

Proposal for Retention of the Louisiana System of Fact Pleading; Expose des Motifs

John H. Tucker jr.

Repository Citation

John H. Tucker jr., *Proposal for Retention of the Louisiana System of Fact Pleading; Expose des Motifs*, 13 La. L. Rev. (1953)
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol13/iss3/3>

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

Proposal for Retention of the Louisiana System of Fact Pleading; Expose des Motifs

*John H. Tucker, jr.**

The Louisiana State Law Institute, an official advisory law revision commission and law reform and legal research agency of the State of Louisiana, was instructed by the Legislature¹ to prepare a revision of the Code of Practice. In the course of its work on the preparation of the projet of the revision, the Council of the Institute was squarely presented with the question of what system of pleading to recommend in this revision. The adoption in the Federal Rules of Civil Procedure (1938) of a system of pleading which has been called "notice" pleading brought into sharp focus the arguments which had been made against the system of "fact" pleading generally prevalent throughout the United States. Therefore, in the discharge of its general purpose ". . . to promote and encourage the clarification and simplification of the law of Louisiana and its better adaptation to present social needs; to secure the better administration of justice,"² the problem of determining which of these two systems should be recommended in the projet for the revision was seriously and fully debated and considered in the Council.³

It well may be that the length of time devoted to the consideration of this problem has given it value disproportionate to its importance. At an earlier date, when the pleadings were the only instrumentalities to perform the functions of notice, formulation of the issues and ascertainment of facts, the provisions for the system of pleading were of tremendous importance. With adoption of the modern devices of pre-trial and deposition and discov-

* Member, Shreveport Bar; President, Louisiana State Law Institute; Member, American Law Institute.

1. La. Act 335 of 1948.

2. La. R.S. 1950, 24:204.

3. The Council of the Louisiana State Law Institute is composed of lawyers, judges, members of the Legislature, representatives of the executive department and of the Faculties.

ery, and provisions for liberality of amendment and other devices bringing flexibility to the judicial process, the pleadings lose much of their former functional character. Therefore, the determination of the system to be adopted is not nearly so important as it was when the pleadings stood alone as the only instrumentality for these purposes, but it is indispensably necessary that all of these functions be performed during the preparatory period before trial in order to achieve the proper administration of justice.

The Council of the Institute, after considering this problem several months, and following a full dress debate, decided to retain Louisiana's own system of pleading which is sometimes called "fact" pleading, although it did not arise out of nor has it ever exhibited all of the characteristics of the fact pleading systems of other states which followed the adoption of the Field Code in New York in 1848.

At the same time the Council of the Institute instructed that this paper be prepared in order to set forth the arguments which had prevailed in the making of its decision to retain the present system of pleading in Louisiana. The views herein expressed, however, are not necessarily those of the Council in all particulars, but it is fair to say that the basic arguments made herein were the same as those made at the meeting of the Council, with necessary amplification and documentation.

The Reporter⁴ in charge of the preparation of that part of the project of the revision relating to pleading, presented to the Council three plans for the solution of the problem: (a) the return to the simplified pleading under the Livingston Code of 1825; (b) the adoption of the notice pleading of the Federal Rules of Civil Procedure; (c) the retention of the present system of fact pleading. The Reporter recommended the return to the system of pleading under the Livingston Code.

4. Professor Henry George McMahon, of Louisiana State University, is the Reporter as well as the Co-ordinator for the entire work of the Code of Practice revision. His Co-reporters are Professor Leon D. Hubert, Jr., of the Tulane University College of Law, and Professor Leon Sarpy, of the Loyola University School of Law, who is also an active member of the bar in New Orleans. It is the practice of the Institute on work of this kind for the reporter or reporters to make a preliminary draft, submit it to advisers selected by the Council from the bench and bar and law schools, with whom they subsequently discuss its provisions. Thereafter, a revised draft is prepared by the reporter and submitted to the Council for its consideration. If there is a difference between the reporter and his advisers, both views are presented to the Council. The draft by the Council is always accompanied by commentaries and the reporter discusses with the Council the reasons and the motives for his proposal.

When confronted with a problem of this kind, the ascertainment of the objectives sought to be attained is of primary importance. This must be done with particular reference to the conditions which now prevail and in the light of the other recommendations concerning pleading contained in the projet for the revision. Proper consideration can be given to the plans proposed only when there has been a correct ascertainment of these objectives, and a fair and full consideration of the circumstances in which the system of pleading adopted will operate. In all of this the Institute should not be and it has not been unmindful of the general purpose for which it was created.

A law suit has always been an adversary proceeding and it probably always will be. Judge Jerome Frank says that our mode of trial is based on what he calls the "fight" theory, which derives from the origin of trials as substitutes for private out-of-court brawls.⁵ He discusses this theory as being opposed to what he calls the "truth" theory. By truth theory he means that the trial courts, judge and jury, should "conduct an intelligent inquiry into all the practically available evidence in order to ascertain, as nearly as may be, the truth about the facts of that suit." He says that many lawyers maintain that the "fight" theory and the "truth" theory coincide because they think that the best way for the court to discover the facts is to have each side try as hard as it can in a partisan manner to direct the court's attention to evidence favorable to that side. He quotes Macaulay to the effect that we obtain the fairest decision when two men argue as unfairly as possible on opposite sides, because then no important consideration will entirely escape attention. His conclusion is that the "fight" theory has invaluable qualities with which we cannot afford to dispense.⁶ A panoramic view of the jurisprudence of an appellate court, with a fair knowledge of the capabilities and character of the lawyers who argue the cases before it, and the judges who write the opinions, will demonstrate that the quality of the jurisprudence will vary directly with the ability, character and industry of the lawyers who appear before the court.

The trial being considered, therefore, as an adversary proceeding, the necessity for the adoption of rules for its conduct

5. Frank, *Courts on Trial*, c. 6 (1949).

6. *Id.* at 81. It may be said parenthetically that Judge Frank then devotes considerable critical attention to the shortcomings of the bar, to which the author cannot subscribe as being fairly applicable to the bar as he knows it.

which will keep the fight out in the open, give the opponents equal opportunity, and prevent judicial ambushade, is imperative.

In the preparatory period preceding actual trial, it is indispensably necessary that (a) the issues be formulated and simplified in order to prescribe the course of the trial; (b) the litigants have fair and full notice of the contentions of their opponents; and (c) that the facts, insofar as desirable, may be ascertained. These objectives of the preparatory period prior to trial have been consistently recognized, but a great deal of confusion has resulted from discussion of these objectives in relation to the functions of the pleadings without properly evaluating the effect of the adoption of devices other than pleadings, designed to accomplish some of these objectives. The problem is one of allocation of functions among these several procedural devices so as "to secure the just, speedy, and inexpensive determination of every action."⁷ Any judicial system which does not provide for the performance of these functions before trial will not accomplish these ultimate objectives.

Pleadings, being the formal written statements made to the court by the parties to a suit of their respective claims and defenses therein, have largely carried most of these burdens in the past, in the systems which have prevailed in states other than Louisiana.

In common law pleading special emphasis was placed upon the *issue-formulating* function of the pleadings. At the same time, it was necessary to bring a claim within one of the existing forms of action, such as trespass and assumpsit, under penalty of dismissal if the wrong form was used.

At the same time, *pleadings in equity* consisted in more detailed statements of the contentions of the parties, with much more flexible proceedings.

Under the earlier code pleading (Field Code of Civil Procedure, N.Y. 1848), emphasis was placed upon disclosing the *material, ultimate facts*, and less stress was placed upon the function of formulation of issues. In code pleading, equity and law were fused in one civil action. These codes borrowed greatly from the equity practice.

The modern view expressed by common law doctrinaires is that the pleadings should give fair notice of the pleader's case to the opposing party and to the court.

7. Federal Rules of Civil Procedure, Rule 1.

Roscoe Pound, and his committee of the American Bar Association, in reporting on a bill in Congress some years ago concerning practice in the federal courts said that the four purposes of pleadings are:

- (1) To serve as the formal basis for the judgment.
- (2) To separate issues of fact and law.
- (3) To give litigants the advantage of a plea of *res adjudicata* if molested again for the same cause.
- (4) To notify parties of the claims, defenses and cross-demands of their adversaries.

He said that the *notice* function is the one that should be emphasized, that the purpose of forming the basis of the judgment should be abandoned, and that the other functions should be as well performed as of the time at which he wrote (1910), if the *notice* function was thoroughly developed and consistently adhered to.⁸

Under the Federal Rules of Civil Procedure, it has been said that "notice" pleading has been adopted, and "fact" pleading abandoned, and that the function of formulation of the issues (the objective of common law pleading) has been transferred to the pre-trial conference, with the accessory procedures for discovery and deposition largely performing the function of ascertaining the material facts (the principal objective of code pleading).

The objective or function of the pleadings under the Federal Rules has been defined by James William Moore in this manner:

"The courts have recognized that the function of pleadings under the Federal Rules is to give *fair notice* of the claim asserted so as to enable the adverse party to answer and prepare for trial, to allow for the application of the doctrine of *res judicata*, and to show the type of case brought, so that it may be assigned to the proper form of trial."⁹

In Louisiana the basic objectives of pleading have remained unchanged since Livingston's Practice Act of 1805.¹⁰ In an early case they were thus described:

"All it requires is, that each party should allege his grounds

8. 35 A.B.A.R. 638 (1910).

9. 2 Moore, Federal Practice 1648, 1649 (2 ed. 1948).

10. Act of April 10, 1805, c. 26, 2 Martin, Digest of the Acts of Louisiana 155 (1816).

of attack or defense so specially, that the adversary shall not be taken unawares, by matters springing up on the trial of which he is not apprised by the pleadings; and that the judgment which may be rendered on the issue joined, will enable him, against whom it has been given, to protect himself by the plea of *res adjudicata*, should a subsequent demand be made for the same thing. . . ."¹¹

While the courts have held that the deficiencies of a pleading which did not contain sufficient allegations to guard the adversary against surprise might be cured by knowledge acquired by the adversary aliunde (as in the above case where the adversary was made aware of the contention while taking depositions prior to trial), the jurisprudence has not deviated from the requirement that the parties have fair and full notice of the factual contentions of their adversaries.¹²

It may be that the objectives of fair notice, and the establishment of the basis for the allowance of the plea of *res judicata*, attributed to the Federal Rules by Professor Moore and Judge Clark,¹³ are the same as those which have been declared in Louisiana for nearly a century and a half; but it must be said that the federal jurisprudence and doctrinal writings interpreting the Federal Rules indicate that the connotations therein given to fair notice vary considerably from the understanding of what constitutes sufficient notice in Louisiana.

Professor Millar says that all systems of pleading must essentially conform to one of two principles to which he refers as the rigid and the flexible. In the rigid system he says the pleadings are structural in that they furnish the basis for the proof, and the judgment must find its support in the pleadings as well as in the proof. In the flexible system the allegations are but preliminary notices; once they have served this purpose they are discharged, and all depends on the case made on trial. Professor Millar thinks it better to accept the flexible system rather than apply palliatives to prevent the principle of rigidity from operating injustice.¹⁴

Dissent must be taken from the rigidity of this classification

11. *Ory v. Winter*, 4 Mart. (N.S.) 277, 280 (La. 1826).

12. See cases cited in Dart, 6 La. Dig. Pleading I, § 6.

13. See Note, American Bar Association Proceedings of Institutes 41 (1933).

14. Millar, American Civil Procedure 1887-1937, 50 Harv. L. Rev. 1041 (1937).

while at the same time accepting the principle of flexibility as a very desirable objective for any system of pleading, and one which should be an attribute of the proposed Louisiana Code of Practice, insofar as practicable. But it must never be forgotten that a law suit is an intensely practical matter, and theory always must be tested on the touchstone of practicality.

Louisiana has never suffered from the technicalities of the pleading systems which have plagued our brethren of the common law. Professor Hubert has described the situation in Louisiana in these graphic words:

"To the Louisiana lawyer the distinctions between the common law writs of trespass, case, detinue, replevin and the like, are vague nightmares of his school days, which he fortunately need not even remember except for the satisfaction of realizing that in Louisiana no such writs exist. The Louisiana lawyer is justly proud of the fact that in his state no litigant need enter the temple of justice through any particular door, nor need he at his peril choose any particular weapon with which to wage the imminent battle. Whether the case is concerned with a contract or a tort, a relationship or a status, the litigant need only allege the facts in an articulated petition, ask for the relief to which he believes himself entitled, add a catch-all prayer for general and equitable relief, and he can be rather certain that no court will tell him that while he has alleged a good cause of action and deserves relief, he has chosen the wrong form of action in which to assert it."¹⁵

The basis for this situation rests in principal part upon the following:

(a) There is no distinction between law and equity in Louisiana, which derives its civil law from the laws of France, Spain and Rome.

(b) The appellate courts have jurisdiction of both facts and law upon appeal.¹⁶

(c) There is no replication or rejoinder in Louisiana, and

15. Hubert, *A Louisiana Anomaly: The Writ System in Real Actions*, 22 *Tulane L. Rev.* 459 (1948). Professor Hubert is one of the reporters for the Institute on the Revision of the Code of Practice.

16. *La. Const. of 1921, Art. VII, § 10*, and corresponding sections of prior constitutions. See Deutsch, *Jury Trials under the Federal Rules and the Louisiana Practice*, 3 *LOUISIANA LAW REVIEW* 422 (1941).

hence none of the procedural baffles which impeded the flow of the judicial process under pleading in common law jurisdictions.

(d) The procedural law of Louisiana is *sui generis*, and its development has been consistent and independent. It has tended to be flexible rather than rigid in operation.

Louisiana under French colonial domination was regulated by the adjective law of the Custom of Paris and the Ordinance adopted in April, 1677, under Louis XIV, called the Code Louis, Ordonnance Civile, or sometimes the Code Civil.

In 1769, Governor O'Reilly as Spanish Governor, abrogated the laws of France, and substituted Spanish law instead. These laws as to procedure prevailed until April 10, 1805, when the Legislative Council of the Territory of Orleans, under the dominion of the United States, adopted a simple, rudimentary practice act attributed to Edward Livingston.

This early practice act had no relationship to any system of practice then prevailing in the United States or England.¹⁷

In 1825, the Code of Practice prepared by Edward Livingston, Moreau-Lislet and Pierre Derbigny was promulgated, and except for ancillary legislation and its reenactment as the Code of Practice of 1870, it is the basic procedural law of Louisiana today.

The Practice Act of 1912, as amended,¹⁸ abolishing the general denial, providing for articulated pleading and for judgment on the pleadings; and the amendment to Article 333 of the Code of Practice requiring the filing of all dilatory exceptions in *limine litis* and simultaneously;¹⁹ the Pre-trial Act as 1950 as amended in 1952; and the Deposition and Discovery Statute of 1952, complete the legislative history of Louisiana procedural law.²⁰

The characteristics of Louisiana procedural law which must be taken into account in considering the several plans or systems of pleading proposed are these:

(a) Louisiana has never had the oppressive technicalities of common law pleading.

17. It was held in *Agnes v. Judice*, 3 Mart. (O.S.) 182 (La. 1813), that the use of such terms as *quo warranto*, *procedendo*, *mandamus* and *prohibition* did not introduce the English common law practice itself.

18. La. Act 157 of 1912, as amended by La. Acts 300 of 1914, 225 of 1924, 27 of 1926; La. R.S. 1950, 13:3601.

19. Pre-trial: La. Act 84 of 1952, La. R.S. Supp. 1952, 13:5151; La. Act 124 of 1936, La. R.S. 1950, 13:3741-3794.

20. La. Act 202 of 1952, La. R.S. Supp. 1952, 13:3741, 13:3794.

(b) The system of pleading has been flexible and judgment has followed the proof, and not necessarily the pleadings.

(c) Amendment of pleadings has been the rule rather than the exception.

(d) Louisiana has adopted the pre-trial and deposition and discovery provisions of the Federal Rules, with some minor modifications.

In addition, the Institute has adopted as part of the projet on pleading, all of the devices for flexibility provided by the Federal Rules, with some modification of a minor nature.

In considering this question of the system of pleading to be recommended in the revision of the Code of Practice, it must be remembered then that Louisiana now has provided for the pre-trial conference and adequate machinery for deposition and discovery by statutes modeled upon the Federal Rules of Civil Procedure, and that the philosophy of its procedural jurisprudence favors substance over technicality, and a liberal construction of pleadings so that the ends of justice may be served.²¹ The projet approved by the Institute crystallizes this philosophy into concrete rules providing for liberality and flexibility which approximate similar provisions in the Federal Rules.

The task to be performed by the pleadings must be evaluated in the full light of these circumstances, and the system adopted defined so as to secure the just, speedy, inexpensive and final determination of every action cognizable by the courts.

The Reporter strongly recommended to the Council of the Institute that the present system of fact pleading in Louisiana be suppressed, and that the simplicity of pleading enjoyed under the Code of Practice of 1825 be adopted. As an alternative, he recommended the adoption of the system of notice pleading under the Federal Rules. He mentioned the retention of the present system of fact pleading as a third choice, but he argued vigorously against its acceptance.

All of these plans were vigorously and fully debated and carefully considered before the Council made its decision, the reasons for which will appear from the following discussion.

21. *Florida Molasses Co. v. Berger*, 220 La. 31, 55 So. 2d 771 (1951). "The purpose of a trial is to arrive at the true situation as it then existed. As a matter of fact, even this Court has frequently remanded cases, when necessary, in order that the true situation may appear." *Rials v. Davis*, 212 La. 161, 171, 31 So. 2d 726, 729 (1947).

THE PLAN TO RETURN TO THE SYSTEM OF PLEADING
UNDER THE CODE OF PRACTICE OF 1825

The Reporter made his proposal to return to the system of pleading prevailing under the Code of Practice of 1825 explicit and concrete by suggesting for adoption an article reading:

"The petition . . . shall set forth the name, surname and residence of the parties, and shall contain a short, clear, and concise statement of the cause of action and the object of the demand, and a prayer for judgment for the specific relief sought."²²

He contends that pleading under the regime of the Code of Practice of 1825 was different from current fact pleading in Louisiana in that a plaintiff then did not have to allege the material or ultimate facts entitling him to the relief sought as is now required. He maintains that fact pleading crept into Louisiana procedural law after the turn of the century, that the decision in *State v. Hackley, Hume and Joyce*²³ introduced the distinction between ultimate fact and conclusion of law into Louisiana procedural jurisprudence, and that the Practice Act of 1912 confirmed the distinction by statute, thereby giving Louisiana fact pleading *de jure* and *de facto*.²⁴

The Reporter defines "fact pleading" as the particular system of pleading which originated in the Field Code of Procedure in New York in 1848. Its chief characteristic, he says, is the requirement of pleading ultimate facts (as distinguished from evidentiary facts and conclusion of law).

The Reporter says that Louisiana's system of pleading includes these characteristics of fact pleading:

(a) The pleading of ultimate facts, which constitute the cause of action;

(b) The denial of any effect to the pleading of conclusions of law;

(c) The necessity of pleading full factual particulars in all cases, under penalty of compulsory amendment, or the exclusion of evidence to support a defense pleaded only generally.²⁵

22. See McMahon, *The Case Against Fact Pleading in Louisiana* 9 (June 6, 1952).

23. 124 La. 858, 50 So. 772 (1909).

24. See McMahon, *The Case Against Fact Pleading in Louisiana* 9 (June 6, 1952).

25. See McMahon, *The Case Against Fact Pleading*, 13 *LOUISIANA LAW REVIEW* 369 (1953).

This thesis cannot be accepted, and for these reasons:

(a) Pleading requirements under the Practice Act of 1912 as amended, insofar as they concern the necessity for the allegation of facts, are not materially different from the pleading requirements of the Code of Practice.²⁶

(b) Moreover, ever since the Livingston Practice Act of 1805, the basic test of the factual content of pleadings has been the necessity for a plaintiff to state his cause of action, and it is not accurate to say that it is now necessary in Louisiana to state "full factual particulars." It has never been necessary to allege evidence,²⁷ but within the ambit of our conception of "cause of action" it always has been necessary to allege facts in order to prove them.²⁸

On account of the eminent position of the Reporter in the field of Louisiana procedural law,²⁹ it will be necessary to present these views (but with the natural trepidation of the layman tilting in academic lists) more extensively and with greater documentation than the nature of the difference of viewpoints warrants in this discussion.

Let us first examine the pertinent parts of the appropriate legislation prior to 1912.

26. See note 18 *supra*.

27. *Honeycut v. Carver*, 25 So. 2d 99 (La. App. 1946); *Succession of Brandon*, 167 So. 515 (La. App. 1936); *Smith v. Silvio*, 150 So. 38 (La. App. 1933); *Gaienne v. Druilhet*, 143 La. 662, 79 So. 212 (1918); *Montgomery v. Chaney*, 13 La. Ann. 207 (1858); *West v. McConnell*, 5 La. 424, 427 (1833).

28. Earlier cases are summarized in the following note annotation in 7 West's La. R.S. Ann. 1950, 13:3601, n. 310.

"Evidence in a case could not be considered on an issue not presented by the pleadings. *Williams v. His Creditors*, 1818, 5 Mart. (O.S.) 618; *Rodriguez v. Morse*, 1824, 2 Mart. (N.S.) 358; *Dumartrait v. Deblanc*, 1826, 5 Mart. (N.S.) 38; *Judice's Heirs v. Brent*, 1827, 6 Mart. (N.S.) 226; *Ponsony v. Debaillon*, 1827, 6 Mart. (N.S.) 238; *Palfrey's Syndic v. Francois*, 1829, 8 Mart. (N.S.) 260; *Benoit v. Hebert*, 1830, 1 La. 212; *Dixon v. Emerson*, 1836, 9 La. 104; *Colsson v. Consolidated Ass'n Bank*, 1838, 12 La. 105; *Lyons v. Jackson*, 1843, 4 Rob. 465; *Levi v. Silverstein*, 1870, 22 La. Ann. 363; *Lawler v. Cosgrove*, 1887, 39 La. Ann. 488, 2 So. 34."

Among later cases holding that recovery cannot be had on a cause of action not alleged, and that proof must correspond with the allegations are: *Jones v. Abercrombie*, 178 La. 427, 151 So. 641 (1933); *Simon v. Duet*, 177 La. 337, 148 So. 250 (1933); *Richard v. Director General of Railroads*, 160 La. 1019, 107 So. 891 (1926).

29. Professor McMahon is author of *Louisiana Practice* (1939) and numerous law review articles on Louisiana practice. His only predecessor who critically discussed the entire subjects of pleading and practice was K. A. Cross, who published his "Pleading in Courts of Ordinary Jurisdiction" in 1885. Until the appearance of the digests prepared by West Publishing Company and Bobbs-Merrill Company, Louisiana digests were prepared by eminent lawyers and judges.

The Practice Act of 1805³⁰ required the petition to state "the cause of action" and the answer to "without evasion answer every material fact stated in plaintiff's petition."³¹

The Codes of Practice of 1825 and 1870 (Article 172), provided, in pertinent part, that

"4. The petition must contain a clear and concise statement of the object of the demand, as well as of the title, or the cause of action on which it is founded."

"6. It must end by conclusions analogous to the nature of the action to which the plaintiff has resorted."

The Projet of the Code of Practice of 1825 attributes the source of this article to the Practice Act of 1805.³² Cross³³ and McMahon³⁴ point to *Las Siete Partidas* for its origin, which requires the petition to set forth "the cause of action. For all these things being set forth in the petition, the defendant will know with certainty what to answer, the plaintiff what to prove, and the judge how to inform himself of the whole matter, and to proceed in the cause according to law."³⁵

Under the regime of the Codes of Practice of 1825 and 1870, the defendant was permitted to file a general denial without specially answering to all of the allegations of the petition, except when called upon to acknowledge or deny his signature (Article 323). However, if the defendant intended to make a special defense by means of some exception, he was required to plead it expressly and positively in his answer (Article 327). He could allege facts in his answer different from those alleged by the plaintiff (Article 328) but in that event they were considered

30. La. Act of April 10, 1805, c. 26; 2 Martin, Digest 155 (1816).

31. The Reporter says this act was primarily a refinement and simplification of contemporary chancery practice, citing Millar, *The Fortunes of Demurrer*, 31 Ill. L. Rev. 596, 605 (1937). However, the Supreme Court, in *Abat v. Whitman*, 7 Mart. (N.S.) 162 (La. 1828), said that the use in the act of the common law terms *quo warranto*, *procedendo*, *mandamus* and prohibition "ought to be considered rather as a translation of the names formerly used than as emanating from English jurisprudence. That their adoption as words can by no rule of law be considered as having introduced the English practice." See also *Flogny v. Adams*, 11 Mart. (O.S.) 547 (La. 1822); *State ex rel. Morgan's L. & T. Co. v. Judge*, 33 La. Ann. 954 (1881). There seems to be little significance to the Reporter's observation in the discussion on that point.

32. 2 Louisiana Legal Archives 31 (1937).

33. Cross, *Pleading in Courts of Ordinary Jurisdiction* 142 (1885).

34. *The Case Against Fact Pleading*, Report to Council of Louisiana State Law Institute, No. 21, p. iii (June 6, 1952).

35. *Las Siete Partidas*, 3.2.40 (1 Moreau and Carleton's transl. 58 [1820]).

as denied by the plaintiff, for neither replication nor rejoinder was permitted (Article 329).

These are the texts of the procedural law important to this question in force in Louisiana prior to the Practice Act of 1912. Intrinsically examined, it appears that the plaintiff is required to state a cause of action, a term which always has been simply defined and well understood in Louisiana, but which has been discarded in the Federal Rules.³⁶

In Louisiana, it has been said with reference to the term "cause of action" that "when used with reference to the pleadings by which the cause of action is alleged, the phrase signifies the facts upon which the plaintiff's right to sue is based and upon which defendant's duty has arisen, coupled with facts which constitute the latter's wrong."³⁷

Intrinsically, then, these texts indicate that facts material to the cause of action and its defense must be stated in the pleadings, a requirement that is made explicit in the Practice Act of 1805 by the direction to defendant to "without evasion answer every *material allegation* of the petition."

It is difficult to look back over the span of years—nearly a century and a half—and determine from several selected cases the attitude of the chief actors in the drama of litigation. As the Reporter says in his polemic against fact pleading appearing in this *LAW REVIEW*, the compass of this discussion will not accommodate detailed or extended discussion of cases.

He has, however, referred to some of the earlier cases which announce the rule that the objective of notice of the demand or defense sufficient to prevent surprise on the trial will be attained if the opposite party have knowledge sufficient for that purpose either from the pleadings or the proceedings before trial.³⁸

The basis for this jurisprudence does not arise out of the system of pleading, but rests upon equitable principles akin to estoppel. In the case of *Flogny v. Adams*,³⁹ the court attributed this rule of law to Spanish sources, saying:

36. 1 Moore, Federal Practice 3, 145, 150 (1938); Clark, Code Pleading §§ 19, 70 (2 ed. 1947).

37. Quoted from 2 Words and Phrases, First Series, Cause of Action 1017, in *Hope v. Madison*, 192 La. 593, 188 So. 711 (1939).

38. Citing *Ralston v. Barclay*, 6 Mart. (O.S.) 649 (La. 1819); *Ory v. Winter*, 4 Mart. (N.S.) 277 (La. 1826); *Ives v. Eastin*, 6 La. 13 (1833); *Frierson v. Irwin*, 5 La. Ann. 525 (1850).

39. *Flogny v. Adams*, 11 Mart. (O.S.) 547, 548 (La. 1822).

"We have held in the cases of *Canfield vs. M'Laughlin*, 9 *Martin*, 303, *Bryan and wife vs. Moore's heirs*, 11 *ibid.* 26, and in *Larche vs. Jackson*, *ibid.* 284; that where the parties alleged rights in one capacity, and proved them in another, without objection in the inferior court, we would proceed to give judgment on the merits. These cases were decided in pursuance of a provision in the *Novissima Recopilacion*, 11, 16, 2; and upon the consideration that the principle of law which requires proof, and allegation to correspond, was made for the protection of the adversary, who might waive it if he chose.

"Should, however, the objection be made when the testimony is offered, the law which authorized these decisions, does not apply; and the equity on which they were founded vanishes. Another rule governs them; that which requires that there be no variance between the evidence and the demand. *Febrero*, *lib. 3, cap. 1, sec. 7, n. 283*, 8 *Martin*, 400."

The principle that there be no variance between the evidence and the demand, and which, incidentally, seems to be a principal point of attack of the opponents of fact pleading, is certainly one of its chief incidents or characteristics. Professor McMahan, however, argues that during this early period and until the turn of the century, a plaintiff need allege only the substance of his demand, and that it was immaterial that his allegations were actually conclusions of law.

It has been noted that the digests of the jurisprudence during this period were prepared by eminent lawyers, for it is only since very recent times that we have had the great benefit of discussion based on the scholarly research performed in our law schools. These digests, therefore, give something more than the impersonal all-inclusive texts of their modern successors from the great publishing houses. They reflect the opinions of active practitioners concerning the import of contemporary decisions. They give a panoramic view of the jurisprudence on a particular point of law, quite sufficient for the purposes of this discussion, and furnish a clew by which the inquisitive may examine the minutiae of the constituent decisions.

Thus, the very first digest of the Louisiana Reports, covering the Martin Reports,⁴⁰ on the subject of pleading has this to say:

40. Christy, Digest of Martin's Reports, verbo "Practice" No. 19, p. 253 (1826).

"19. Every circumstance which is proper to be known, in order to put the defendant on his defence to the suit, ought to be stated in the petition. *Duncan et al Syndics v. Bechtel vi Mart.* 510."

"23. Fact which must be proven, must be alleged in the petition, that the adverse party may have an opportunity to disprove them in the inferior court. *Bouthemy v. Dreux et al XII Mart.* 639."

"35. The allegata and probate must agree. *White and al v. Noland iii Mart.* (N.S. 636, *Stroud v. Beardslee ii Mart.* (N.S. 84.)"

A later digest, covering the period 1838-1843,⁴¹ reiterated this rule as follows:

"1. The plaintiff is bound to set out every fact material to his case, whether it involves a positive or a negative; but he is not required to allege the absence or non-existence of facts which might defeat his action. *Mathews v. Pascal's executors.* 13 L. R. 47."

Another digest of this formative period, covering the period 1809-1851,⁴² contains the statement which seems to be completely

41. *Deslix Report*, 13 La. to 3 Robinson, verbo "Pleadings" No. 1 (1843).

42. Hennen, *A Digest of Reported Decisions from 1 Martin to 6th La. Annual, 1809-1851*, verbo "Pleading" V-(a) (3) 2, p. 1199 (1852). A later edition, which includes up to the 15th Annual, published in 1861, contains another statement of this principle, which permits the introduction of evidence under indefinite and informal pleadings if *from the pleadings and proceedings before trial* the opposite party have sufficient notice of the nature of the demand or defense advanced, and could not be surprised.

Cross criticized the jurisprudence cited by Hennen in his treatise on pleading. *Pleading in Courts of Ordinary Jurisdiction* 87 (1885). He considered that some looseness had developed in exceptional cases, which he considered to have been corrected. He said: "But in other cases the court has given such positive declaration of the sound doctrine, that we may now confidently rely on the just requirement of accurate and definite pleading in the courts of record. In *Picket v. Nance*, 14 La. Ann. 668 (1859), the court distinctly says: 'Although great latitude is allowed under our system of practice, yet the plaintiff is required to make a clear and concise statement of the object of his demand, as well as the nature of his title, or the cause of action on which it was founded.' In the late case (*Burbank vs. Harris*, 32 A. 396), the repudiation of the heresy we have been considering is put in still more emphatic and peremptory form. Although the case had been remanded for trial on a certain issue, it was held that proof was not admissible on the plea thus distinctly set forth, without a formal amendment of the pleadings; 'for,' says the court, 'we could not be understood to offer proof to be admitted, which was clearly inadmissible under the pleadings.' In fact, there can be no just reason for this loose practice, which has been permitted in exceptional cases in order to meet the equities developed by peculiar circumstances. It has produced a fluctuating temper in the administration of justice; it has given license for careless and negligent pleading, leading to confusion and difficulty in deciding causes; and it has conferred inordinate discretion on

at variance with the Reporter's contention that Louisiana enjoyed a system of quasi-notice pleading during this period. There it is said:

"2. Vague and general allegations cannot support a petition. The cause of action, the object of the demand, and the nature of the title must be stated with such certainty as to apprise defendant of every circumstance necessary to put him on a just defence; and to bar a subsequent investigation of matters once decided. If the substance of plaintiff's case be set forth, mere technicalities cannot affect it; but he must be held to his material and substantive allegations, for the obscurity or duplicity of which he can take no advantage to the prejudice of defendant who will be protected, when surprised. C.P. 172. *Duncan v. Bechtel*, 6 M. 510; *Ralston v. Barclay* Ib. 649; *Ory v. Winter* 4 N.S. 284; *Florance v. Nixon* 3 L. 292; *Hatch v. City Bank*, 1 R. 470; *Succession of Kendrick*, 7 R. 138; *Barrett v. Lacharie*, 2 A. 655; *Blackly v. Matlock*, 3 A. 366; *Gremillion v. Bonaventure*, 4 A. 60; *Seghers v. Lemaitre* 5 A. 263."

These statements of eminent lawyers concerning the law of the periods in which they lived constitute a sort of answer in globo to the Reporter's contention that pleading during the 19th century was not the fact pleading of the present, but something that approached the notice pleading of the Federal Rules.

It was not intended in this expose des motifs to discuss every one of the cases quoted from or cited in the presentation of the Reporter's views against fact pleading. A detailed and critical evaluation of each of these decisions seems unnecessary in the light of these generalized statements.⁴³

There have been times when exceptional cases have caused some deviation in the detailed application of the broad principles expressed in these digests, and in the cases upon which they are

the inferior tribunals, by practically giving them power to admit testimony by a liberal, or to reject it by a stringent, application of the technical rules."

43. Other witnesses of like character could be called, but they might not be heard, because the evidence they would give would be cumulative, but they should be named for those who might be inquisitive. They are: *Benjamin and Slidell, Digest of Reports—1 Mart. (O.S.) to 5 La. Reports 1809-1833*, revised to cover 1809-1839, verbo *Practice*, D-Nos. 26, 33 (1834); *Greiner's Annotated Code of Practice (1839)* contains laconic annotations to the same general effect under Article 172; *Loque, A Digest of Decisions from 1st Annual to page 800, 30th Annual, verbo Pleading V-(a)(b)(1)—No. 1, V(c)(1) No. 1 (1878)*; *Taylor's Digest (1889)*, *Breaux's Digest (1901)* and *Roehl's Digest (1911)*, had no discussion of precisely similar questions.

based.⁴⁴ The variables of talent, environment, application and ability of expression of judge and lawyer, and the eccentricities of circumstance tend toward some degree of inconsistency in jurisprudence.

But here there has been no deviation from the broad principles upon which Louisiana rules of pleading are based—the material facts, or the facts constituting the substance of the complaint and defense must be stated clearly and concisely, and the parties will not be allowed to prove that which is not alleged. And these principles have applied in Louisiana ever since the Practice Act of 1805.

The Reporter thinks that the influence of fact pleading, as he described it, began to assert itself around the turn of the century, although he frankly states that he could find no cases during this period which conclusively so indicated. He thinks the negligence form in Flemming's Formulary⁴⁵ published in 1903 "offers fairly convincing proof that, at least in negligence cases, the pleading of full factual particulars was either required or considered the safer practice."

The Reporter considers that the rules of fact pleading were accepted by the Supreme Court of Louisiana in the case of *State v. Hackley, Hume and Joyce*,⁴⁶ decided in 1909, which he considers to have had the immediate effect of changing the procedural philosophy of Louisiana.

He considers that the Pleading and Practice Act of 1912⁴⁷ following the decision in the *Hackley, Hume and Joyce* case gave statutory sanction to the fact pleading recognized and accepted in that case.

With due deference, these views cannot be accepted. The *Hackley, Hume and Joyce* case had no such paroxysmal effect on the procedural laws of this state, and there is no evidence that it was even remotely connected with the movement for the adoption of the Practice Act of 1912.

In the *Hackley, Hume and Joyce* case, the state sought to recover lands under allegations that patents had been fraudulently obtained, and that the defendants who claimed to own them by titles emanating from the patentee were holders in bad faith.

44. See note 42 supra.

45. Flemming, A Formulary of Civil Procedure (1903).

46. *State v. Hackley, Hume and Joyce*, 124 La. 354, 50 So. 772 (1909).

47. La. Act 157 of 1912; as amended this act is now La. R.S. 1950, 13:3601.

An exception of no cause of action was sustained, and an exception of want of tender not passed upon. On appeal by the state, on original hearing in the Supreme Court, the exception of no cause of action and exception of want of tender were overruled. On rehearing, the judgment below maintaining the exception of no cause of action was reinstated and the suit dismissed, with leave to the state to renew its suit on proper allegations. On rehearing the court took the position that even though the patent might be invalid because of the fraud of the entryman, the mesne conveyances by which the defendants held title might be good, and each of them an insurmountable barrier to the claims of the state. The court said that this results from the jurisprudence that where fraud has been committed by the patentee, the government cannot recover the land from a third person who acquired it for valuable consideration and without notice of the fraud.

The court held that the allegation that defendants were "holders in bad faith" was a mere conclusion of law, since the connotation of Article 3452 of the Civil Code defining a "holder in bad faith" only extends to knowledge that there is an invalidity and not to the facts from which the invalidity of his title is sought to be deduced.

The court discussed the difference between allegations of fact and conclusions of law, quoting extensively from 31 Cyc. 51, as elaborately discussed in Professor McMahon's paper.

This was not the first time that the court had made the same distinction and in exactly the same words. In *State v. Capitol City Oil Mills v. Monroe*,⁴⁸ the court said:

"The statement that the allegations of the petition for injunction are to be taken as true for the purpose of a decision as to whether the prohibited act was one such as would work plaintiff in injunction irreparable injury must be taken with the limitation attached to the rule announced, which is that it extends to and covers all allegations well pleaded, not to conclusions of law nor matters of mere evidence pleaded in the petition (*Fertilizing Co. v. Wolf*, 48 La. Ann. 631, 19 So. 558) nor to surplusage."

In another case⁴⁹ the court likewise referred to "conclusions," saying:

48. *State ex rel. Capital City Oil-Mills Co. v. Monroe*, 50 La. Ann. 266, 23 So. 839 (1897).

49. *Southern Chemical and Fertilizing Co. v. B. J. Wolf & Sons*, 48 La. Ann. 631, 19 So. 558 (1896).

"Plaintiffs in their petition have pleaded part of the evidence upon which they would rely in the event of a trial on the merits, and announced in some places conclusions of law. These particular portions of the petition all do not consider falling under the rule invoked, that on the trial of an exception of no cause of action the allegations of the petition are taken for true."

In fact, there are many cases, covering a wide range of time, where the petitions have been dismissed because of generality and vagueness, which, to all intents, are very often the equivalent of the term "conclusion of law." Some of these cases were cited in the *Hackley, Hume and Joyce* case.⁵⁰

Disagreement must also be expressed with the conclusion of the Reporter that the petition in the *Hackley, Hume and Joyce* case would have been a proper pleading under the Louisiana law theretofore existing. Actually the author of the original opinion concurred in the opinion on rehearing, and in a short opinion, said that the petition should have alleged that each successive holder of the title had knowledge of the original fraud. Enough of Louisiana jurisprudence has already been cited to demonstrate the correctness of the ruling.⁵¹

The decision was the first elaborate statement of the distinction between ultimate facts, conclusions of law and evidence, and it was followed by a spate of cases involving the sufficiency of pleadings in which the distinction was discussed in terms of

50. *Seghers v. Lamaitre*, 5 La. Ann. 263 (1850); *Landry v. Dickson and Boyken*, 7 La. Ann. 238 (1852); *Perkins v. Potts*, 8 La. Ann. 14 (1853); *Compton v. Compton*, 9 La. Ann. 499 (1854); *Waddell v. Judson*, 12 La. Ann. 13 (1857); *Rooks v. Williams*, 13 La. Ann. 374 (1858). See also *Stevens v. Pinneo*, 26 La. Ann. 617 (1874) to the effect that an allegation that no formality of law has been observed in the seizure and sale of property is so vague that it amounts to nothing.

51. Professor McMahan attributes the decision in the *Hackley, Hume and Joyce* case wholly to adherence "to the rules of fact pleading." His position is that the allegation of the conclusions of law should have been sufficient, and attributes the semantic philosophy of Humpty Dumpty to the court in making its distinction concerning the implications of "holder in bad faith" with relationship to "without valuable consideration" and "with notice." The author thinks the distinction made by the court had real merit. Under the applicable law, as Judge Monroe said in his concurrence on rehearing, the bad faith, depending on *knowledge of the fraud of the original entryman, on the part of each intervening transferee of the title attacked*, was critically important to the plaintiff's case. The codal implication of the conclusion "possessor in bad faith" could mean that the possessor knew his title was defective, but not *how* it was defective, and knowledge of the particular vitiating fraud must be brought home not only to the possessors, but to all intervening transferees. That is the way I understand the court's decision, and it makes sense to me.

ultimate facts and conclusion of law. But that is only evidence of the impulse of semantics on jurisprudence, an observable phenomenon whenever new words are used to define old distinctions. But the fact pleading we had after *State v. Hackley, Hume and Joyce* was no different from the fact pleading we had before, and the decision in that case effected no change in our procedural law, either in the jurisprudence, or as the cause of the adoption of any legislation.

The Pleading and Practice Act of 1912 was not passed as a result of the *Hackley, Hume and Joyce* case, and it seems hardly possible that the eminent members of the Louisiana Bar who drafted and proposed this legislation would have failed to mention that the proposed statute was introducing fact pleading into the Louisiana statute law, if such indeed were true. Neither did the committee mention the Field Code of 1848 for New York.

The Louisiana State Bar Association considered this practice reform at two annual meetings: in 1910, soon after the final decision in the *Hackley, Hume and Joyce* case,⁵² and again in 1912. That case was not mentioned in the printed record of the discussions at those meetings.

The Practice Act of 1912 was an attempt to require responsibility and definition in the place of irresponsibility and generality, by requiring pleadings to be verified under oath, and to state in articulated form the respective claims of the plaintiff and defendant, with provisions for judgment in the pleadings, in case of an insufficient answer, thereby effectively abolishing answer by way of general denial.⁵³

52. On rehearing, November 29, 1909.

53. Because the proceedings of the Louisiana State Bar Association for 1910 and 1912, published in Louisiana State Bar Association Reports for those years, are not readily obtainable, pertinent extracts are reproduced in this note.

In 1910, a committee from the Bar Association headed by Mr. R. E. Milling, prepared an act which was described by him as having "the effect of requiring opposing attorneys to narrow the issues by simple and non-technical pleadings. Our idea is that the petition should set forth concisely the plaintiff's full case." The committee was composed of Mr. Milling, E. P. Florance and John Dyamond, Jr. This act provided that the judge should examine the pleadings, order amendment if necessary to define issues, and then limit the proof to the issues raised—a proposal for a pre-trial procedure of considerable merit. 12 La. Bar Assn. Rep. 136. The act was not adopted because it was introduced too late during the legislative session to secure consideration. Another committee of the Bar Association prepared the draft of the bill, which became the Practice Act of 1912.

The reasons for this act are best explained in the words of those who prepared it. In presenting the draft of this act to the Bar Association, Mr. Charles P. Fenner said:

"I say, I think it must be admitted that in Louisiana, where we are

really operating today under practically the same system of procedure which was adopted by the state as a pioneer in that field in 1826, there are reforms which may be adopted with wisdom.

"I assume that we will all agree upon this general proposition: That in framing a system for the administration of Justice in the Courts, we ought to so frame the system as to accomplish the results which we want to accomplish as speedily and with as little expense either of effort or of money, as practicable. I say, I assume that we all agree to that general proposition. Now, in that connection, then, the following questions inevitably suggest themselves:

"In any rational system of procedure, why should the party plaintiff be permitted to invoke the consideration by the court of a claim for relief based upon allegations of fact which he is unwilling or unable to verify under reasonable conditions by his affidavit? Why should a defendant be permitted to delay the administration of justice by the filing of frivolous exceptions, intended merely for delay? Why should such a defendant be permitted to further delay and impede the administration of justice by denying things which, upon his oath, he must admit to be true? Why should the administration of justice be impeded and rendered costly and expensive by the necessity of procuring and administering proof of allegations of fact which the other party, under oath, would be obliged to admit? And finally, why should a plaintiff be subject to the delay incidental to the regular fixing of his case for trial on the merits, when it is apparent, on the fact of the pleadings, that he is entitled to a judgment?

"I confess that I find it very difficult to give any satisfactory reply to any of these questions. And yet it must be conceded that everyone of the criticisms which are implied in these questions may be justly levied against the system of jurisprudence under which we practice in the state of Louisiana. In this state, a plaintiff may go into the court and invoke the consideration of the court of a claim for relief based upon allegations which he could not go on the stand and verify by his oath,—allegations which he could not verify by an affidavit attached to his petition. . . .

"So a plaintiff may file a petition based upon numerous allegations of fact, proof of which may be difficult and expensive, no one of which the defendant could under oath, deny, and yet, under our system, all that the defendant has to do is file a general denial and the plaintiff is put, not merely to the trouble, but to the expense of procuring, in the first place, and then administering in the court, proof of every one of these allegations, with the result that the record and the costs are immensely increased.

"And so, under our system of procedure, it not infrequently happens that a plaintiff having filed a petition, to which the defendant files a pleading by way of answer, which sets forth no defense whatever, I say it not infrequently happens that such a plaintiff is obliged to wait until, in the due and orderly course of procedure, his case is reached for trial on the merits, before he can go through the formality of taking a judgment. That is all it amounts to under the circumstances. A man filed, in one of the divisions of the Civil District Court, a suit on a promissory note—in a division which happens to be way behind on its docket,—the defendant comes in and files a general denial (a pleading under which he cannot introduce evidence of any possible defense) and the plaintiff may be delayed for a year before he can get a judgment on his petition. Now, I say, we must admit, it seems to me, that those are abuses. The only question is, is it practicable to so amend the law as to do away with those abuses.

"The first bill (pleading and practice act of 1912), which is presented by your committee is an attempt to remedy those abuses and to expedite and facilitate trials and decrease the cost of litigation."

He then took up the bill, section by section, and said:

"Well, of course (after reading the first section) that is a very simple provision—its purpose and object are simply to have the plaintiff so frame his petition as to enable the defendant to comply with the requirements of the second section, when he files his answer. That is to say either admit or deny each of the material allegations of the petition."

Mr. P. J. Chappuis, a member of the committee, spoke at the same time, and said:

Professor McMahon says that the most important feature of the statute and one which he admits was apparently not an objective of its draftsmen, was the requirement that "material facts" be pleaded in numbered paragraphs. He says that after *Hackley, Hume and Joyce* these words could only mean "ultimate" facts, with all of the resulting implications. The inference is unwarranted, but if warranted, not significant.

If the *Hackley, Hume and Joyce* decision had made such a violent change in Louisiana pleading, could it not just as reasonably be concluded that the use of a different term so soon after that decision implied a rejection rather than an adoption of the language used in that case?

As a matter of fact we began the use of the term with the earliest legislation on pleading, wherein it was provided "That all suits . . . shall be commenced by a petition . . . which shall state the names of the parties, their places of residence, and the cause of action, with the necessary circumstances of places and dates" and "That every answer . . . shall without evasion, answer every material fact stated in the plaintiff's petition."⁵⁴ (Italics supplied.)

And the last Louisiana practice act provides: "The plaintiff in his petition shall state his cause of action articulately, that is to say, he shall, so far as practicable, state each of the material facts

"Pleadings are the written allegation of what is affirmed on one side or denied on the other, disclosing the real matter in dispute between the parties, and forming the foundation of proof to be submitted on the trial. It is desirable that the issues should be reduced to the smallest possible number, or, in other words, that looseness in any system of pleading should not put it within the power of a litigant to multiply issues when in reality they are without foundation of fact.

"The system in Louisiana, as it has obtained all these years, has been a most prolific source of loose, vague and indefinite pleading, by putting it within the power of the defendant to throw on the plaintiff the whole onus of making out his case by simply pleading the general denial, which puts the plaintiff to proof of all conditions precedent to recovery, although it may well be that in truth there is no real controversy regarding any number of the material facts involved in the trial. It is the experience of every lawyer that there are but few cases in which the real dispute is not confined to but a few material facts; yet, when one thinks of the efforts, the time and the money spent in securing unnecessary evidence, and the time wasted by the bench and bar in reviewing records made voluminous by such unnecessary evidence, he is surprised that some means have not long ago been found to put an end to this abuse."

"I have said, I believe this bill is a step in the right direction; but I do not think it is a panacea for all the evils which beset the administration of justice. To a great extent, the remedy for many forms of injustice will be found in the proper conception and observance by members of the Bar, of the ethics of the profession set forth in the charter of this association." 13 La. Bar Ass'n Rep. 111 et seq. (1911).

54. Act of April 10, 1805, c. 26, 2 Martin's Digest 155.

upon which he bases his claim for relief, in a separate paragraph, separately numbered." (Italics supplied.)

And the defendant is required in his answer to "either admit or deny specifically *each material allegation of fact contained in plaintiff's petition.*" (Italics supplied.)⁵⁵

And in the long intervening period under the regime of the Code of 1825, Benjamin and Slidell were saying "The proof should correspond with the *material allegations*"⁵⁶ and Deslix that "The plaintiff is bound to set out *every fact material* to his case."⁵⁷

Louisiana has not been over technical in the use of language in relation to pleading and practice. Whether it be "material facts" or "ultimate facts"—or just simply facts—when used in relation to pleading requirements, the one common denominator of all of the decisions, well understood, and generally applied, has been the requirement that the plaintiff make a short, concise statement of the facts constituting his cause of action.

The provision for the machinery to test the factual content of petitions as stating a cause of action, by means of the exceptions of no cause of action and of vagueness,⁵⁸ long before the *Hackley, Hume and Joyce* case, is strongly corroborative of the view that there was no difference in the fact pleading requirements of Louisiana practice brought about by that case or the Practice Act of 1912.

It is not believed, therefore, that there is any material difference between the system of pleading facts under the Code of 1825 and the present law.

The Reporter had originally suggested that Article 12 of the projet should provide "The petition . . . shall contain . . . a short, clear, and concise statement of the cause of action."

55. La. Act 157 of 1912. As amended this act is now La. R.S. 1950, 13:3601.

56. See note 43 *supra*.

57. Deslix Report, 13 La. to 3 Robinson, verbo "Pleadings" No. 1 (1843).

58. McMahon, *The Exception of No Cause of Action in Louisiana*, 9 *Tulane L. Rev.* 17 (1934). See also Wortham, *Civil Procedure in Louisiana* (1916), of which only the first volume was published. He explains the distinction between the exceptions of no cause of action and vagueness in this manner: "The distinction is that, when the allegations are too vague and indefinite to admit of proof, the exception of no cause of action lies; if not, the defendant must content himself with demanding greater fullness of averment in limine, by the exception of vagueness. . . . The point at which the allegations become too vague and indefinite to admit of proof is variable, and cannot be established by any rule which could be applied in all cases. In *re Sprowl's Will*, 109 La. 352, 33 So. 365; See *State v. Hackley, Hume & Joyce*, 124 La. 854, 50 So. 772 (1909) and instances cited."

In the light of the definition of "cause of action" in *Hope v. Madison*⁵⁹ and the views hereinabove expressed, the Reporter's recommendation couched in this language would have been acceptable except for the vigorous views he had expressed in his accompanying commentaries, and his later recommendation that another article of the projet be changed "so as to reflect clearly and unequivocally a legislative intent to overturn the present jurisprudential rules of fact pleading."⁶⁰

The Reporter has argued well and vigorously in support of his recommendations. He says that, after all, it is a question of degree, that any system of pleading necessarily must require that some facts be pleaded. He says that full factual details and particulars should not be required. If he means that the pleading of evidence should not be required, there is complete agreement, for Louisiana does not make any such requirement. The dividing lines between ultimate or material fact, conclusion of law, and evidence, in the realm of pleading are broad and not sharp and precise—as indeed the lines between questions of fact and questions of law, between substance and procedure are broad. What test, then, can the Reporter offer by which to determine when allegations that are "general" and do not "include factual details or particulars" at the same time state a cause of action?

"Cause of action" is a term well understood, and consistently applied in Louisiana pleading, and the projet for the revision contains the time honored pleading devices of the exceptions of "no cause of action" and of "vagueness," but under their respective family names,⁶¹ as the means of testing the sufficiency of the allegations of fact in a plaintiff's petition. But the qualifications suggested by the Reporter will bring to "cause of action" uncertainty where there is now understanding, and the looseness which is often the result of generality. Consequently, the plan

59. *Hope v. Madison*, 192 La. 593, 188 So. 711 (1939): ". . . as used in pleadings the phrase signified the facts upon which plaintiff's right to sue is based and upon which defendant's duty has arisen coupled with facts which constitute defendant's wrong."

60. Memorandum, *The Case Against Fact Pleading in Louisiana*, June 6, 1952, he suggested that Article 6 of the projet be redrafted to read:

"Alternative 1. All averments of the petition and answer shall be simple concise and direct and, except as otherwise specifically required . . . *may be general, and need not include* any factual details or particulars. . . ."

"Alternative 2. Same as above except after "otherwise specifically required" the suggested article reads "need not include factual details or particulars."

61. "No cause of action" is now a ground for "the preemptory exception"; "vagueness" a ground for "the dilatory exception."

to abandon the present system of fact pleading and the adoption of the system recommended by the Reporter was rejected.

THE PROPOSAL TO ADOPT NOTICE PLEADING
MODELED ON THE FEDERAL RULES

The essence of the "notice" system of pleading urged upon the Institute as an alternative to the quasi-notice pleading first recommended to the Institute is contained in the General Rules of Pleading of the Federal Rules of Civil Procedure, where it is provided:

"A pleading which sets forth a claim for relief . . . shall contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief. . . ."⁶²

The philosophy underlying this system of pleading considers it to be the function of the pleadings (a) to give fair notice of the claim asserted so as to enable the adverse party to answer and prepare for trial, (b) to allow for the application of the doctrine of *res judicata*, and (c) to show the type of case brought, so that it may be assigned to the proper form of trial. This philosophy sounds familiar to the Louisiana lawyer, because the objectives of notice and finality have always been sought through pleadings in Louisiana courts.

The writings of the doctrinaires,⁶³ however, interpreting these functions, are far afield from our ideas concerning them, and the many decisions of the federal courts interpreting the rules have made the functions of pleadings impotent and ephemeral,⁶⁴ somewhat after the fashion of the system of flexible pleading described by Professor Millar.⁶⁵

One of the best definitions of the purpose of the pleading stage of litigation, has been given by one who, however, advocates a plan counter to the theory of the adversary system of litigation. He says:

"What is the purpose of the pleadings in an action? From the

62. Rule 8(a), Federal Rules of Civil Procedure.

63. See 2 Moore, *Federal Practice* 1607, 1647 (2 ed. 1948); Clark, *Code Pleading* 225 (2 ed. 1947).

64. In one of the earliest cases, *SEC v. Timetrust, Inc.*, 28 F. Supp. 34, 1 F.R. Serv. 8a, case 4 (N.D. Calif. 1939), it was said that: "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."

65. See Millar, *American Civil Procedure 1887-1937*, 50 *Harv. L. Rev.* 1017 (1937).

standpoint of the parties and their attorneys, the pleadings should serve to inform each side of the contentions of the other as to matters of fact. They should tell the defendant what he is being sued for; they should tell the plaintiff what defenses the defendant proposes to make. The pleadings should thus facilitate preparation for trial and prevent surprise of either party at least as to matters of fact if a trial takes place. From the standpoint of the court, the pleadings should formulate the issues to be tried, and should inform the trier of the nature of the cause. Moreover, they should narrow the issues to those actually in *bona fide* controversy and should separate issues of fact from issues of law. This latter is particularly important in cases where a jury is to pass on fact issues; but even in non-jury cases, precise formulation and separation of issues is of considerable importance in saving the time and energy of the judge. From the standpoint of parties, attorneys and the court alike, and even more from the standpoint of the public, a satisfactory system of pleading should save time and expense at the trial of the cause and should expedite its final and just determination. The more complicated the controversy, the greater is the need for a system of pleading which will accomplish these purposes."⁶⁶

This is a fair statement of the credo underlying this expose des motifs. To accomplish these purposes of the pleading stage of litigation, the principal exponents of the notice pleading of the Federal Rules have assigned the basic function of formulation of the issues largely to pre-trial and discovery, leaving the function of fair notice and the allowance of the application of the doctrine of *res judicata* to the pleadings.⁶⁷

Aside from the general observation that it is difficult to see how the pleadings could afford the basis for the allowance of a plea of *res judicata* without a cause of action being stated therein, in Louisiana it might be dangerous for the issues not to appear from the pleadings, for in Louisiana the doctrine of *res judicata* is more restricted than at common law, and its scope is defined and limited by the Civil Code. There it is provided that the authority of the thing adjudged (*res judicata*) "takes place only

66. Simpson, A Possible Solution of the Pleading Problem, 53 Harv. L. Rev. 169, 172 (1939).

67. 1 Moore, Federal Practice 438 (1 ed. 1938); 2 Moore, Federal Practice 1607 (2 ed. 1948).

with respect to what was the object of the judgment. The thing demanded must be the same; the demand must be founded on the same cause of action; the demand must be between the same parties and formed against each other in the same quality."⁶⁸ It has been held under this article that a prior judgment must be so in point as to control the issue in the pending case, in order to be available as *res judicata*.⁶⁹

Mr. Hennen nearly 100 years ago noted the importance of the pleadings in the formulation of a definite issue, which is to be regarded as determining the weight and the extent of the judgment as *res judicata*.

Mr. Cross on the same subject says that "We must always look for the issue, not to the matters *en pais* known only to the litigants, but to the formal statement of it, set up in the pleadings on file, and unless this connection is regarded and maintained, there can be no harmony in the doctrinal statement of principles governing the formation of pleas, and of those controlling the subject of *res judicata*."⁷⁰ If the pleadings are to serve for the allowance of *res judicata*, in Louisiana it would seem that the pleadings should set forth a cause of action.

What constitutes "fair notice" is necessarily a variable, but Judge Clark's *ad captandum* philosophy, as to the purpose of notice, is difficult to accept. He has said:

"The aim of pleadings should be therefore to give reasonable notice of the pleader's case to the opponent *and to the court*. This does not go as far as the technical notice pleading, since it requires notice of the pleader's entire cause, not merely that he has a claim. The notice to the court is perhaps the more important, for in general the opponent knows enough about the case to relieve us of worry about him. In fact we have spent altogether too much thought over the danger of surprising a defendant. If his case is prepared at all adequately he will not be surprised. Our solicitude for him will simply result in giving him opportunities to delay the case and harass his opponent. The main purpose of the pleadings should therefore be to give the trial court a proper understanding of the case. If the trial court is adequately informed of the issue by the pleadings, it means that the parties

68. Art. 2286, La. Civil Code of 1870.

69. *Iselen v. Hunter Co.*, 173 F. 2d 388 (5th Cir. 1949).

70. Cross, *Pleading in Courts of Ordinary Jurisdiction* 87 (1885); Hennen, *A Digest of Reported Decisions from 1 Martin* 59 6th La. Annual, 1809-1851, verbo "Pleading" 1155 (1852).

are likewise so informed. It is for the court, not the litigants, to vindicate pleading rules."⁷¹

The Federal Rules have been interpreted as no longer requiring a plaintiff to state a cause of action. "Under the new rules of Civil procedure," the Second Circuit Court of Appeals has said through Judge Clark, "there is no pleading requirement of stating facts sufficient to constitute a cause of action," but only that there be "a short and plain statement of the claim showing that the pleader is entitled to relief."⁷² That may stem from what has been called the "morass of decisions concerning a cause of action"⁷³ and the variety of definitions attributed to it.⁷⁴

The origin of the word "claim" used as a substitute for the phrase "cause of action" has been explained in a fairly early case⁷⁵ arising under the Federal Rules, where it was said that "For the traditional and hydra-headed phrase 'cause of action' the Federal Rules of Civil Procedure have substituted the word 'claim.' It is used to denote the aggregate of operative facts which give rise to a right enforceable in the courts." See Moore, *Federal Practice* 3,145-150,605; Clark, *Code Pleading* Secs. 18.70." The phrase "aggregate of operative facts which give rise to a right enforceable in the courts" originated with Judge Clark,⁷⁶ and was used prior to the Federal Rules by the Supreme Court of the United States, with attribution to Judge Clark, to describe an aspect of the meaning of "cause of action."⁷⁷

Were it not that the originator of this phrase and the Reporter for the committee who drafted the Federal Rules has officially held that there is "no pleading requirement of stating fact sufficient to state a cause of action,"⁷⁸ it might be possible to say that the use of the term "claim," as defined by Judge Swan in the

71. Clark, *Code Pleading* 57 (2 ed. 1947).

72. *Dioguardi v. Durning*, 139 F. 2d 774 (2d Cir. 1944).

73. 1 Moore, *Federal Practice* 145 (2 ed. 1948).

74. Clark, *Code Pleading* 129 (2 ed. 1947).

75. *Original Ballet Russe, Ltd. v. Ballet Theatre, Inc.*, 133 Fed. 187 (2d Cir. 1943). The citation to Clark in the opinion refers to the first edition of Clark on *Code Pleading*. His second edition treats of the subject of the code cause of action in Chapter 2, Section 19. Clark says at page 147 that "The objective was not as of old to state all of the facts constituting the cause of action, but rather 'a short and plain statement of the claim showing [which would show] that the pleader is entitled to relief.' This, it is submitted, is not evasion; it is constructive draftsmanship to further a definite objective." See also 2 Moore, *Federal Practice* 359 (2 ed. 1948).

76. Clark, *Code Pleading* 81 (1 ed. 1928).

77. *United States v. Memphis Cotton Oil Co.*, 288 U.S. 62, 68 (1933).

78. See *Dioguardi v. Durning*, 139 F. 2d 774 (2d Cir. 1944).

original *Ballet Russe* case, with attribution to Judge Clark and Mr. Moore, was the equivalent of requiring the complaint to state facts constituting the cause of action. That is, if the Louisiana definition of "cause of action" is used. For it must be confessed that the phrase "aggregate of operative facts which give rise to a right enforceable in the courts" defining "claim," seems to the author to convey exactly the same meaning as the language in *Hope v. Madison* that "as used with reference to pleadings the phrase (cause of action) signifies facts upon which plaintiff's right to sue is based . . ."⁷⁹

It is realized that those responsible for the Federal Rules did not use the phrase "cause of action" because they wanted to get away from all of the limitations with which it was encrusted in common law jurisdictions, of which we know nothing in Louisiana. The "useless conceptual tangles"⁸⁰ described in Mr. Moore's monumental treatise⁸¹ seem largely to derive from the basic difference between law and equity and relate back to the writ system of common law pleading,⁸² neither of which have ever obtained in Louisiana.

Moreover the discussion by Judge Clark in "Code Pleading," under the rubric "cause as synonymous with right of action" compared with Professor McMahon's definitive essay on the exception of no cause of action in Louisiana,⁸³ wherein he distinguished that exception from the exception of no right of action, is further indication of the broad and fundamental differences which prevent complete mutual understanding of these pro-

79. *Hope v. Madison*, 192 La. 593, 188 So. 711 (1939).

80. Arnold, *The Code "Cause of Action" Clarified by the Supreme Court*, 19 A.B.A.J. 215 (1933).

81. 2 Moore, *Federal Practice* 361 (2 ed. 1948): "So long as the common-law system of pleading was followed, a legal cause of action meant a set of facts which when pleaded and proved would support a judgment under a particular writ. Actually the emphasis was upon forms of action rather than causes of action. The cause of action was not identical with facts which occurrence had grouped together. Such a segment of life often produced several causes of action, perhaps one equitable and several legal causes of action. The common law as developed did not adapt itself to any existing factual arrangement but sought artificially to straight-jacket certain fragments into causes of action, and further complicated this by the problem of joinder of causes. A shift was inevitable. With the advent of the codes an effort was made to adapt procedure to the exigencies of life. Law and equity were to be merged; and there was to be but one form of action in which *all* relief must be secured. Reversions to a dismembered system of law and equity have occurred in some of the code states; but in the main a workable union has resulted in the states, and the achieved union under the Rules is excellent."

82. Clark, *Code Pleading* 130 (2 ed. 1947).

83. 5 *Tulane L. Rev.* 17-27 (1930).

cedural problems. The difficulties are semantic but they originated in the mists of antiquity out of which emerged two different systems of substantive law.

Never having been plagued with the troubles which beset the use of "cause of action," and for the reasons given for rejecting the Reporter's recommendation to adopt a form of quasi-notice pleading, the use of "claim" as that term is now defined in federal jurisprudence⁸⁴ also must be rejected for use in the projet for the revision.⁸⁵

There is another compelling reason for the rejection of this generalized concept by which allegations which fail to state a cause of action constitute a "claim" within the intendment of the Federal Rules. It is found in the jurisprudence interpreting the deposition and discovery rules.

The proponents of the system of the Federal Rules say that the issue formulation function of the pleading or preparatory stage of litigation can better be performed by the pre-trial and discovery procedures under the rules, and therefore it is necessary that the pleadings "do little more than indicate generally the type of litigation that is involved. A generalized summary of the case that affords notice is all that is required."⁸⁶

Accordingly, the official forms have been provided which by law are "now sufficient under the rules." Form 9, *Complaint For Negligence*, is illustrative of the brevity allowed. Paragraph 2 of that form reads:

"On June 1, 1936, on a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway."

Suppose the defendant, desiring to know the specific negligence that he will be required to meet, propounds to the plaintiff this interrogatory:

"Please state each and every act or omission to act on the part of the defendant which you claim in any way contributed to the alleged accident."

84. 5 Federal Rules Service 785, commentary "The 'claim' under the Federal Rules." See also 2 Moore, Federal Practice 359 et seq. and authorities cited (2 ed. 1948).

85. Professor McMahon used "cause of action" in his first alternative plan.

86. *SEC v. Timetrust, Inc.*, 28 F. Supp. 34, 1 F.R. Serv. 8a, 25 case 4 (N.D. Calif. 1939).

Under *Doucette v. Howe* and *Bush v. Skidis*, and the long line of cases cited in the latter case, this interrogatory would be denied because it calls for an opinion and conclusion.⁸⁷

In the *Bush v. Skidis* case, the court permitted the defendant to obtain the specific information by means of the allowance of a motion for a more definite statement.

But the plethora of cases cited in *Bush v. Skidis* and discussed elaborately by Professor Moore⁸⁸ demonstrates that the problem of distinguishing between facts and conclusions of law in determining the issues in litigation has been transferred from the pleadings to the discovery process, and with much more serious consequences.

As applied to the pleadings, the leading advocates of the Federal Rules inveigh against the difficulties of distinguishing "ultimate facts," "conclusions of law" and "evidence" from one another.⁸⁹ If the difficulty lies in the pleadings, the remedy lies in amendment, the necessity for which in Louisiana probably would become apparent when the issues are discussed under our exception or pre-trial procedures, and remedied under our liberal provisions for amendment. However, if a defendant is charged with "negligent" conduct without other definition or specification of the acts, omissions, or conduct constituting negligence, and he is prevented from obtaining this information through discovery, the issues will not have been formulated and he will not have had fair notice of that which he will be forced to meet at the trial.

It is not enough to say with Judge Clark that the defendant knows or should know the facts. What any litigant wants to know is what his opponent says are the facts.

In any event, the criticisms of fact or issue pleading on account of the difficulty of distinguishing between ultimate or material facts and conclusions of law is addressed to the problem of proof and its variance from the pleadings. Judge Clark says that the rules of variance are in substance the fundamental rules

87. *Bush v. Skidis*, 8 F.R.D. 561, 12 F.R. Serv. 52 (1948); *Doucette v. Howe*, 1 F.R.D. 17 (D.C. Mass. 1909). This problem is elaborately discussed in 4 Moore, *Federal Practice* 2303 (2 ed. 1951).

88. 4 Moore, *Federal Practice* 2303 (2 ed. 1948).

89. Clark, *Code Pleading* 225, § 38 (2 ed. 1947); 2 Moore, *Federal Practice* 1640 et seq. (2 ed. 1948); 1 Moore, *Federal Practice* 546 et seq. (1 ed. 1938). Professor McMahon is thoroughly in accord with Judge Clark and Professor Moore on this point. See his memorandum against fact pleading. *The Case Against Fact Pleading in Louisiana* (June 6, 1952).

of pleading discussed throughout his book.⁹⁰ But the problem of variance is bound to exist even under the notice system of pleading, where, insofar as the pleadings are concerned, the distinction between facts and conclusions is not intended to be significant. But some place during the pre-trial state of litigation the issue, of necessity, will have to be formulated, and the problem of variance will arise and its solution will have to be referred to the issues—no matter where or how formulated. If they have been formulated by the pleadings and simplified by the pre-trial conference, reference will be facilitated. If they have been formulated in the pre-trial or discovery conference, reference may not be either certain or readily available.

The remedy for this problem should be in liberality of amendment, and in the proper functioning of pre-trial and discovery, for all of which there is ample provision in Louisiana law today. Generality, which often begets looseness, is surely not an answer to the problem. In any event, the problem of distinguishing between facts and conclusions still remains under the Federal Rules, and, as stated above, in a manner calculated to do more harm than is now conceivable under our system of pleading in Louisiana.

If the assumption is correct that during the pre-trial stage of litigation the issues must be formulated, why should it be made imperative that the work of ascertaining the issues be postponed to the pre-trial conference or discovery?

It has been suggested that sometimes the plaintiff does not know the facts upon which his right to recovery rests. The answer is two-fold: In an appropriate case discovery is available even before the filing of his suit; and, secondly, it is not often that a litigant is so ignorant of his cause of complaint. The ascertainment of the material facts constituting a client's cause of action prior to the institution of suit is a duty not often shirked by the lawyer and is conducive to the just, speedy and inexpensive determination of litigation.

If the procedures provided by the Federal Rules be followed, in the manner contemplated, and described in the latest book on pre-trial,⁹¹ the judge at the first pre-trial conference will ask the plaintiff to state his contentions and then the defendant to state

90. Clark, *Code Pleading* 739 (2 ed. 1947).

91. Nims, *Pretrial* (1950).

his defense, and the process of formulating the issues will have commenced.

Why would it not be better to require that this initial statement of the basis of the claim be made in the petition, and the issues formulated by the pleadings, with the pre-trial conference serving to narrow the issues to those actually in dispute, and to restrict the trial to proof of those disputed questions of fact, pertinent to the issues? The objection to the system in common law jurisdictions growing out of the filing and settlement of a multiplicity of consecutive pleadings has never obtained in Louisiana. At one time it was possible here to delay the course of the trial by filing dilatory exceptions consecutively, but that is not now possible, and replication has never been permitted.

If the parties can be required to give factual information to define the issues by means of interrogation, why would it not be better to put this information as to issues in the pleadings?

And as Judge Hulen said in *Bush v. Skidis*,⁹² "Why put the Court and the parties to the trouble of searching through various papers to determine what the issues are when the complaint and answer might serve the purpose—a purpose they have served from time immemorial." Judge Hulen in the same opinion points to the trouble and expense that is involved in the process of formulating the issues in the pre-trial conference or by discovery. He concluded his opinion with these remarks:

"Nor do we consider it good practice leading to 'the just, speedy and inexpensive determination of every action' to say the party seeking full information on the issues may obtain it by pretrial conference. Such a proceeding requires time of the court and the litigants and in the end the court will reduce to a memorandum the issues of the case on negligence and file it in the case. To force the party charged with negligence to resort to discovery process or pretrial conference to learn the issues of the case as to charges of negligence means delay and added expense in the 'determination' of the actions."

It has been most difficult to determine from the Rules and their interpretive doctrine criteria by which to approximate the sufficiency of pleadings under the rules. "Claim" is undefined in the Rules, and the definition from the original *Ballet Russe*

92. *Bush v. Skidis*, 8 F.R.D. 561, 564, 12 F.R. Serv. 52 (E.D. Mo. 1948).

case—"the aggregate of operative facts which give rise to a right enforceable in the courts"⁹³—originally used to define one aspect of "cause of action"—is logically incongruous with the fiat that the complaint need not state a cause of action,⁹⁴ and completely innocuous when confronted by some of the Official Forms, of which Form 9 is an example which has been discussed in this paper.

Professor Moore's test of sufficiency—"If, within the framework of the complaint, evidence may be introduced which will sustain a grant of relief to the plaintiff, the complaint is sufficient"⁹⁵—causes one to ask the meaning of "framework of the complaint." As used in relation to the introduction of evidence, the test poses a problem which received the attention of a very wise Louisiana lawyer many years ago, and his observations bear repetition here. In 1885, Mr. K. A. Cross said:

"In accordance with the distribution of the subject heretofore made, we come now to III. The allegations of a general nature, which must be included in pleas, or in other words, The Burden of Pleading. This discussion is embarrassed at the outset by a vicious doctrinal error, adopted into the jurisprudence of every American State, and everywhere accepted in our reports. This consists in assigning the topic to the department of Evidence, and in investigating the principles governing Pleading, at the point where the plea is to be proved or disproved on the trial. As a consequence, the doctrine has been stated by reference to the Burden of Proof, but nothing has been determined as to the Burden of Pleading. The most cursory reflection will show the disadvantage of this method. Pleading is the matrix, which gives form to Evidence. Pleading is the original mould to which Evidence must conform with plastic adaptation. The *allegata* and the *probata* must agree, but it is the former which govern, and it is only by arriving at some definite rules determining the burden of allegation, that we can establish a rigid and inflexible standard, by reference to which the necessity and propriety of proof can be determined with accuracy and precision."⁹⁶

93. See note 75 *supra*.

94. See *Dioguardi v. Durning*, 139 F. 2d 774 (2d Cir. 1944).

95. 2 Moore, *Federal Practice* 1653 (2 ed. 1948).

96. Cross, *Pleading in Courts of Ordinary Jurisdiction*, c. 6 (The Burden of Pleading), p. 85, 86 (1885).

But the "rigid and inflexible standard" sought by Mr. Cross must be considered in relation to his views on the objectives of pleading in Louisiana, which he considered to be as follows:⁹⁷

"The objects contemplated by the lawmaker in requiring parties to state their demand or defence in a court of record, according to definite and precise rules, are twofold. (1) To give full notice to the opposite party of the grounds of action or defence, so that proof may be shaped with reference thereto; and (2) to furnish incontestible evidence in all future controversies of what was the subject of dispute, and of what was decided on the issues presented."

The problem of variance, which cuts across the entire span of pleading,⁹⁸ is not made less difficult by the generality of the statement of the issues. What Cross evidently meant was that the standard itself be rigid and inflexible as distinguished from the manner in which it is applied, which need be neither inflexible nor rigid. If the requirement be that the petition state the "facts giving rise to a right enforceable in courts" (cf. Judge Clark's definition and the definition in *Hope v. Madison*),⁹⁹ the standard is rigidly and inflexibly fixed as to require the petition to state "a cause of action"—but the infinite variety of the circumstances of litigation will adapt themselves to the standard with plastic flexibility.

Both Judge Clark and Professor Moore recognize that the particularity of allegation required should vary with the question at issue, and that the solution will vary with the case presented.¹⁰⁰ But the test of "fair notice" which they suggest is itself a variable, and as we understand it here in Louisiana, "fair notice" is an objective of the pleading requirement that the plaintiff's petition state a "cause of action." As interpreted, the "short and plain statement of a claim" required by the Rules does not mean that a cause of action must be alleged. The expression is undefined in the Rules, and the various tests in the cases and doctrinal writings are indefinite and inconclusive, if not illusory, and there is nothing to which the allegations can conform with "plastic adaptation," if that phrase may be borrowed from Mr. Cross.¹⁰¹

97. *Id.* at 86.

98. Clark, Code Pleading 739 (2 ed. 1947).

99. See p. 423 *supra*.

100. Clark, Code Pleading 232-233 (2 ed. 1947).

101. Let none think of us as antiquarians because reference is made to writers of another day, for Louisiana has required that pleadings be suffi-

Professor Moore says that in borderline cases, the court should consider

- "(1) At what stage of the action is the objection raised?
- "(2) Are the prima facie elements of the claim or defense stated?
- "(3) If these are stated, is the statement fair notice to the adverse party?
- "(4) Is it feasible to require more particularity?"¹⁰²

These tests, particularly (2) and (3), seem to contain no better definitions or criteria by which to measure the sufficiency of pleadings than the rules themselves. What are the "prima facie elements" of the claim or defense stated? And what is "fair notice"? And, unless the test of finality has been abandoned, should not another inquiry be made concerning efficacy of the pleadings to support the allowance of *res judicata* between the same parties on the same issues?

The apparent impossibility of giving workable definitions or tests of the generality and simplicity desired by the Rules, caused the jurists-consults who guided their development by prodigious commentaries of the highest scholarship, to point to the official illustrative forms which accompany the Rules as desiderata of simplicity and generality under the Rules.¹⁰³ At first these forms were illustrative only. Now, by law, they are sufficient pleadings under the Rules.

Professor McMahon referred the Institute to an article on the subject of "Facts" and "Statements of Facts"¹⁰⁴ for its guidance. There it was said:

"To sum up our argument: when ancient landmarks are swept away, they must obviously be replaced by other marks at least equally useful in guiding the wayfarer through

ciently certain to put the parties on their guard, and to support the plea of *res judicata* for more than a century, and long before the days of notice pleading in this country.

102. 2 Moore, *Federal Practice* 1655-1656 (2 ed. 1948).

103. *Id.* at 1658. Clark, *Code Pleading* 239, 243 (2 ed. 1947): "The simplicity sought is demonstrated by the forms of pleading the claim for relief for breaches of contract, on the common counts, and for negligence, which have been applied by the courts."

See Judge Clark's remarks at the Washington Institute. A.B.A. Institute Proceedings on the Federal Rules "Washington and New York 42 et seq. (1938).

104. Cook, 'Fact' and 'Statements of Fact,' 4 U. of Chi. L. Rev. 233, 246 (1937).

the pleading wilderness. But, from the very nature of verbal symbols and of 'facts,' a direction to 'state the facts constituting the cause of action' or to 'state in plain and concise language the cause of action' can not possibly furnish adequate guidance. It can do little more than generate doubt and uncertainty and provoke controversy and litigation. That has been the uniform experience in the past. If such directions are accompanied by an adequate set of forms, which while not required are sufficient if used, the difficulty is solved and peace and good order reign in the pleader's world."

In this expose des motifs it has been explained that we have never had any difficulty with the requirement that a plaintiff state his cause of action in his petition. Here in Louisiana, our ancient landmarks should not be swept away in favor of the use of such vague or indefinable or general formulae that a system of ectypal pleading is necessary. The fears conjured up by the following vivid description of pleading at common law should give us pause. Professor Moore has said:

"But if ritualistic language was used to allege a duty, breach, and consequent damage the declaration in case was good, although only slightly informative. And since an instrument could be pleaded according to its legal effect little factual information was accorded the defendant in special assumption. *The main thing was to follow a good form to be found in Chitty*, and be sure to include enough counts to circumvent the always present objection of fatal variance. And the defendant was not obliged to controvert only those things that were actually in dispute. The general issue, extremely broad, in many of the forms of action, told the plaintiff nothing more than that the defendant intended to have his day in court."¹⁰⁵

And now the Federal Rules, by the adoption of Form 9, return the lawyer, like his predecessors of a bygone day, to Chitty for guidance in negligence cases.¹⁰⁶ Louisiana never had such pleading, and the quotation is only apropos by way of contrast with the highly important interpretive position given to the official forms.

105. 2 Moore, Federal Practice 1609 (2 ed. 1948). See A.B.A. Institute Proceedings, Washington and New York 45 (1938).

106. See Judge Clark's remarks at the Washington Institute attributing Form 9 to Chitty, Pleading 529 (7 ed. 1844), by way of Massachusetts. 2 Mass. Gen. Laws 1932, c. 231, § 147, Form 13.

About the only difficulties of interpretation in Louisiana pointed out in this discussion of this question are concerned with distinguishing "ultimate fact," "conclusion of law" and "evidence." It cannot be believed that these difficulties are either as severe as they are depicted, or cause the miscarriage of justice in the courts. The jurisprudence interpreting the use of those terms, generated out of the actualities of the court room, is certainly a reliable and understandable landmark by comparison with an illustrative form. The interpretation of language is of the essence of the profession of law. It can never be adequately accomplished with a form book.

It has been said that "[w]hat constituted good craftsmanship in pleading before the Rules continues to constitute good craftsmanship,"¹⁰⁷ but that which is permissible pleading under the Rules would not necessarily be good craftsmanship under what is believed still to be the prevailing opinion in the United States.

Some of the writers have said that the settlement of pleading questions in a busy court is dangerous because decisions are often the result of snap judgment and may cause great harm during later stages of the case. If that result would happen when pleadings alone are at issue, is it reasonable to suppose that more and better consideration would be given by a busy court to the formulation of issues, pleading questions and the other details properly cognizable by the pre-trial conference?

Some of the writers against fact pleading advance arguments which presuppose ignorance, indifference, indolence, or the lack of a proper professional attitude on the part of lawyers at the bar. No attention has been given to them here, for such arguments are not susceptible of proof, and serve no useful purpose in discussions like this.

There is an additional reason why this notice system from the Federal Rules should not be engrafted in our Louisiana practice, which probably exists in every state. The courts of first instance in Louisiana have jurisdiction of cases of all kinds and involving small amounts, unlike the federal court where the jurisdictional amount is relatively high. In these cases involving relatively small amounts, and constituting the bulk of litigation in Louisiana, the necessity for resorting to pre-trial and discovery are often oppressively expensive. Any system which requires

107. 2 Moore, *Federal Practice* 1654 (2 ed. 1948).

that litigation begin with a statement of the issues in the pleadings will certainly obtain the just, speedy and inexpensive determination of these cases, more readily than where resort to pre-trial and discovery is necessary.

Professor Simpson has criticised fact pleading under the Codes in three particulars.¹⁰⁸ They are:

First, the Code system of pleading lends itself to unnecessary delay. He says the reasons are to be found in the successive and repeated objection to plaintiff's pleadings, and to the modern methods of securing evidence before trial.

In Louisiana we have never had replication. At one time it was possible to delay a case by the serialized filing of dilatory exceptions. This has been remedied by a law which requires all such exceptions to be filed at one time.¹⁰⁹ In Louisiana we have pre-trial and deposition and discovery statutes. Their use is not mandatory and since we have our own system of pleading facts, these devices are not resorted to as would probably be the case with notice pleading. In any event these devices do not now cause much delay.

Second. Code pleading does not elucidate the real issues in the case so as to inform the court and the parties of those matters about which there is a bona fide contest. This results, he says, from the use of the general denial, and by the pleading of defenses not intended to be seriously urged.

In Louisiana, the general denial was abolished in 1912, and the pleading of matters without any intention of urging them should be made apparent at the pre-trial conference, if that instrumentality operates as it is supposed to do.

Third. Code pleading does not prevent surprise because it was never intended to inform as to matters of law, and as to matters of fact it does not prevent surprise of the plaintiff by unanticipated defences. Neither does it prevent the surprise which results from preparation for trial only to have the issue prepared against withdrawn or not urged by the opponent.

It is believed that in Louisiana the system of pleading does

108. Simpson, A Possible Solution of the Pleading Problem, 53 Harv. L. Rev. 184 et seq. (1939).

109. La. Act 124 of 1936, La. R.S. 1950, 13:3601, requires that the attorney certify that such an exception is filed in good faith and not merely for the purpose of delay.

give sufficient information from the pleadings to prevent surprise, and while it is not necessary to plead the "theory of the case," the pleadings do reflect the theory of the case, for it would seem that in any case the lawyer bases his pleadings on a definite theory of the law under which he expects to recover.¹¹⁰ Pre-trial and discovery should eliminate needless preparation for undisputed issues.

Professor Simpson¹¹¹ criticises notice pleading for these failings: There is no clear definition of the issues, and no opportunity for the effective separation of fact and law questions. There is no clarification and simplification of complex issues prior to trial, and there is no attempt to eliminate non-good faith claims and defenses. He says the possibility of surprise is substantial.

Of course, here he was discussing notice pleading, without the accessory devices of pre-trial and discovery. But his observation is valuable for it points out the essential deficiencies of notice pleading per se and when they are compared with the difficulties of code pleading, and the discussion of their applicability in Louisiana, the superiority of the Louisiana system is quite apparent.

RETENTION OF LOUISIANA FACT PLEADING

In Louisiana we now have substantially the pre-trial and discovery and deposition procedures of the Federal Rules, and the Institute has adopted a projet in the revision of the Code of Practice which contains the motion for summary judgment, and provisions for amendment, including amendments to cause the pleadings to conform to the evidence (substantially Rule 15 of

110. Professor Simpson says the Scots have pleaded the "Theory of the Case" for some years; and that the practice prevails in France, Italy, Spain and Germany. Simpson, *A Possible Solution of the Pleading Problem*, 53 Harv. L. Rev. 169 (1939). On this subject see 2 Moore, *Federal Practice 1656 (Pleading Legal Theory of the Claim)* (2 ed. 1948); Commentary, "Pleading of 'Theory of Recovery'," 3 F.R. Serv. 8a,26; Millar, *Notabilia of American Civil Procedure*, 50 Harv. L. Rev. 1017 (1937); Millar, *Civil Procedure of the Trial Court in Historical Perspective* 195 (1952); Hubert, *Theory of a Case in Louisiana*, 24 Tulane L. Rev. 66 (1949). See Clark, *Code Pleading 259-264* (2 ed. 1947): "Necessity of a Theory of Pleadings"; and the ad hominem observation on p. 233 that "As pointed out later however, in discussing the necessity of a 'theory of the pleadings,' it should be borne in mind that the pleader's ultimate theory is that his client should have judgment in his favor, that these other are but subordinate theories to that end; and a shift in merely the subordinate theory when the main theory is known will perhaps rarely be an unfair surprise to the defendant."

111. Simpson, *A Possible Solution of the Pleading Problem*, 53 Harv. L. Rev. 169 (1939).

the Federal Rules). It may be considered then, that insofar as pleadings are concerned, Louisiana will have all of the provisions for liberality provided by the Federal Rules on pleading, except that Louisiana will retain its present law which requires the pleading of material facts.

The only area of difference then is the failure to adopt the notice system of pleading which is provided by Rule 8 of the Federal Rules.

The rationale of the arguments against our system of fact pleading is the problem of variance. The present jurisprudential rule in Louisiana (deficiencies in answers excepted), according to the commentary of Professor McMahon to Article 71 of the projet of the Code Revision, is substantially identical with the end results of that article. Article 71 of the projet provides:¹¹²

“When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised by the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to so amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby, and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense on the merits. The court may grant a continuance to enable the objecting party to meet such evidence.”

In the provisions of that article lie all the necessary refutation of the arguments against our system of fact pleading. The stalking-horse cases, typified by *Buckley v. Mandel Brothers*¹¹³ would never have been so decided under the regime of a sensible and benign rule such as Rule 15 of the Federal Rules, or Article

112. See Louisiana State Law Institute, *Preparatory Material*, p. 76. *Comments on Article 71*.

113. 333 Ill. 368, 164 N.E. 657 (1929), cited in 2 Moore, *Federal Practice* 1608 (2 ed. 1948).

71 approved by the Council of the Louisiana State Law Institute, or under present jurisprudential rules in Louisiana.¹¹⁴

Louisiana, therefore, has paid the Federal Rules the supreme compliment of adopting in their entirety the rules for the pre-trial conference, and discovery and deposition, with little change. The Council of the Institute is recommending the adoption of other devices designed to bring simplicity and flexibility to the rules of pleading—that is, all except the rule which establishes notice pleading in the federal courts, the adoption of which is the crux of this discussion.

Conformity between the federal and state courts in matters of pleading is highly desirable, but it is believed that the notice system of pleading is not practicable or desirable for the courts of Louisiana.

The Federal Rules were adopted in 1938, and have been in effect now for nearly 13 years. In that time the institution of pre-trial and deposition and discovery has been generally received with approval, except where operation under these provisions has been in a manner not contemplated by the Rules. But in this 13 year period, few states have adopted the system of notice pleading of the Federal Rules. Professor McMahon's paper against fact pleading mentions the case of Texas, where the attorneys say they plead in the federal courts just as they do in the state courts. Prominent firms from Ohio, which has code pleading, give similar information. So it is in Louisiana. It well may be that lawyers generally continue to plead facts in the federal courts just as they did before the Rules, because what constituted good craftsmanship before the Rules, remains so under the Rules, although they are designed to permit extreme generality.

Underlying the decision of the Council of the Institute is the philosophy that he who comes into court and sets in operation the majestic processes of the law against a defendant should be required to do something more than act on conjecture—he should bear the burden of pleading a cause of action, as we understand that phrase in Louisiana. Not only the defendant, but the court and the public are interested in the prevention of far-fetched or useless litigation. With discovery before trial to aid in obtaining necessary information before the institution of suit, if need be, there is every sound reason to make the require-

114. Louisiana State Law Institute, Code of Practice Preparatory Material. Pleading. Henry G. McMahon, Report, March 7 and 8, 1952.

ment such that the lawyer will be brought to the realization of the advantages of studying and analyzing his case before he brings it.

In Louisiana, judges and lawyers by the score, who have been questioned on the subject, report no dissatisfaction with the present rules of pleading requiring the pleading of material facts, which, as has been discussed in this expose, has been with us ever since the Practice Act of 1805. Our system of pleading has given general satisfaction and the adoption of pre-trial and discovery statute is not evidence of dissatisfaction, but merely of the desire of the legal profession in Louisiana to improve the system of pleading and practice, where benefit is to be derived from additions thereto. Discovery is not new in Louisiana. The Practice Act of 1805 contained provisions for interrogatories for discovery which were maintained in the Code of Practice until the adoption of the Discovery Act of 1952.

The decision on this particular point of pleading has been in the interest of that which is believed to be sound law and good pleading. It will retain standards of good craftsmanship which have prevailed in the past, and rules which, with the accessory and supplementary provisions for pre-trial and discovery, should insure that there be a just, speedy, inexpensive and final determination of all litigation.

An old gentleman in one of the agricultural parishes in Louisiana gave a rural church a deed to some land with this habendum: "To have and to hold so long as this property shall be used to combat the damnable teachings of modernism." This expose has not been written in that spirit, for by modern standards of pleading in our sister states, Louisiana was modern one hundred and fifty years ago.

The Louisiana State Law Institute has a broad rule which guides its consideration of problems of law reform and law revision; it does not hesitate to recommend change where change is needed, but it will not recommend change just for the sake of change. Such has been its guide here, and such is the case for the retention of Louisiana fact pleading.

All of which is respectfully submitted.

POSTSCRIPTUM

Since the above was written the February 1953 advance sheets of Federal Rules Decisions has been published, containing

a discussion of "Claim or Cause of Action," to give background to the recommendation of the Judicial Conference of the Judges of the Ninth Circuit on September 11, 1952, recommending that Rule 8 (a) (2) of the Federal Rules be amended so as to read substantially as follows: "(2) a short and plain statement of the claim showing that the pleader is entitled to relief, which statement shall contain the facts constituting a cause of action."

The report of the discussion contains the Report to the Board of Governors of the State Bar of California of its Committee on Federal Practice making the same recommendation. This committee report says that "no one knew of instances of denial of justice under the State of California requirement that a plaintiff state a cause of action, while in contrast, the committee was aware of repeated instances of harrassment of defendants who have been compelled to defend cases where the complaint when drawn out at considerable trouble and expense, demonstrated that the complainant did not have, never did have, nor could have a cause of action entitling him to relief."

The report of a Committee of the Los Angeles Bar Association, appearing as part of the discussion, made the same recommendation. This report contains an expression of the views of Judge Arthur T. Vanderbilt, Chief Justice of the New Jersey Supreme Court, to the same effect, and quotes him as follows:

"Some of our 'occasional thinkers' have thought me ultra-conservative in insisting that a complaint should state, however inartistically, the essentials of a cause of action."

It is significant that this leader at the very forefront of the movement for the improvement of the judicial administration in the United States, Chief Justice of a court with unlimited and unrestricted rule-making power, and his court, have not adopted the notice pleading of the Federal Rules.

The views of judges and lawyers of a distant sister state which are identical with the decision of the Council of the Institute, lend great support to the a priori argument made in this expose des motifs.

JHTjr

BIBLIOGRAPHICAL NOTE

CONCERNING THE HISTORY OF LOUISIANA LAW OF CIVIL PROCEDURE

- Dart: *Civil Procedure in Louisiana Under the Spanish Regime*, 12 *La. Historical Q.* 22 (1939)
Dart: *The Colonial Legal Systems of Arkansas, Louisiana and Texas*, 12 *A.B.A.J.* 481 (1926)

- Dart: Courts and Law in Colonial Louisiana, 22 La. Bar A. Rep. 7 (1921)
- Dart: The History of the Supreme Court of Louisiana, 133 La. xxx (1913)
- Dart: The Influence of the Ancient Law of Spain in the Jurisprudence of Louisiana
- Dart: The Louisiana Judicial System, 1 La. Digest (1937)
- Dart: The Place of Civil Law in Louisiana, 6 Tulane L. Rev. 163 (1930)
- Dart: The Sources of the Civil Code of Louisiana, 3 La. Bar A. Rep. 21-76 1922 (contains a splendid bibliography)
- Gayarre: History of Louisiana (1846)
- Groner: Louisiana Law, Its Development in the First Quarter of American Rule, 8 LOUISIANA LAW REVIEW 350 (1948)
- Howe: Law in the Louisiana Purchase, 14 Yale L.J. 77 (1904)
- Martin: History of Louisiana (1882)
- Schmidt: Civil Law of Spain and Mexico (1851)
- Sherman: Roman Law in the Modern World (1917)
- Tucker: Source Books of Louisiana Law, 7 Tulane L. Rev. 82 (1932)
- Wenger: The Roman Law of Civil Procedure, 5 Tulane L. Rev. 353 (1931) (contains an interesting description of the proceedings culminating in *contestatio litis*, a term frequently used in Louisiana not so many years ago)
- Wigmore: Louisiana: The Story of Its Legal System, 1 So. L.Q. 1 (1916)

For obvious reasons this list is far from inclusive. Enough sources have been indicated to guide the inquisitive reader to some of the principal writings concerning Louisiana Legal History to which access is not too difficult.

CONCERNING LOUISIANA LAW AND THE FEDERAL RULES

- Barrett: Issues of Fact and the Federal Rules, 13 Tulane L. Rev. 105 (1938)
- Deutsch: Jury Trials under the Federal Rules and Louisiana Practice, 3 LOUISIANA LAW REVIEW 422 (1941)
- Flory and McMahon: The New Federal Rules and Louisiana Practice, 1 LOUISIANA LAW REVIEW 45 (1938)
- Miller: The Federal Rules of Civil Procedure, 13 Tulane L. Rev. 99 (1938)

This bibliographical note would not be complete without referring to the fact that there have been hundreds of cases interpreting the Federal Rules since their adoption. Shepard's Federal Reporter Citations, Volume 2, 1938-1953, contains 25 columns of citations to Rule 8 alone. The Federal Rules Decisions, now on its 13th volume, contains decisions involving procedural questions, with commentaries on procedural subjects separately included. The Federal Rules Service, now in its 18th volume, arranges these rules cases according to the particular rule involved, and in addition contains comments written expressly for the service, and the republication of law review articles.

In addition to Moore's definitive work on Federal Practice, cited frequently in this expose des motifs, Cyclopaedia of Federal Procedure (Callaghan), and Federal Practice and Procedure (Rules edition) by Barron and Holtzoff, assisted by West's Federal Digest, are valuable and encyclopedic texts which will aid the weary traveler through this "morass" of decisions interpreting the Federal Rules. In addition, there have been scores of law review articles, commenting on the Federal Rules.

In this defense of Louisiana fact pleading, it has been necessary to consult many of these sources, and some are referred to in the notes. No other listing is required, and this bibliographic note is made in reminiscence of the application for rehearing made to the Supreme Court of Louisiana by a fine lawyer from North Louisiana, wherein he said he did not expect the court to grant him a rehearing but that he earnestly prayed that the court would add a "per curiam" to the opinion, mentioning a particular case, because he would not want posterity to think he had failed to call the case to the court's attention.