claim or defense, and not to formal or technical allegations) is but too often a statement of "facts" as prescribed by the codes, made as the lamented Charles O'Conor expressed it, "just as any old woman, in trouble for the first time, would narrate her grievances," licked into a semblance of orderly shape by reference to some book of so-called "forms" or to the results of the labor of a brother practitioner, and telling the opposing party much more or less than he requires and is entitled, for the purposes of his defense, to know. In other cases the method adopted consists of a mixture of the necessary "facts" or, as convenient, the evidence of such facts, and a series of legal conclusions presented in perfect good faith as convincing and ultimate facts, interwoven with such argument or explanation as seems necessary to complete and solidify the whole; and in still others, a form is taken bodily, chiefly because it is offered and labelled as appropriate by some compiler who is assumed to know, and used in blissful ignorance as to why its formal and jurisdictional allegations are retained in one case and not in the other, or whether they fit the particular case at all. The result of these careless or inefficient methods must always be the same. The adversary is not thought of save to be misled or mystified; the actual evidence by which the pleading is to be sustained and of which it is supposed to present the ultimate facts, is often lost sight of or slighted for some sweeping jurisdictional allegation or some graceful period; and last, but not least, the court is saddled with the extra labor of rescuing from the mass of chaff and useless repetition, the real issues to be disposed of.

The causes of the conditions I have mentioned seem to rest in two things. One is a reliance on the code alone, either from a want of knowledge of the principles and rules of the older systems, or from a disregard of such knowledge if already acquired; while the other and perhaps the most important, lies in the difficulty of complying with the common directions of the codes that the complaint or petition must contain a plain and concise statement of the facts constituting the cause of action, without unnecessary repetition, but not the evidence of such facts. As to the cause first mentioned, it is of course true that both students

and lawyers will be responsible, each to himself only, for any failure to profit by a sufficient training in this branch of legal procedure, and it is no less true that many have regarded and will continue to treat the common law and equity systems as of no immediate importance in code practice, and to be examined only in connection with controversies in the Federal courts, or, possibly, in a State court having a common law or chancery jurisdiction. It is to such, as well as to those to be next referred to, that the suggestions of this article seem proper, and to such they are commended.

The second cause before mentioned, is one which has been fruitful in the refinements and discussion it has caused, inasmuch as the requirement of the practice acts that the pleader shall allege facts and at the same time not plead evidence, has often compelled lawyers, in their anxiety to so frame their pleadings as to remain in court and at the same time fully set forth the cause of action they advocated, to present a series of statements of fact, covering all possible grounds directly or indirectly connected with their case, in order to avoid the consequences of a variance between pleading and proof in the event of strict rulings by the court as to the issues involved. Probably more of the bad pleading that may be noticed arises from this than from any other cause; and the provisions of the codes directing that pleadings be liberally construed, while sometimes effective to relieve one from the consequences of carelessness or ignorance, are by no means to be relied on to help out any serious errors or omissions in the statement of the substance of either cause of action or defense. This requirement as to stating facts seems to have been about the only really new departure, in framing the codes, from what was before required, and was characterized by Mr. O'Conor as "an attempt at an absolute impossibility in prescribing the rule of pleading," substantially and in effect prohibiting the statement of conclusions in law or in reason from the facts of the case, and at the same time forbidding the statement of the evidence tending to prove such facts. According to the decisions interpreting these provisions, the facts referred to in the statute are "physical facts" (whatever that may mean in a legal sense), and those which the evidence to be offered at the trial will prove—not the evidence required to prove the existence of such facts. And it has been also held that the facts in question are in general such as were required to be stated in pleadings at common law—that is, issuable and material facts, essential to the cause of action or defense, and

not those detailed and minute circumstances which may go to establish such issuable facts. As to the exact meaning of this requirement of the codes, there has been and may continue to be some confusion, the interpretation given being often controlled by the nature of the case (as shown by the different methods of alleging fraud and negligence), or perhaps, by the tendency of the court toward strictness or liberality in applying the proper rules of construction. The rule against pleading evidence, moreover, is not an original code rule, so to speak, but one taken from the common law, and also recognized under the equity system except where the complainant's allegations are framed with the object of obtaining a discovery from the defendant. The difficulty lies in its application to particular cases, the ultimate facts to be stated being often really conclusions of law or fact that are not readily distinguishable as such. It would be beyond the limits of this article to enter into any comparison of the decisions on this point, and perhaps the best summary of the situation may be made by taking the statement that "some latitude of interpretation is to be given to the term 'facts' when used in a rule of pleading. It must of necessity embrace a class of mixed facts in which more or less of legal inference is admitted," with that of the court, in an early New York case, that the facts required by the codes to be stated in pleading are in general the issuable and material facts required to be stated at common law—that is, that in a legal action under the codes the facts constituting the cause of action must be at least what the common law procedure would have required; and in a suit for equitable relief the same facts would be necessary as in a bill in equity for relief under the older chancery system. But however the provisions in question may be construed, it is certainly not to be greatly wondered at that, in view of the uncertainty as to what is actually required, and the consequent fear of being thrown out of court on a demurrer, or subjected to the consequences of a variance at the trial, lawyers should often seek to place their causes on safe ground by so extending and broadening their statements of fact as to enable them, under the rules of construction applicable, to maintain their standing in court upon the evidence they are finally able to present.

It is not the purpose of this article to advance the theory that a knowledge of the early methods and rules of pleading will afford any specific or immediate remedy for the faults already referred to, or prevent the consequences of carelessness or willful neglect, but there can be little doubt that such know-

ledge, valuable in any case from a historical standpoint, is much more so in giving a familiarity with the sources from which the principles, at least, of our present code procedure were derived and consequently with the reason why allegations in common use are made. The codes have abolished the older forms of procedure, substituting a single form of action for all controversies, whether legal or equitable, and the formal and technical portions of the older method are therefore of no further importance in this connection, particularly the fictitious allegations as to venue and the taking in trover and conversion, and the well-known "common counts" are no longer used as formerly, though still, it seems, available. It will, therefore, only be necessary to examine the rules as to the substantial allegations of the pleadings, both now and formerly in force, and note the relation between them and the extent to which the older rules, or the principles upon which they rest, are active in the structure of pleadings under the codes.

Taking the rules stated as effective in connection with code pleading, let us first examine, as the natural order, those determining what facts must not be given in the statement of the cause of action, in either complaint or petition. Five rules have been here laid down by Mr. Bliss, covering presumptions of law and of fact, matters judicially noticed, anticipating defenses, and pleading evidence, conclusions of law, or immaterial or irrelevant matters. In each instance we find the rule as given is practically a re-statement of that in force under the common law system, and the supporting principle is in each case the same. Thus, facts which the law presumes, as the absence of criminal and improper motives in acts done, or the proper and lawful conduct of all men in their business, need not be alleged, and the same is true of facts which the law will necessarily imply from the existence of other facts. So the allegation of matters of which the court takes judicial notice, as the laws of nations, public statutes or treaties, or matters of general notoriety, etc., is not required, nor is the plaintiff allowed to anticipate a defense by stating facts which would more properly come from the other side, nor to plead evidence which should be presented only at the trial. He is also prohibited from stating conclusions of law, or encumbering his pleading with matter that is irrelevant and immaterial to the issues to be examined. These rules are all to be found in the common law system, though perhaps not wholly in the same words, and also, for the most part, in that of the courts of chancery, although, as we have seen, the rule as to

pleading evidence does not apply in equity as to allegations of the bill which are framed to obtain a discovery.

Again, taking the code rules as to the facts to be stated, we find first the substance of the common law rule that the pleadings must show title or authority, and in another rule, viz., that "in actions on contract the complaint must show privity," a reaffirmance of the common law principle that privity, where essential to the right of action, must be shown, as well as of the requirement of the equity system that the bill must show a relation between the parties giving the complainant the right to relief in the particular suit against the defendant named. So the rule that "in actions on contract, consideration must be shown," follows directly upon the requirements of the older systems, and that providing that in seeking relief other than by a judgment for money or specific property it must appear that such judgment could not be obtained, is substantially another mode of stating the chancery rule that in order to obtain equitable relief, the complainant's bill must show, on its face, a title or equity to the relief sought. A further rule, that as to persons suing or being sued in a representative capacity, the authority or relation must be shown, is also the application of a principle embodied in the common law rule as to showing title, and the other rules as to certainty and materiality. In regard to corporations, however, there does not seem to have been any positive requirement under either the common law or equity systems, independent of statute, that any allegation should be made as to the legal existence of a corporation, it being regarded as an individual, and suing or defending in its corporate name in the same manner. With this exception, all the rules laid down by Mr. Bliss as to the facts to be stated or omitted are the counterpart of those followed in common law procedure, or are framed by analogy in the application of the same principles, and in these are included all rules of the common law or equity systems under this head, not referable to technicalities or formal requirements which the change to the single form of action has swept away.

Turning now to the rules as to the manner of stating facts, the first of the common law requirements which need be mentioned is that forbidding duplicity, and in connection with this may be taken the equity rule against multifariousness in the improper joinder of different grounds for relief in the same bill. While the practice acts generally permit several distinct and independent causes of action, legal or equitable, to be joined in

the same complaint or petition, if arising out of the same transaction or series of transactions and between the same parties, the principles of the common law and of the later equity rules are clearly applicable, and the causes of action thus stated must each, as in the case of a single statement, be complete in itself, and not embrace distinct and inconsistent grounds for complaint or relief. The four subordinate rules given by Mr. Stephen as exceptions or qualifications to the general rule as to duplicity, are also fully applicable, being rules of substance entirely. Thus, matter which of itself renders a pleading double will have the same effect, though ill pleaded, while immaterial matter or matter of inducement will not cause the fault, nor will a series of detailed facts if establishing but a single point or proposition.

Again, the rules of the common law as to certainty, both principal and subordinate, are applied to their full extent in code pleading, except where the framers of the statute, for the sake of simplicity or brevity, have provided for a special method of statement. Thus, time (not the fictitious venue of the common law) and place, whenever material, are to be stated as at common law, and, as we have already seen, the rule as to showing title is also enforced. Items of quantity, quality and value, whenever material to the issue, must be truly stated, and both persons and property described with sufficient certainty for purposes of identification, accuracy being especially necessary in the case of real property. Of the subordinate rules, those relating to pleading evidence, or matters judicially noticed, or anticipating the defense, or stating presumptions of law or fact, have already been noticed. All are as fully applicable under the codes as at common law or under the equity system, and not less so are the further rules that no greater certainty is required than the nature of the thing pleaded will conveniently admit of, and that less particularity is required in the statement of matter of inducement, or where the facts lie more in the knowledge of the opposing party. So, also, the rule that acts valid at common law, but regulated by a subsequent statute, are to be pleaded the same as before the statute, is still in force.

Taking, further, the common law rules as to consistency and simplicity, as well as directness and brevity, the code system recognizes and applies those forbidding inconsistency, repugnancy, ambiguity, argumentativeness, and alternative or hypothetical pleading, and indirect recitals, as well as that providing that matters are to be pleaded according to their legal operation and effect, though the latter is modified in being made

optional with the pleader. Departure is also prohibited and surplusage is condemned, though the liberal rules of practice generally allow the objectionable matter to be stricken out. Other rules might be mentioned, but as they relate to technical matters connected with the older forms and theories, they have no place in the code system. In the enumeration already given we have covered, though somewhat imperfectly, all rules of the common law system which related to and controlled the substantial statement of the cause of action, nearly all of which are also fully applicable to the system of pleading in equity. It may be added, also, that while the codes are more specific as to the form and contents of the answer, the substance or facts of any defense or counterclaim as well as of any new matter in a reply, should be presented under the same rules of statement as the facts constituting a cause of action.

The foregoing review of the relations between the old and new systems as to the structure of pleadings, has necessarily been too brief for that illustration by decisions which gives the best and most intelligible explanation, but if its suggestions are accepted by any student, or influence any lawyer to turn to the older method for aid in the preparation of his pleadings under the new, the result aimed at will have been accomplished. Much has been written in elaborate explanation of the theory and application of the general provisions of the code as to pleading and practice, and most if not all the text-writers have to a greater or less extent recognized and explained the application of common law and equity rules and principles. All have been obliged to assume, however, that the student or practitioner was familiar with the older methods, and it has been for a long time the belief of the writer that no harm could result from emphasizing the teaching of the law schools, by a few suggestions as to preparing pleadings with reference to the reasons underlying the rules upon which the different allegations are founded. It will often be found that, where the statute is silent, doubt as to the necessity or propriety of particular allegations will disappear upon an examination of the reason of the common law rule in similar cases, and I feel safe in asserting that if any lawyer will frame his allegations of fact, in a complaint or petition under the codes, to fully comply with the requirements of the common law or equity methods in a like case, he need fear no demurrer, provided the statute does not dictate the form of procedure.

Finally, I cannot better close this article than by the words

of the late Professor Cooley, which though written many years ago, seem to be fully applicable to the conditions of to-day: "The works of common law pleading have not been superseded by the new codes which have been introduced. * * * A careful study of these works is the very best preparation for the pleader, as well where a code is in force as where the old common law forms are still adhered to. Any expectation which may have existed that the code was to banish technicality, and substitute such simplicity that any man of common understanding was to be competent, without legal training, to present his case in due form of law, has not been realized. After a trial of the code system for many years, its friends must confess that there is something more than form in the old system of pleading, and that the lawyer who has learned to state his case in a logical manner after the rules laid down by Stephen and Gould, is better prepared to draw a pleading that will stand the test on demurrer than the man who, without that training, undertakes to tell his story to the court as he might tell it to a neighbor, but who, never having accustomed himself to a strict and logical presentation of the precise facts which constitute the legal cause of action or the legal defense, is in danger of stating so much or so little, or of presenting the facts so inaccurately, as to leave his rights in doubt on his own showing. Let the common law rules be mastered, and the work under the codes will prove easy and simple, and it will speedily be seen that no time has been lost or labor wasted, in coming to the new practice by the old road."

Benjamin J. Shipman.

ST. PAUL, February 3d, 1898.