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IN an often-quoted report of a committee of the American Bar Association, Roscoe Pound stated: "Pleadings have four purposes: (1) The first is to serve as a formal basis for the judgment. This is the oldest function, and one that goes back before the time of rational, as distinguished from purely mechanical trial of issues. . . . (2) Another is to separate issues of fact from questions of law. . . . (3) Another is to give litigants the advantage of a plea of *res judicata* if molested again for the same cause. . . . (4) Finally, pleadings exist to notify parties of the claims, defenses and cross-demands of their adversaries. . . . The notice-function of pleading is the one that should be emphasized. The function of serving as a formal basis for the judgment should be abandoned, and the other functions will be performed at least as well as now if the notice-function is thoroughly developed and consistently adhered to."[1] A brief history of each of these functions will serve as an outline of the history and theory of pleading in Anglo-American law.

I

FUNCTIONS OF PLEADING

1. *Pleadings as basis for judgment*

a. *Actions at law*

Coke saw great significance in the "ancient words of judgments [consideratum est &c.] . . . because that judgment is ever given by the court upon due consideration had of the record before them."[2] Blackstone defined a judgment as "the sentence of the law, pronounced by

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[1] 35 A.B.A. REP. 614, 638 (1910).

[2] FIRST INSTITUTE, Book III, c. 10 (Vol. 3, p. 505, 1818).

the court upon matter contained in the record."[3] Stephen pointed out that "nothing will be error of law that does not appear *on the face of the record;* for matters not so appearing are not supposed to have entered into the consideration of the judges."[4] The principle involved in these statements, namely, that a court must base its judgment on matters appearing on the face of the judgment record, has been characterized by Holdsworth as "a very fundamental principle of the common law, which had important effects upon the principles of pleading."[5] To observe these effects it is necessary to examine historically the relationship which existed, and still exists, between pleadings and the record.

Before 1400 (and for a long time thereafter) pleadings were oral.[6] They were spoken in the presence of the court as a part of the trial. If either party called for a judgment during the course of the pleadings, those spoken up to that point were entered on the court's record or roll.[7] Judgment was then rendered on the record thus made.

In the early 1400's a practice grew up of entering pleadings directly on the record out of the presence of the court.[8] If either party called for a judgment during the course of the pleadings, the roll was brought into court to serve as a basis for the judgment.

In the late 1400's a note or memorandum of a pleading could be left with the prothonotary or clerk who would prepare a draft of a proper entry.[9] The actual entry might not be made until after the case was closed. The practice of delaying entry was disapproved by the judges who thought it desirable to enter up the record day by day as the case proceeded.[10]

In the 1500's and 1600's written drafts of pleading entries gradually took the place of oral pleadings.[11] The filing of a written pleading became the legal equivalent of speaking a pleading in open court. If a party called for a judgment during the course of the pleadings, those filed up to that point were copied onto the judgment roll. Judgment was then based on this judgment record.

Writing in the 1820's, Stephen observed that the practice of copying

[3] 3 BLACKST. COMM., Wendell ed., 395 (1854).
[4] STEPHEN ON PLEADING, Tyler ed., 144 (1924).
[5] 9 HOLDSWORTH, A HISTORY OF ENGLISH LAW 278 (1927).
[6] STEPHEN ON PLEADING, Tyler ed., 59 (1924); 3 HOLDSWORTH, id. 627.
[7] STEPHEN, id. 60; HOLDSWORTH, id. 643.
[8] STEPHEN, id. 63; HOLDSWORTH, id. 643.
[9] HOLDSWORTH, id. 644.
[10] HOLDSWORTH, id. 645. Also see HASTINGS, THE COURT OF COMMON PLEAS IN FIFTEENTH CENTURY ENGLAND, c. 13 (1947).
[11] HOLDSWORTH, id. 648. Some of the earliest collections of pleading precedents were known as books of "Entries."

the pleadings onto the roll was, at that time, usually neglected.[12] The filed pleadings were copied into a demurrer-book or into an issue-book. Only the beginning of a record—an incipitur—was entered on the roll. Statutes today commonly provide that pleadings and other specified papers on file shall constitute the judgment roll.[13]

(1) *Judgment by default*

In the actions known as "real" actions judgment could be entered for the "demandant" (plaintiff) in the absence of the "tenant" (defendant).[14] In the "personal" actions no judgment was possible without an appearance by the defendant. If, however, the defendant appeared and then failed to plead, judgment by default for saying nothing (*nil dicit*) could be rendered against him.[15] If his attorney was not informed of any defense he might have, a similar judgment (*non sum informatus*) might be entered.[16] An act of Parliament passed in 1725 authorized the plaintiff to enter the defendant's appearance in certain cases.[17] Having entered the appearance, the plaintiff could "declare" (state his claim) and then, for want of a "plea" (answer), could ask for a judgment by *nil dicit*.[18] The appearance requirement was finally abolished in 1852.[19] In colonial America the practice of entering judgment by default for want of appearance was established as early as the 1600's.[20] In New Jersey, for instance, a copy of the declaration was served with notice of suit.[21] If the defendant failed to appear and plead within the time allowed, judgment could be entered by default. Present-day practice is similar to that established in New Jersey in 1686.

Before rendering a judgment against a defendant by default the court should know: (1) That the plaintiff's claim is sufficient in law. (2) That the factual elements of the plaintiff's claim are true.

[12] STEPHEN ON PLEADING, Tyler ed., 111 (1924).

[13] See 49 C.J.S., pp. 256, 260. For a recent case see State ex rel. Commissioners of Land Office v. Whitfield, (Okla. 1948) 193 P. (2d) 306.

[14] BOOTH, REAL ACTIONS, Am. ed., c. 6 ("Of Default before Appearance"), 18 (1808).

[15] STEPHEN ON PLEADING, Tyler ed., 136 (1924).

[16] Id. 136.

[17] 12 Geo. 1, c. 29, § 1.

[18] BOOTE, ACTION OR SUIT AT LAW 135-6 (1823).

[19] Common Law Practice Act, § 26 (1852), 15 & 16 Vict., c. 76.

[20] See Hutchinson v. Manchester Street Railway, 73 N.H. 271, 60 A. 1011 (1905).

[21] See EDSALL, JOURNAL OF THE COURTS OF COMMON RIGHT AND CHANCERY OF EAST NEW JERSEY 1683-1702, pp. 45-7 (1937).

(1) In the "real" actions a demandant might obtain a judgment by default without declaring, if the original writ contained a detailed statement of the demandant's claim.[22] If the writ was general, the necessary details must be pleaded.[23] In the "personal" actions a declaration was always necessary.[24] In the early practice a declaration was a repetition of the statement of claim set forth in the original (jurisdictional) writ plus certain details.[25] Later, the declaration was the only statement of the plaintiff's claim. If the declaration failed to state the substantive elements of a recognized claim, it was insufficient in law. As the plaintiff in declaring was supposed to be repeating a statement of claim contained in a supposed writ, failure to state all the elements of a recognized claim, or a statement of the elements of a supposed, but unrecognized, claim, was a substantial defect comparable to want of jurisdiction to consider the claim. Some courts today take the position that a default judgment based on a substantially bad statement of claim is void for want of jurisdiction.[26] Most courts hold that such a judgment is erroneous and reversible on appeal, but not void.[27]

(2) In the early practice there was no clear distinction between allegation and proof. A pleader was expected to speak the truth.[28] In stating the details of the plaintiff's claim, the plaintiff or his attorney commonly stated facts which tended to show the truth of the claim.[29] If the defendant denied the truth, the issue of fact was tried by a jury or otherwise. If the defendant defaulted, the court had, in the plaintiff's statements, a rational basis for believing that the factual elements of the claim were true. When the defendant or his attorney was in court, an inference of truth could be drawn from the defendant's failure to deny or from the fact his attorney was not informed of any defense the defendant might have. With the change-over from oral to written pleadings came a clear-cut distinction between allegations and proof. Statements of fact made in a pleading were mere allegations, and, without more, the court had no basis for believing them true. If the defendant defaulted, the only rational basis for believing that the plaintiff's claim was factually true was the inference of truth drawn

[22] BOOTH, REAL ACTIONS, Am. ed., 21, 228 (1808).

[23] Ibid.

[24] There was no default for failure to appear; only for failure to plead to the plaintiff's declaration.

[25] 3 BLACKST. COMM., Wendell ed., 293 (1854).

[26] See Roberts v. Seaboard Surety Co., 158 Fla. 686, 29 S. (2d) 743 (1947).

[27] See 49 C.J.S. 338.

[28] 2 HOLDSWORTH, A HISTORY OF ENGLISH LAW 105-6 (1927), 3 id. 648-9.

[29] 3 HOLDSWORTH, id. 635-8.

from the defendant's failure to appear or plead. The "right" was known "by implication and judgment of law."[30] When the plaintiff asked for damages which could not be determined mathematically from facts appearing on the face of the record, a writ of inquiry was issued.[31] Under present-day statutes the hearing in damages is before the judge, who determines the amount. If it appears to the judge that the "facts" admitted by the defendant's default are, in reality, not true, he must still render judgment for the plaintiff. Except as to the amount of the damage, the judgment must be based on the pleadings contained in the judgment record.

If, after the defendant appeared, the plaintiff failed to declare, or if he failed to take any later step in the action, judgment of *non pros.* was entered against him.[32] This was not a bar to another action. Failure of the plaintiff to plead was never an admission, but merely a discontinuance of his action.

(2) *Judgment on demurrer*

Whenever a party thought his opponent's pleading was insufficient in law he could pause (demur) and demand judgment on the pleadings. If the opponent insisted that his pleading was sufficient he joined in the demurrer. The pleadings up to that point were entered on the record (or copied into a demurrer book) and judgment rendered on the record. Stephen observed "that on demurrer the court will consider the whole record, and give judgment for the party who, on the whole, appears to be entitled to it."[33]

Demurrer to declaration. When a declaration was spoken the defendant might demur or plead. If he chose to demur, the plaintiff was given an opportunity to amend his statement before it was entered on the record. Failure to amend was evidence of inability to amend. If the defendant persisted in his demurrer and the plaintiff joined, the issue thus formed was entered. The court's judgment on this issue ended the case. When for the plaintiff, the judgment was similar to that rendered when the defendant defaulted. It was thought that the defendant's election to demur was an admission that he had "no ground for denial or traverse."[34] The facts alleged by the plaintiff were taken

[30] BOOTH, REAL ACTIONS, Am. ed., 73 (1808).

[31] The writ was directed to the sheriff commanding him by twelve men to inquire into the damages and make return to the court.

[32] STEPHEN ON PLEADING, Tyler ed., 136 (1924).

[33] Id. 160.

[34] Id. 160.

as true, and judgment rendered accordingly. When the amount of any damages claimed could not be determined from the record, a hearing in damages was necessary. A judgment for the plaintiff was a final judgment on the merits. The same was true of a judgment for the defendant. The plaintiff took nothing by his action, the defendant recovering his costs. Demurrers to written pleadings differed only in form from those formerly spoken. If the pleading demurred to had already been entered on the record, an amendment of the record was permitted to meet the objection. In present-day practice an amendment is allowed after a demurrer has been sustained. A plaintiff who fails to amend may be barred from maintaining a later action on his claim.

Demurrer to defense in bar. A demurrer to a plea in bar called for a judgment on the pleadings spoken or filed up to that time. The declaration was examined first. If it was found to be defective in substance, judgment for the defendant was entered immediately, unless the missing fact was supplied by the plea. Defects of form were not considered, having been waived by the defendant's failure to demur. If the declaration was found to be legally sufficient in substance, the court then considered the legal sufficiency of the plea. A plea which was defective in substance or in form was no answer to the declaration. A judgment against the defendant on the demurrer was a final judgment on the merits. A judgment against the plaintiff was also a final judgment on the merits. By demurring to the plea, instead of replying to it, the plaintiff admitted its truth. The plea being legally sufficient and factually true, judgment for the defendant necessarily followed.

Demurrer to defense in abatement. A plea in abatement stated some ground for abating or quashing the original writ. A demurrer to such a plea did not pray for judgment on the merits, but that the defendant be required to plead further to the plaintiff's declaration. By demurring, the plaintiff admitted the truth of the plea. If the court sustained the demurrer, it adjudged that the defendant plead again. If it overruled the demurrer, it ended the case by quashing the plaintiff's writ. Since the plea was directed to an actual or supposed original writ, and did not purport to answer the merits of the declaration, the court did not consider the sufficiency of the declaration in rendering judgment on the demurrer.

Demurrer to replication. A demurrer to a replication to a plea in abatement prayed for a judgment quashing the plaintiff's writ. A demurrer to a replication to a plea in bar prayed for a judgment on the merits. In the case of a legally sufficient plea in abatement and a defective replication, judgment on demurrer was for the defendant that

the writ be quashed. The plea being good and its truth admitted, judgment for the defendant was the logical result. Judgment for the plaintiff followed with like logic when the demurrer was overruled. The replication being good and its truth admitted, the defendant was required to plead to the declaration. In the case of a demurrer to a replication to a plea in bar, the first step was to examine the declaration. If it and the plea were substantially good, the legal sufficiency of the replication was then considered. When found insufficient, judgment went to the defendant on the merits. When found sufficient, a like judgment was rendered for the plaintiff.

Demurrer to later pleadings. In the common-law scheme of procedure pleadings were spoken or filed until an issue, either of law or of fact, was reached. After the replication there might be a rejoinder, a surrejoinder, a rebutter, a surrebutter, and any further pleading which might be necessary. In the case of a demurrer to any of these later pleadings, the court examined the earlier pleadings and rendered judgment for the appropriate party in the same manner as on demurrer to a replication.

Demurrer searching the record. It is commonly said a demurrer will "open" or "search" the record back to the pleading containing the first defect of substance.[35] Illustrations of the operation of this principle in cases having but one line of pleading, appear in the preceding paragraphs. Where claims were joined in one declaration and a separate defense pleaded to each, or where, after 1705, several defenses were pleaded to one claim, there were as many lines of pleadings as there were defenses.[36] One line might terminate in an issue of law; another, in an issue of fact. In a case having more than one line of pleading, the demurrer "searched" only the line which it terminated. Judgment on such a demurrer would determine the rights of the parties with respect to the one claim or defense without determining the entire case.

(3) *Judgment on verdict or findings*

When a line of pleading was terminated by a denial (traverse) the issue of fact thus formed was, ordinarily, tried by jury. The verdict of the jury might be general or special. Where general, it merely found for the plaintiff or for the defendant. Where special, it stated the facts found to be true. The verdict was always entered on, or deemed a part of, the judgment record.

[35] CLARK, CODE PLEADING, 2d ed., 524 (1947).

[36] See discussion of "multiple issues" in Blume, "The Scope of a Civil Action," 42 MICH. L. REV. 257 at 275-6 (1943).

Issues formed by pleas. When all facts alleged in the declaration were denied by the defendant, a general verdict for the plaintiff was taken to mean that all the facts stated in the declaration were true, or, at least, probably true. A general verdict for the defendant was taken to mean that at least one of the facts had not been proved. If the declaration was sufficient in law and all the facts stated therein were true, or deemed true, judgment for the plaintiff necessarily followed. If one of the necessary facts was deemed not proved, the only course was to enter judgment for the defendant. When some, but not all, of the facts alleged in the declaration were denied, those not denied were deemed admitted by the defendant's failure to deny. The verdict then disposed of the facts denied. In this type of case the judgment was based partly on the pleadings and partly on the verdict. If the defendant made no denials, but set up new facts in avoidance of the plaintiff's claim, all facts alleged in the declaration were assumed to be true.[37]

Issues formed by replications. When a defendant pleaded new facts in avoidance of the plaintiff's claim, the plaintiff, by means of a replication might deny one of these facts or set up new facts in avoidance. If he denied one of the facts, the others were admitted. If he set up new facts in avoidance, he admitted all the facts which constituted the defendant's defense. In the case of a denial, judgment was based on the pleadings and on a verdict settling the issue raised by the denial.

Issues formed by later pleadings. A rejoinder was made only when the replication was affirmative; a surrejoinder only when the rejoinder was affirmative, and so on. When a traverse was pleaded the line of pleadings came to an end. As all pleadings prior to the traverse were affirmative, all facts well pleaded in all the pleadings, except the fact traversed, were assumed to be true. Upon the entry of a verdict finding the truth or falsity of the fact traversed, the court was able to enter a judgment ending the case.

A judgment rendered on a verdict did not differ in theory from a judgment rendered by default, or on demurrer to a pleading. In every case the judgment was based on the record. In no case did the court

[37] The only basis for this assumption was the defendant's choice. If he could have denied the facts, presumably he would have done so instead of offering an affirmative defense. For a recent illustration see Nantahala Power & Light Co. v. Sloan, 227 N.C. 151 at 153, 41 S.E. (2d) 361 (1947): "Here the existence and the extent of the original easement are alleged in the petition and not denied in the answer. Therefore, the respondent admitted the existence and extent of the petitioner's easement prior to raising its dam one vertical foot. Such admission is as binding on the parties as if found by the jury, and 'evidence offered in relation thereto is irrelevant.' "

(judges) undertake to determine from evidence the truth of the "facts" alleged as the factual basis of a claim or defense. The facts were either admitted at the pleading stage by failure to deny, or found by a jury whose verdict was entered on the record. In the early centuries the judges might or might not know the evidence on which a jury based its verdict. Facts were decided from evidence already known to the jurors or obtained by them out of court. Later, however, the judges did know the evidence on which the jurors acted, as it was presented in open court. The judges might know from the evidence that a fact found by a jury was probably untrue, yet were required to base their judgment on the verdict, unless, of course, the verdict was set aside on motion for new trial. After the middle of the 1600's the judges could set a verdict aside as against the weight of the evidence, but could not render judgment until another verdict took its place.

The present-day practice of waiving a jury and having the judge decide issues of fact was unknown to the English common-law courts prior to the middle of the 1800's. In America the development came much earlier. In Connecticut, for instance, a statute found in the Revision of 1673 made it a "liberty of Plaintiff and Defendant, by mutual consent, to chuse whether they will be tried by the Bench or Jury."[38] With this development came a new problem. Is the judgment in a jury-waived case based only on the record? Or on the record *and* evidence? The solution has been to require the judge to make either general or special findings of fact and enter them on the record. In making these findings he performs the functions of a jury.[39] After the findings are entered on the record, he resumes his role of judge and renders a judgment based on the record.

(4) *Motion for judgment on the pleadings*

The right to demur was lost by speaking or filing a responsive pleading. In present-day practice either party may, after the pleadings are closed, move for judgment on the pleadings.[40] When such a motion is made the court searches the record for the first pleading which is defective in substance. Finding such a pleading, the court renders judgment against the pleader in the same way common-law courts rendered judgment when a demurrer was interposed.

[38] Conn. Revision of 1673, title "Tryals," p. 67. Cf. 2 SWIFT'S SYSTEM 229, 230 (1796).

[39] See Fowler v. Towle, 49 N.H. 507 (1870).

[40] CLARK, CODE PLEADING, 2d ed., 554 (1947).

(5) *Motion in arrest or for judgment n.o.v.*

After a verdict was entered in the issue book and returned to the central court, there was a four-day period prior to judgment in which the losing party could move in arrest of judgment or for judgment *non obstante veredicto*. In the case of a general verdict for the plaintiff, judgment was entered for the plaintiff unless (1) his declaration failed to state all the elements of a legally sufficient claim or (2) some later pleading confessed, and failed to avoid, facts constituting a good defense. In the case of a general verdict for the defendant, judgment was entered for the defendant unless his pleadings, after admitting the factual elements of the plaintiff's claim, failed to allege new facts sufficient to avoid the effect of the admission. In the one case judgment was arrested, leaving the plaintiff free to sue again. In the other case, a final judgment on the merits was rendered for the plaintiff notwithstanding the verdict for the defendant.

Royal commissioners appointed in 1850 to inquire into *The Process, Practice, and System of Pleading* in the English courts of common law, in their *First Report*, 1851, stated:

> "According to the general principle of pleading, every person suing another, or defending himself, must state a legal cause of action or ground of defence. It is obvious that in every system of jurisprudence the adversary must be entitled to question two things; the truth of the statement in point of fact, and its sufficiency in point of law. No man should be bound to admit the legal sufficiency of a claim, or its truth, when he contends that neither exists. By the English law he can now deny both, but under this disadvantage, that he cannot as a right first take the opinion of the Court as to the sufficiency of the claim or defence in point of law, and then contest the facts. If he demurs, he cannot insist as of right upon the truth of the facts being tried, if the judgment on the law be against him; but a party may of right deny the truth of his adversary's statement, and should its truth be established he may by motion in arrest of judgment, or for judgment non obstante veredicto, or by writ of error, question its legal sufficiency as a claim or defence. Upon this general statement such a right seems reasonable and proper; but there is no doubt that mischievous consequences follow from it. For instance, through inadvertence a party omits a material averment in a declaration, as, e.g., in an action against the drawer of a bill of exchange the averment of the notice of dishonour. The defendant observes the omission, but keeps his objection secret, and pleads over, as it is called, traversing the other averments of the declaration. The

cause is tried, and a verdict found for the plaintiff, and the defendant then takes his objection by motion in arrest of judgment. The objection when taken at that stage is fatal, because no amendment is allowed after trial; whereas if the defect had been pointed out at an earlier period, the omitted fact, if capable of proof, might have been supplied by amendment, and if it were not capable of proof the costs of the trial might have been saved. . . .

"We consider it would be improper to abolish entirely the motions in arrest of judgment, and for judgment non obstante veredicto. One reason for retaining them is, that it is a fundamental principle of the law, and we think a sound one, that the statement of facts on the record should show a good cause of action or a good ground of defence."[41]

In present-day practice a defective pleading may be amended after verdict to conform to proof which has come in without objection. In this way the results of the trial can be saved. By correcting the defective record, a judgment in accord with the verdict can be entered.

(6) *Writ of error*

Error of the trial court in rendering judgment could be raised in the appellate court by a general assignment of error to the effect that it appears "by the record" that judgment was given for *A* against *B*, "whereas by the law of the land" it ought to have been given for *B* against *A*.[42] If, upon examination of a transcript of the judgment record, this was found to be true, the judgment was reversed. A judgment might be reversed because of a substantial defect in the record never called to the attention of the trial court. In explanation of this practice Stephen wrote:

"The most frequent case of error is when, upon the face of the record, the judges appear to have committed a mistake *in law*. This may be by having *wrongly decided an issue in law* brought before them by demurrer, but it may happen in other ways. As formerly stated, the judgment will in general follow success in the issue. It is, however, a principle necessary to be understood, in order to have a right apprehension of the nature of writs of error, that the judges are, in contemplation of law, bound, before in any case they give judgment, *to examine the whole record*, and then to adjudge either for the plaintiff or the defendant,

[41] FIRST REPORT OF THE COMMISSIONERS TO INQUIRE INTO THE PROCESS, PRACTICE, AND SYSTEM OF PLEADING 51 (1851).

[42] BURRILL'S APPENDIX, 2d ed., 410-11 (1846).

according to the legal right as it may on the whole appear, notwithstanding, or without regard to, the issue in law or fact that may have been raised and decided between the parties."[43]

When it appeared from the record that judgment had been entered for the wrong party, the judgment was erroneous on its face. No objection or exception was necessary. The error was never waived.

b. *Suits in Chancery*

From the beginning of the history of the English Court of Chancery the complainant's complaint was made in writing.[44] It was filed, but not entered on a roll. Prior to about 1450 the defendant's answer was oral, and not recorded.[45] In some cases the substance of the answer was recited in the decree.[46] After 1450 all the pleadings were in writing.[47] They were engrossed on parchment, and constituted a part of the permanent records of the court. Decrees, which were entered on a parchment roll, commonly recited the pleadings and other proceedings, but not the evidence, in the case. The evidence was in writing, but was not a part of the formal record.[48]

(1) *Decree pro confesso.* A decree pro confesso against a person who had not appeared was not possible prior to 1732.[49] Where, after appearance, a defendant failed to answer, a decree pro confesso was possible, but only after attachment, attachment with proclamations, commission of rebellion, sergeant-at-arms, and sequestration failed to bring him before the court.[50] An act of Parliament passed in 1732 authorized decrees pro confesso against absconding persons and those who refused to appear after being brought into court by habeas corpus.[51] When a bill was to be taken pro confesso, the complainant's court clerk

[43] STEPHEN ON PLEADING, Tyler ed., 143-4 (1924). In Newman v. Perrill, 73 Ind. 153 at 156 (1880), the court said: "It is the duty of the court not to permit a judgment to be entered upon a complaint which is so clearly insufficient as to afford the judgment no foundation."

[44] ENGELMANN, HISTORY OF CONTINENTAL CIVIL PROCEDURE, trans. and ed. by Millar, Prolegomena, p. 60 (1927). Cf. Baildon, "Introduction to Select Cases in Chancery 1364-1471," 10 SELDEN SOCIETY xxiv (1896).

[45] Baildon, id. at xxvii.

[46] Ibid.

[47] Ibid.

[48] ENGELMANN, HISTORY OF CONTINENTAL CIVIL PROCEDURE, trans. and ed. by Millar, 61.

[49] 1 DANIELL, CHANCERY PRACTICE, *p. 680 (1845).

[50] Id., *p. 681.

[51] 5 Geo. 2, c. 25.

was required to attend "with the record of the bill."[52] If "upon reading the record, and taking it to be true" the complainant appeared to have "any equity," the court would decree for the complainant in accordance with the bill.[53] Where an account was directed, items stated in the bill were not taken as true, but must be proved.[54] According to Chancellor Sanford of New York, allegations which are direct and positive should be taken by the master as true; those which are uncertain, and any necessary details, must be proved.[55] To the extent the decree was based on facts taken as true, the decree pro confesso was a judgment based on the record.

(2) *Decree on demurrer to bill.* The principal pleadings of chancery practice were the complainant's bill of complaint and the defendant's answer. In some situations the defendant might file a plea instead of an answer. Special replications and later pleadings, used at one time, fell into disuse when the complainant's bill began to anticipate defenses.[56] After this change, a formal replication was used to bring the case to issue.[57] The only demurrer used was to the complainant's bill.[58] When the complainant thought the answer admitted his claim he could have the case set for hearing on bill and answer. If the court agreed with him, the bill was taken as confessed.[59] In demurring to the bill the defendant always protested that he was not confessing any of the facts alleged in the bill. In spite of this protestation, the facts were admitted,[60] at least for the purposes of argument.[61] If the demurrer was sustained, and the bill was not amended, the defendant could have the bill dismissed for want of prosecution.[62] If the demurrer was overruled, the defendant was required to answer.[63] If he did not do so, the bill was taken as confessed.

[52] 1 DANIELL, CHANCERY PRACTICE, *p. 695 (1845).
[53] Ibid.
[54] Dominicetti v. Latti, Dick. 588, 21 Eng. Rep. 400 (1781).
[55] Williams v. Corwin, 1 Hopkins Ch. (N.Y.) 471 (1824).
[56] STORY, EQUITY PLEADING, § 678 (1838); LANGDELL, EQUITY PLEADING 54 (1877). According to Langdell the practice of carrying the pleadings further than the answer "seems to have gone out of use before the close of the seventeenth century." (P. 54, note 1.)
[57] STORY, id., § 878; LANGDELL, id. 55.
[58] LANGDELL, id. 58.
[59] LANGDELL, id. 50.
[60] STORY, EQUITY PLEADING § 452 (1838).
[61] LANGDELL, id. 60.
[62] Ibid.
[63] Ibid.

(3) *Decree on hearing of evidence.* Facts not taken as confessed had to be proved to the satisfaction of the court. The practice of having a jury find the facts and then basing a judgment on the record, was not followed. The verdict of a jury might be taken, but it was merely advisory. According to the usual practice of the English court, witnesses were examined out of the presence of the court. Daniell observed:

> "It is to be noticed that an examination by the examiner is frequently termed an *'examination in court,'* because, anciently, the examination was before a judge of the Court. This judge was generally the Master of the Rolls, who, as the business of the Court increased, left the examination of witnesses to his clerks; so that the examination before the judge gradually fell into desuetude, and the practice arose of examining all witnesses, within a certain distance from town, before the examiners, who having been originally the deputies of the judge, the examination before them still continued to be treated as an examination in Court."[64]

It should be noted, however, that the evidence obtained was not considered by the court until offered, admitted, and read at the hearing of the case. In colonial America there was a return to the early practice of examining witnesses in the presence of the court. This is the present day practice, except where there has been a reference to a master. In the latter case the master, after hearing the evidence, makes findings which are reported to the court. Like the verdict of a jury in a chancery case, the report of a master is merely advisory. The judge may accept it and act upon it, or he may disregard it in whole or in part, according to his own judgment as to the weight of the evidence.[65]

(4) *Record on Appeal.* In an action at law the evidence considered by the jury was never a part of the formal judgment record. It was included in the appellate record on writ of error only when necessary to explain some ruling of the judge. On chancery appeal all the evidence, including any that might have been excluded, was sent to the appellate court. The reason for this difference is obvious. In the court of law judgment was based on the record, and not on the evidence. In the court of chancery the decree was based on the evidence, unless, of course, it was based on facts which had been confessed. On writ of error the appellate court searches the record for errors of the judge. On chancery appeal the appellate court re-examines the evidence to see if justice has been done.

[64] 2 DANIELL, CHANCERY PRACTICE, *p. 474 (1845).

[65] Kimberly v. Arms, 129 U.S. 512 at 523, 10 S.Ct. 1064 (1888).

2. *Pleadings as means of forming issues*[66]

According to Stephen, the formation of *"an issue"* was the "main object" of common-law pleading, and was peculiar to that system.[67] Holdsworth has stated that "the settlement by the debate of the parties in court of the issue to be tried" was "the fundamental peculiarity of the English system of pleading."[68]

Except in two situations, noted below, the rules of common-law pleading required that every action be reduced to one issue of law or of fact. A single issue of fact was enforced by the rules which prohibited "duplicity." To any one claim the defendant was allowed only one defense.[69] If this defense was a denial of the truth of one of the matters alleged by the plaintiff, the only issue raised by the pleadings was the single question of fact. If, instead of denying, the defendant pleaded an affirmative defense, the plaintiff was required to reply. Under the rules against duplicity a reply was limited to one denial or one new matter of avoidance.[70] If new matter was set up in the replication calling for a rejoinder, the rejoinder was limited to one denial or one new matter of avoidance, and so on until issue was reached. The fact that no pleading could be double meant that only one line of pleading was formed.

Instead of denying the truth of some matter alleged by the opposite party or setting up new matter in avoidance, a party could assert that his opponent's claim, defense, reply, or other pleading was "insufficient in law," thus raising an issue of law. He could not, however, raise an issue of fact and an issue of law at the same time with respect to the same matter.[71] If an issue of law was raised at any stage, the entire action was submitted to the court on this single issue. The scheme contemplated a single line of pleading terminated either by an issue of fact or by an issue of law.

One exceptional situation was presented when a plaintiff joined two or more claims in one action. In this situation the defendant was allowed to plead a separate defense to each claim.[72] This meant that, instead of only one line of pleading, there might be as many lines as there were claims, and, as each line terminated in an issue of law or of fact, as many issues as there were lines.

[66] Most of this section is reprinted from Blume, "The Scope of a Civil Action," 42 MICH. L. REV. 257 at 273, 275 (1943).

[67] STEPHEN ON PLEADING, Tyler ed., 148 (1924).

[68] 2 HOLDSWORTH, A HISTORY OF ENGLISH LAW 632 (1927).

[69] STEPHEN ON PLEADING, Tyler ed., 262 (1924); 3 HOLDSWORTH, id. 631; 9 id. 291.

[70] Ibid. [71] STEPHEN, id. 267. [72] STEPHEN, id. 258.

A second exceptional situation was presented when a plaintiff sued two or more persons as joint defendants. As each defendant was allowed to defend separately,[73] there might be as many lines of pleading, and therefore, as many issues, as there were defendants.

The common-law scheme of limiting every action to a single issue collapsed finally because of the unfairness involved in restricting a defendant to one defense. One relaxation came by allowing the defendant to plead broad general denials (issues) which permitted the proof of more than one defense. Another relaxation came by an act of Parliament passed in 1705 which authorized the defendant, with leave of the court, to plead to one claim as many defenses as he might have.[74] This statute did not, however, permit double pleading at any stage later than the plea. With respect to one claim the number of lines of pleading was governed by the number of defenses. As the statute did not apply to pleas in abatement, the old rules continued to prohibit more than one plea in abatement to the same matter at the same time. The old rules, also, continued to prohibit the joinder of a plea in abatement with a plea in bar, and the raising of an issue of law and an issue of fact with respect to the same matter at the same time.

In chancery a defendant might meet the complainant's bill by a plea or answer. If he chose to meet it by plea he was required to limit his plea to one affirmative matter or to one denial so as to reduce the cause to a single point.[75] Although the courts of chancery were "anxious to preserve some analogy to the comparative simplicity of proceedings at the common law,"[76] they never undertook to limit a suit to a single point if the defendant was willing to put in an answer as distinguished from a plea.

Under the common-law scheme of continuing to plead until issue was reached, a party could not, in a later pleading, "depart" from a position taken in an earlier pleading. The object of the rule against "departure" was to prevent delay in reaching issue, and to minimize the number of pleadings.[77]

3. *Pleadings as record of matters adjudicated*

When a judgment is rendered in a court of record the parties are precluded from re-litigating any matter adjudicated in the action. If the plaintiff loses and undertakes to sue the defendant again on the

[73] STEPHEN, id. 246.
[74] 4 Anne, c. 16.
[75] STORY, EQUITY PLEADING, § 653 (1838).
[76] Id., § 271.
[77] STEPHEN ON PLEADING, Tyler ed., 354 (1924).

same claim, he is barred by the former judgment. If either party sues the other on a different claim arising out of the same transaction, both are estopped from disputing any matter settled in the prior action. This, in the old practice, was known as "estoppel by record."[78]

Coke declared that the rolls of a court of record "import in them such incontrollable credit and veritie, as they admit no averment, plea, or proofe to the contrarie."[79] According to Lord Ellenborough, "the judgment roll imports incontrovertible verity as to all the proceedings which it sets forth; and so much so, that a party cannot be admitted to plead that the things which it professes to state are not true."[80] At common law, as we have seen, a judgment was a conclusion drawn from a record. The judgment record was conclusive not only of the fact that a certain conclusion was drawn, but of the premises from which it was drawn.

To prove what matters were litigated in a prior action it is necessary to produce a copy of the judgment record of that action. It is presumed that all matters in issue under the pleadings were decided, unless the contrary appears. It is also presumed that no matter outside the issues formed by the pleadings was decided, unless the contrary appears. Some courts have held that no proof other than the record is to be considered.[81] Others have held, and this is the prevailing view, that parol evidence is admissible to show what was decided so long as it does not impeach or contradict the judgment record.[82] While it is generally held that parol evidence is admissible to show that some issue raised by the pleadings was not decided, the courts have been inclined to hold otherwise when an attempt is made to prove that a matter not in issue under the pleadings was actually litigated in the prior action. In an early case in the New York Court of Appeals, Gardiner, J., said:

> "The rule is well established, if not elementary, that a party insisting upon a former recovery must show that the record of the former suit includes the matters alledged to have been determined. This is true in all cases in courts of record, whether the pleadings between the parties in the previous suit are general or special in

[78] SPENCER BOWER, RES JUDICATA 5 (1924). For history of doctrine see Millar, "The Historical Relation of Estoppel by Record to Res Judicata," 35 ILL. L. REV. 41 (1940); Millar, "The Premises of the Judgment as Res Judicata in Continental and Anglo-American Law," 39 MICH. L. REV. 1, 238 (1940).

[79] Co. LITT. 260a.

[80] Ramsbottom v. Buckhurst, 2 M. & S. 565, 105 Eng. Rep. 492 (1814).

[81] Sintzenick v. Lucas, 1 Esp. 43, 170 Eng. Rep. 274 (1793); Smith v. Sherwood, 4 Conn. 276 (1822).

[82] See FREEMAN ON JUDGMENTS, § 275 (1873).

> their character. . . . It follows that when the declaration, as in the first suit between these parties, states a special matter as the ground of action, and issue is taken by the defendant upon the allegation, parol proof is inadmissible to show that a different subject was litigated upon the trial. For this would be to contradict the record, which shows the issue, and the verdict and judgment upon that issue, to the exclusion of all other matters whatsoever."[83]

The view that such proof would contradict the record has been taken by the other courts.[84] In more recent years, however, the New York court has indicated an intention to depart from the older view. In a comparatively recent opinion Cardozo, J., said:

> "The burden is on a litigant who claims the benefit of a former judgment as *res judicata* to prove that the *res* to be thus established by estoppel was either involved by implication or actually determined in the former litigation. . . . Presumably the issues involved or determined are those pertinent to the subject of the controversy as defined by the pleadings. . . . The test of the pleadings and their implications, however, is not final and exclusive. The course of the trial or the form of the decision may show that the pleadings were abandoned, and that controversies beyond them were determined after trial. . . . This extension of the pleadings is not to be presumed. The burden of proving it is on the party asserting the estoppel."[85]

If, under the older views, a defendant permitted a plaintiff to prove a claim which was different from the claim pleaded in his statement of claim, he ran the risk of being forced to pay the second claim a second time, as he could not prove that the judgment which purported to be on the first claim was, in reality, on the second. His proper procedure was to object to proof of the second claim on the ground of variance. To protect the defendant, the courts would not permit the plaintiff to prove a claim which varied from the one pleaded. According to Stephen a variance in "some particular point or points" is as fatal to the party having the burden of proof as a "total failure of evidence."[86]

An illustration of the strictness with which the older courts applied

[83] Campbell v. Butts, 3 N.Y. 173 at 174 (1849).

[84] Rosema v. Porter, 112 Mich. 13, 70 N.W. 316 (1897); Gay v. Welles, 7 Pick. (24 Mass.) 217 (1828); Jones v. Perkins, 54 Me. 393 (1867). Also see Perkins v. Walker, 19 Vt. 144 (1847); Standish v. Parker, 19 Mass. 20 (1823).

[85] People ex rel. Village of Chateaugay v. Public Service Commission, 255 N.Y. 232 at 238, 174 N.E. 637 (1931).

[86] STEPHEN ON PLEADING, Tyler ed., 118 (1924).

the doctrine of variance will be found in *Bridge v. Austin.*[87] In this case the plaintiff alleged that the defendant agreed to "transport" certain linens at his "own risk against all danger, except the dangers of the seas." A memorandum of the contract as introduced in evidence provided that the defendant should "dispose of" the linens at his own risks "except those of the seas." The court said: "The contracts are materially different; and as a judgment in this action would not be a bar to another action on the contract stated in the memorandum, the verdict must be set aside."[88]

4. *Pleadings as notice of claims and defenses*

A party should have notice of his opponent's claim or defense for two purposes: (1) To enable him to prepare a responsive pleading. (2) To enable him to prepare for trial. Under the common law, notice for both purposes was supposed to be given by the pleadings in the case.

a. *Notice of claim*

A statement of claim (declaration) at common law had to contain in some form all the factual elements of a legally-recognized claim. This was necessary for two reasons: (1) To enable the court to determine from the record whether the claim was legally sufficient. (2) To enable the opposite party to raise an issue of fact as to one element of the claim or an issue of law as to the legal sufficiency of the entire claim. Furthermore, the claim had to be identified by details such as time and place so the pleading would serve as a record of matters adjudicated. In meeting these requirements, the plaintiff's declaration at common law necessarily gave some notice of what the plaintiff

[87] 4 Mass. 115 (1808).

[88] Other illustrations of variance will be found in STEPHEN ON PLEADING, Tyler ed., 118-9 (1824), and in 1 GREENLEAF, EVIDENCE, §§ 66-73 (1846). In Shepard v. New Haven & Northampton Co., 45 Conn. 54 at 56 (1877), Pardee, J., stated: "Every allegation essential to the issue must be proved in the form stated; the fact proven must be legally identical with the claim put forth; and this for the defendants' protection; first that he may know the charge which he is to meet; secondly, if he is unable to disprove it, that the verdict and judgment may protect him from another action based upon the same wrong." One test of variance is whether the difference between the allegation and the proof is so great that the objecting party will not be protected against future litigation. See, Frazer v. Smith, 60 Ill. 145 (1871); Wheeler v. Read, 36 Ill. 81 (1864); Faris v. Lewis, 2 B. Monroe (41 Ky.) 375 (1842); Atlantic Coast Line R.R. Co. v. Dahlberg Brokerage Co., 170 Ala. 617, 54 S. 168 (1910); Bowie v. Foster, 1 Minor (Ala.) 264 (1824). Due to the fact that pleadings serve as a record of what *was* proved as well as notice of what *will* be proved, the record of what *was* proved is made before the proof is offered. Having made the record in advance of trial, the proof cannot vary from the record.

expected to prove at the trial. In some cases the notice was quite sufficient to enable the defendant to prepare a responsive pleading and to prepare for trial. In others, however, the declaration might be so general as to afford little or no notice of what the plaintiff's proof might be.

General assumpsit. "General" assumpsit is the most familiar illustration of general pleading at common law. This type of pleading was developed to take care of cases in which a promise to pay money was implied from the conduct of the parties. After stating generally the nature of the benefits which were the basis of implying a promise to pay, the plaintiff alleged that, in consideration of these benefits, the defendant promised to pay for the benefits, but has failed to do so. Later, this general form of pleading could be used whenever the situation was such that a promise to pay might be implied even though an express contract to pay was actually made. When the general form of pleading was used, the defendant had no way of knowing whether the plaintiff intended to prove an express contract, a contract implied (in fact) from the conduct of the parties, or quasi-contract (an obligation imposed by law to pay for benefits received). Furthermore, the defendant had no notice of the precise benefits which were to be proved as the consideration of his promise to pay. The benefits were usually described merely as "goods sold and delivered," "work and labor performed," "money had and received," or the like. Toward the end of the common-law development the defendant could demand a "bill of particulars" showing the benefits which the plaintiff planned to prove as the consideration of the defendant's promise.[89] In the case of goods sold and delivered the particulars would be an itemized list of the goods, with dates and prices. The effect of a bill of particulars was to limit the plaintiff's proof to the items listed in the bill. While it seems probable that the main purpose of the bill was to serve as a record of the matters adjudicated, the bill was useful in that it notified the defendant of the precise nature of the plaintiff's claim.

Negligence. In an action for damages resulting from negligence at common law the plaintiff was not required to plead the details of the defendant's negligence, but might plead generally that the defendant negligently did, or failed to do, a certain act.[90] Most courts today require that the grounds of negligence be pleaded. In some courts the details need not be pleaded, but must be furnished in a bill of

[89] PHILLIPS, CODE PLEADING, 2d ed. by Viesselman, § 448 (1932).

[90] CLARKE, CODE PLEADING, 2d ed., 300 (1947).

particulars when demanded. Since the details of the negligence are not needed to serve as a basis for the judgment, or as a record of matters adjudicated, or even to enable the defendant to frame a responsive pleading, it seems clear that when they are required the purpose is to enable the defendant to prepare for trial.

Special damage. In some cases damage must be pleaded as a substantive element of the plaintiff's claim.[91] In most cases, however, this is not true. In the latter cases the only reason for pleading items of damage is to give the defendant notice so he can prepare for trial. In view of the limited purpose of pleading items of damage, they must be pleaded only when failure to do so may take the defendant by surprise at the time of trial. General allegations of damage are sufficient if they give the defendant fair notice of what the proof will be.

b. *Notice of defense*

Confession and avoidance. An affirmative plea at common law tacitly confessed the plaintiff's claim and set up new facts to avoid the confession. Replications and later pleadings might likewise confess and avoid. Whenever such an affirmative pleading was used, it served (1) as basis for the judgment, (2) as means of forming issues of fact, and (3) as record of matters adjudicated. In performing these functions, it gave notice to the opposite party sufficient to enable him to prepare a responsive pleading and to prepare for trial.

Specific denials. A "common traverse" at common law was used to form a specific issue of fact. This was accomplished by denying specifically some affirmative allegation of fact, or by stating the affirmative of some negative allegation of fact. As the traverse was always specific, the party whose pleading was traversed had warning that opposing evidence would be offered, but no notice of what the opposing proof would be.

General issues. In present-day pleading a "general denial" has the effect of denying each and all of the material facts set forth in the pleading denied. Any evidence tending to disprove the facts denied may be introduced at the trial, but new facts constituting an avoidance may not be proved. At common law the plea of "not guilty" in the action of "trespass" had the effect of a "general denial." This, however, was not true of the "general issues" used in the other forms of action. Under a plea of "not guilty" in the action of "trespass on the case" the defendant could introduce evidence tending to disprove all the facts

[91] Id. 329.

alleged by the plaintiff, and could, also, prove new facts except statute of limitations, and truth in libel and slander. Under a plea of "not guilty" in "trover" the defendant could make the same proof as in "case," except new facts showing a release. Under a plea of "non assumpsit" in the action of "assumpsit," the defendant could, in addition to evidence tending to disprove the plaintiff's facts, offer evidence of new facts except bankruptcy, tender, and limitations. In the other forms of action similar variations existed. In no case was the plaintiff given adequate notice of what the defendant's proof would be. When a "general denial" is used, the plaintiff does not know where the real attack will come, for it is unlikely that the defendant really intends to dispute *all* the facts. Furthermore, he does not know what evidence will be used to support the denial. When a "general issue" was used, the plaintiff not only did not know which fact the defendant expected to attack, but had to be prepared to meet such unpleaded affirmative defenses as might be proved under the particular "general issue."

II

MOVEMENTS FOR PLEADING REFORM

1. *Rules of Hilary Term, 1834*

An act of Parliament passed in 1833 authorized the judges of the Superior Courts of Common Law at Westminster to "make such Alterations in the Mode of pleading in the said Courts" as to them might "seem expedient."[92] It was provided, however, that the right to plead the "General Issue" in any case specially authorized by statute should not be taken away. This act was the first to provide for a general revision of the "Mode of pleading." By earlier statutes Parliament had modified the scheme of common-law pleading in certain respects,[93] but had never attempted a general reform. This attempt at reform did not come suddenly, but only after the need for reform had been agitated some thirty years,[94] and after the matter had been studied by a commission appointed by the king.[95]

[92] 3 & 4 William 4, c. 42; 1 CHITTY ON PLEADING, 7th ed., 730 (1844).

[93] See statutes listed in Reppy, "The Hilary Rules and their Effect on Negative and Affirmative Pleadings under Modern Codes and Practice Acts," 6 N.Y. UNIV. L.Q. 95 at 100-102 (1929).

[94] See Sunderland, "The English Struggle for Procedural Reform," 39 HARV. L. REV. 725 (1926); Holdsworth, "The New Rules of Pleading of the Hilary Term, 1834," 1 CAMB. L.J. 261 (1923).

[95] See reports of Commissioners appointed to inquire into the PRACTICE AND PROCEEDINGS OF THE SUPERIOR COURTS OF COMMON LAW 1829-1832.

While authorizing a general reform of the "Mode of pleading," the act of 1833 clearly indicated that the reform contemplated was in the direction of making issues of fact more specific. With the development of "general assumpsit" and the wide use of "general issues" had come such generality in pleading that specific fact issues were not developed in many cases. It was Parliament's intention that the rules of pleading be altered so "the Questions to be tried by the Jury" would be "left less at large."[96]

To accomplish the reform indicated by the act of 1833, the judges, at Hilary Term, 1834, undertook, among other things, a complete revision of the rules governing the effect of the various general issues.[97] Instead of having the effect of denying all facts alleged by the plaintiff, each general issue was to have the effect of denying a single fact or group of facts designated by the court rules. All new facts constituting avoidances must be specially pleaded, and not proved under a general issue. By requiring denials to be specific, and by requiring new matter by way of confession and avoidance to be pleaded affirmatively, the judges undertook to restore what they considered to be the true system of common-law pleading.

While there had been much criticism of "general" pleading because of its failure to give adequate notice of claims and defenses, there also had been criticism of "special" pleading because of its prolixity. Bentham put it this way: "General pleading conveys no information, but there is an end to it: if any information is conveyed by pleading, it is by special pleading, but there is no end to it."[98] Under the scheme of general issues, the pleadings, although general, served as a basis for a judgment. They also formed issues, although, of course, the issues were "general issues." But in many cases they did not provide a sufficient record of matters adjudicated, and did not give adequate notice of claims and defenses. According to the Royal Commissioners, the cure for "general" pleading was "special" pleading.[99] This cure was

[96] Preamble to statute, note 92, supra.

[97] Text of the Hilary Rules will be found in 11 LAW MAG. 267 (1834); 1 CHITTY ON PLEADING, 7th ed., 748 (1844).

[98] 7 WORKS OF JEREMY BENTHAM 274 (1843).

[99] The Royal Commissioners (note 95, supra) in their SECOND REPORT (1830), p. 45, said: "That the present state of the practice on this subject, requires alteration, seems to be universally felt; but with respect to the *kind* of alteration required, the views taken by different persons, are surprisingly dissimilar; one set of opinions pointing to the restriction of the general issue, and another to its wider application, and to a corresponding extinguishment of special pleading. It will be found, however, on reference to the written communications addressed to us, that there is a decided

tried, but the result was a system as prolix as that of the common law, and even more complex.[100]

2. *New York Code, 1848*

In 1846 New York adopted a new constitution which abolished the Court of Chancery, and provided that the Supreme Court should have general jurisdiction in law and equity. The legislature was directed to create a commission "to revise, reform, simplify and abridge the rules and practice, pleadings, forms and proceedings of the courts . . . and to report thereon to the Legislature."[101] The commission was duly appointed, and directed, among other things, to abolish the forms of action and to provide "for a uniform course of proceeding in all cases whether of legal or equitable cognizance."[102] Acting with unusual speed, the commissioners drafted a code and presented it to the legislature on February 29, 1848. The code, with slight modifications, was adopted by the legislature the same year. Being largely the work of David Dudley Field, the code came to be known as the "Field Code."

One division of the code (Title VI) dealt with "Pleadings in Civil Actions." There were six short chapters: (1) The Complaint. (2) The Demurrer. (3) The Answer. (4) The Reply. (5) General Rules of Pleading. (6) Mistakes in Pleading, and Amendments. The intention was to set up a complete scheme of pleading for all actions—legal or equitable.

Pleadings as basis for judgment. In their first report (1848) the Code Commissioners said: "The pleadings, we have said, are the written allegations of the parties of the cause of action on one side, and the

preponderance of authority in favour of the former course; and we do not hesitate to declare our own strong conviction that it is the right one, and that its adoption would be attended with highly beneficial results."

[100] Whittier, in his often-cited article, "Notice Pleading," 31 HARV. L. REV. 501 at 506-7 (1918), stated: "Code Pleading and Hilary Rules pleading require the facts essential to constitute a cause of action, the facts which must be proved at the trial, to be alleged in the pleadings. It is this fundamental principle of our present system that seems to me erroneous. But what are the objections to it? It is a fruitful source of the delay in litigation which is so commonly condemned; it causes a great waste of time on the part of appellate courts; it no doubt wastes much time in the trial courts, though proof of this is harder to obtain; and occasionally it leads to an improper conclusion of a particular litigation. . . . Under the common-law system the matter was bad enough with a pleading question decided in every sixth case. But under the Hilary Rules it was worse. Every fourth case decided a question on the pleadings. Pleading ran riot." Also see 9 HOLDSWORTH, A HISTORY OF ENGLISH LAW 324-5 (1926).

[101] N.Y. Const. (1846) Art. 6, § 24.

[102] N.Y. Laws (1847) c. 59, § 8.

defense on the other. Their object is three-fold: to present the facts on which the court is to pronounce the law; to present them in such a manner, as that the precise points in dispute shall be perceived, to which the proofs may be directed; and to preserve the record of the rights determined."[103] The "facts" on which the court is to "pronounce the law" are "facts" constituting a claim or defense. If the "facts" alleged constitute a legally sufficient claim or defense and are found to be true, the court renders judgment for the pleader. If the "facts" do not constitute a legally sufficient claim or defense, the court renders judgment for the opposite party. Pleadings serve as the basis of the judgment in two ways: (1) They serve as a record of matters admitted by failure to deny, and of matters found by a general verdict. (2) They enable the court to determine from the record whether a claim or defense is legally complete.

(1) After providing that the answer should contain a "specific" denial of each allegation of the complaint controverted by the defendant, and that the reply should contain a similar denial of each allegation of new matter in the answer controverted by the plaintiff, the New York Code provided: "Every material allegation of the complaint, not specifically controverted by the answer, . . . and every material allegation of new matter in the answer, not specifically controverted by the reply, . . . shall for the purposes of the action, be taken as true."[104] In the case of a default, the plaintiff was directed to file with the clerk the "summons and complaint, with proof of service," and proof that no answer had been received.[105] Judgment was to be based on this record in actions on contracts to recover money.[106] In other actions judgment was to be based on a similar record after the amount had been determined.[107] In all cases the pleadings were to be a part of the "judgment roll."[108]

(2) The code clearly indicated that the court was not to render judgment for a party whose claim or defense was not legally complete. In a chapter dealing with "Issues, and the Mode of Trial" the code provided: "An issue of law arises, 1. Upon a demurrer to the complaint: or 2. Upon an allegation of fact in pleading, by the one party,

[103] FIRST REPORT OF THE COMMISSIONERS ON PLEADING AND PRACTICE 137 (1848).

[104] N.Y. Laws (1848) c. 379, § 144.

[105] Id. § 202.

[106] Ibid

[107] Ibid.

[108] Id. § 236.

the truth of which is not controverted by the other."[109] In the chapter on "The Demurrer" it was provided that objections to the complaint not raised by demurrer or answer should be deemed to have been waived except "the objection to the jurisdiction of the court over the subject of the action; and the objection that the complaint does not state facts sufficient to constitute a cause of action."[110] According to the code, failure to controvert facts has the effect of admitting their truth for the purposes of the action, but does not have the effect of admitting that they are legally sufficient to constitute a claim or defense. When facts are alleged, an issue of law immediately arises as to their legal sufficiency. Failure to raise this issue by demurrer or otherwise is not an admission. The objection is never waived.

Pleadings as means of forming issues. The second object of pleading, according to the report of the Code Commissioners, is to present the facts "in such a manner, as that the precise points in dispute shall be perceived, to which the proofs may be directed." To carry out the second object, all denials were required to be specific, and all new matter by way of avoidance must be affirmatively pleaded.[111] No provision was made for a "general issue." In this repect the reform was similar to that undertaken by the Hilary Rules of 1834. To meet the objection that "special" pleading was too prolix, the pleading stages were limited to three—complaint, answer, and reply. If issue was not reached by the reply, new facts alleged therein were deemed controverted or avoided.[112] The scheme was a logical development of common-law special pleading so far as it went. It should be noted, however, that the code was amended in 1849 to allow a "general" denial in addition to "specific" denials.[113] By an amendment adopted in 1852 a reply was required to a counterclaim, but not to new matter pleaded as an affirmative defense.[114] For cases in which a counterclaim was not involved, the pleading stages were reduced to two. The common-law rule against "departure" is found in the section which provided that a reply may allege "any new matter not inconsistent with the complaint."[115]

Pleadings as record of matters adjudicated. The strictness of the common-law rule against variance can be understood only by having

[109] Id. § 204.
[110] Id. § 127.
[111] Id. § 128.
[112] Id. § 144.
[113] Id. § 149.
[114] Id. § 168.
[115] Id. § 131.

in mind: (1) That the whole idea of *res judicata* was closely identified with the doctrine of "estoppel by record."[116] (2) That the record of a court of record "imports incontrovertible verity."[117] If on trial by jury, evidence of matters not pleaded should be introduced and the jury should base its verdict on such evidence, the record (pleadings and verdict) would show that one matter had been litigated, when in reality another matter had been decided by the jury. To insure the truth of the record, to prevent surprise at the trial, and to protect against future actions, the common-law courts would not permit allegation of one matter and proof of another. One way to avoid the dangers of variance was to make the pleadings as general as possible. Another, was to state the same matter in various ways (counts) in the same pleading. When a pleading was general, the danger of variance was avoided, but there was no record of the specific matters adjudicated. When multiple counts were used, the danger of variance was minimized, but the pleadings were too prolix and the record did not show which of the various statements was found to be true. The English commissioners discussed the problem of variance in their second report,[118] and proposed, among other reforms, a limitation on the number of counts which might be used; also, that, in certain situations, an amendment of the record should be permitted to let in the proof.[119] The New York Code provided:

> "§ 145. No variance between the allegation in a pleading and the proof, shall be deemed material, unless it have actually misled the adverse party, to his prejudice, in maintaining his action or defence, upon the merits. . . .
>
> "§ 146. Where the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs.
>
> "§ 147. Where, however, the allegation of the cause of action or defence to which the proof is directed is unproved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance, within the last two sections, but a failure of proof."

The New York commissioners recognized, as we have seen, that one

[116] Supra, note 78.

[117] Supra, notes 79 and 80.

[118] SECOND REPORT OF COMMISSIONERS APPOINTED TO INQUIRE INTO THE PRACTICE AND PROCEEDINGS OF THE SUPERIOR COURTS OF COMMON LAW 34 (1830).

[119] Id. 85.

object of pleading is "to preserve the record of the rights determined." By allowing an immediate amendment of the pleadings whenever the proof offered at the trial differed from the facts alleged in the pleadings, the courts could eliminate the dangers of variance, and, at the same time, have a record of matters adjudicated. Amendment was to be permitted when the opposite party was not actually misled. The English Commissioners had said: "We understand by a *variance* between the allegations and the proof, a discrepancy between them in some particular or particulars only: where the disagreement extends to the whole sense and tenor of the allegation, we consider it not as a case of variance, but of mere failure of proof, which ought of course in every case to be fatal."[120] The New York Code made a similar distinction. It also provided that the court might "at any time" amend any pleading or proceeding "by conforming the pleading or proceeding to the facts proved," but only when the amendment did not "change substantially the cause of action or defence."[121]

Pleadings as notice of claims and defenses. In their statement of the objects of pleading, the New York commissioners did not include the "notice function." They apparently assumed that if the other functions of pleading were properly performed, the parties would have notice of claims and defenses sufficient to enable them to prepare responsive pleadings and to prepare for trial. They provided that the complaint should state "facts."[122] and not "presumptions of law."[123] All denials were to be specific.[124] A variance was to be deemed material if the opposite party was "actually misled." The code as amended in 1849 provided:

> "And when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defence is not apparent, the court may require the pleading to be made definite and certain, by amendment."[125]

It has been generally recognized that one of the outstanding characteristics of the code was its emphasis on pleading "facts." If pleadings "present the facts on which the court is to pronounce the law" and "present them in such a manner, as that the precise points in dispute shall be perceived," the function of giving notice has been to a large extent performed. It should be noted, however, that no provision was

[120] Id. 38.
[121] N.Y. Laws (1848) § 149.
[122] Id. § 120.
[123] Id. § 134.
[124] Id. § 128.
[125] Id. § 160.

made for giving notice of what would be proved in support of a denial. And when the code was amended in 1849 to allow a "general denial" it ceased to provide for notice to the plaintiff of the precise point at which the defendant's attack would come.

3. *Judicature Acts and Rules, 1875*

The English movement for procedure reform which led to the Hilary Rules of 1834, received a new impetus from the adoption of the New York Code in 1848. After passing a series of statutes which made important changes in common-law and equity procedure,[126] Parliament, in 1873, passed the "Supreme Court of Judicature Act,"[127] which consolidated the superior courts of law and equity into one Supreme Court, and provided a uniform system of pleading for the various branches of the court. This act and an amendatory act passed in 1875[128] went into effect in 1875, along with a large number of "Rules of Court" which were appended to the amendatory act. The judges were authorized to modify existing rules and adopt new ones. Pleading rules appended to the act of 1875 were grouped under the following "orders": XIX. Pleadings generally. XX. Pleading matters arising pending the action. XXI. Statement of claim. XXII. Defence. XXIV. Reply and subsequent pleadings. XXV. Close of Pleadings. XXVI. Issues. XXVII. Amendment of pleadings. XXVIII. Demurrer. XXIX. Default of pleading.

Pleadings as basis for judgment. In *Philipps v. Philipps*[129] (1878) Bramwell, L.J. said: "The object of the rules is threefold. It is that the plaintiff may state what his case is for the information of the defendant, and that the plaintiff may be tied down to it and not spring a new case on the defendant; secondly, that the defendant may be at liberty to say, that the statement is not sufficient in point of law, and to raise the point on demurrer; and thirdly that the defendant, instead of being driven to deny everything by an ambiguous and uncertain statement involving conclusions of law as well as actual facts, and so going down to try an expensive issue, may be at liberty to single out any one statement, and to answer it." In this statement of the objects of pleading, emphasis is placed on two functions: (1) Giving notice. (2) Forming issues. Advocates of "notice" pleading, as distinguished from "issue" or "fact" pleading, take the position that a statement of

[126] See HARTSHORNE, COURTS AND PROCEDURE IN ENGLAND AND IN NEW JERSEY, c. 14 (1905).

[127] 36 and 37 Vict., c. 66.

[128] 38 and 39 Vict., c. 77.

[129] 4 Q.B.D. 127 at 131.

claim or defense is sufficient if it gives adequate notice, regardless of whether it states all the substantive elements of a legally sufficient claim or defense. The English rules, when first adopted, were hailed as establishing a new system of "notice" pleading. It should be noted, however, that the rules provide that "every pleading shall contain, and contain only, a statement in summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved."[130] Cotton, L.J., in the case mentioned above, stated: "The statement of claim, of necessity, must set out all the facts material to prevent the defendant from being taken by surprise, because it is the first pleading, and that which ought to be referred to for the purpose of seeing whether there is a cause of action." In other words, a pleading should set out enough to prevent surprise, and enough also to enable the court to determine whether the party has a legally sufficient claim or defense. Although demurrers have now been abolished,[131] the rules provide for an objection in point of law. Odgers states that "either party may object to the pleading of the opposite party on the ground that such pleading does not set forth a sufficient ground of action, defence or reply, as the case may be."[132] In the comparatively recent case of *Bruce v. Odhams Press* (1936)[133] Scott, L.J., discussed the necessity of pleading all the elements of a claim or defense as follows:

> ". . . The new rules of pleading introduced by and under the Judicature Acts did not release a plaintiff from his obligation to 'declare' a legally complete cause of action in his statement of claim. . . .
>
> "The cardinal provision in r.4 is that the statement of claim must state the material facts. The word 'material' means necessary for the purpose of formulating a complete cause of action; and if any one 'material' fact is omitted, the statement of claim is bad; it is 'demurrable' in the old phraseology, and in the new is liable to be 'struck out' under Order xxv., r. 4: see *Phillips v. Phillips;* or 'a further and better statement of claim' may be ordered under Order xix., r. 7.
>
> "The function of 'particulars' under r.6 is quite different. They are not to be used in order to fill material gaps in a demurrable statement of claim—gaps which ought to have been filled by appropriate statements of the various material facts which together

[130] THE ANNUAL PRACTICE 1946-1947, Order 19, rule 4.

[131] Id., Order 25, rule 1.

[132] ODGERS, PRINCIPLES OF PLEADING AND PRACTICE, 13th ed., 127 (1946).

[133] [1936] 1 K.B. 697.

> constitute the plaintiff's cause of action. The use of particulars is intended to meet a further and quite separate requirement of pleading, imposed in fairness and justice to the defendant. Their function is to fill in the picture of the plaintiff's cause of action with information sufficiently detailed to put the defendant on his guard as to the case he has to meet and to enable him to prepare for trial. Consequently in strictness particulars cannot cure a bad statement of claim. . . ."[134]

In stating his opinion that a certain material fact had been omitted from the statement of claim, the Lord Justice continued:

> "It is directly supported by the decision in *Fisher v. Clement* [7 B. & C. 459 (1827)] where the declaration alleged that the libel was 'published of and concerning the plaintiff,' a verdict for 30£ damages was found for him, and judgment was entered accordingly, but on writ of error the Court of King's Bench set aside the judgment on the ground that the above allegation was insufficient, there being no innuendo that the matter of the libel related to the plaintiff.
>
> "But if this statement of claim would have been bad in the old days, it is equally so now. Mr. Field, I am sure, did not intend to contend that the omission of a necessary averment could be cured by evidence at the trial. . . ."[135]

Although from this opinion it is clear that a pleading must state all the "material facts" necessary to constitute a "legally complete" claim or defense, why this must be done is not expressly stated. Whether a claim or defense is legally sufficient must be determined at some stage of the proceedings, the earlier the better. The rules permit the raising of this issue at the pleading stage. It has been said, however, that a defendant is not required to demur: "If he does not demur, he does not waive the objection, and may say at the trial that the claim is bad on the face of it."[136] If *all* the material facts constituting a claim or defense must be alleged to avoid an objection in point of law; if a missing fact cannot be supplied by evidence at the trial; and if the objection in point of law is not waived by failure to raise it at the pleading stage, it seems safe to conclude that the English courts still require pleadings which will be legally sufficient to support a judgment.

[134] Id. at 712.

[135] Id. at 714.

[136] Stokes v. Grant, 4 C.P.D. 25 (1878). Also see ODGERS, PRINCIPLES OF PLEADING AND PRACTICE, 13th ed., 128 (1946), who advises that objection in point of law be saved until the trial. But compare views of Common Law Procedure Commissioners (1851) set out in 9 HOLDSWORTH, A HISTORY OF ENGLISH LAW 318 (1927).

That pleadings serve as the basis of the judgment in the sense that they furnish the record of matters admitted by failure to deny, seems abundantly clear. The rules provide: "Every allegation of fact in any pleading, not being a petition or summons, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted."[137] Although "no entries now are made on any parchment roll,"[138] the party entering judgment "shall deliver to the officer a copy of the whole of the pleadings in the cause."[139] Where the writ of summons is "specially" indorsed for a "liquidated sum," and the defendant defaults, the plaintiff may enter final judgment for any sum not exceeding the sum indorsed.[140] According to Odgers, a "special" indorsement must "state all material facts necessary to constitute a complete cause of action."[141] Where, after default, there must be a hearing to determine the amount of the judgment, the court or a judge may order the filing of a statement of claim or particulars.[142] In equity cases a statement of claim must be filed before there can be a judgment by default.[143] In such a case, "the statement of claim will stand admitted, and the plaintiff will obtain such judgment as he is entitled to on the assumption that every word contained therein is true."[144]

Pleadings as means of forming issues. In a case decided soon after the rules were first adopted, Jessel, M.R., stated: The whole object of pleadings is to bring the parties to an issue. . . . In fact, the whole meaning of the system is to narrow the parties to definite issues."[145] In order to have "specific" issues as distinguished from "general" issues, affirmative pleadings must state "facts," not "conclusions"; denials must be "specific," not "general." The rules provide, as we have seen, that each pleading "shall contain, and contain only, a statement in summary form of the material facts on which the party relies for his claim or defence."[146] The rules further provide: "It shall not be sufficient for a defendant in his defence to deny generally the ground alleged by the statement of claim, or for a plaintiff in his reply to deny generally the grounds alleged in a defence by way of counterclaim, but

[137] THE ANNUAL PRACTICE 1946-1947, Order 19, rule 13.
[138] ODGERS, PRINCIPLES OF PLEADING AND PRACTICE, 13th ed., 62 (1946).
[139] THE ANNUAL PRACTICE 1946-1947, Order 41, rule 1.
[140] Id., Order 13, rule 3.
[141] ODGERS, PRINCIPLES OF PLEADING AND PRACTICE, 13th ed., 40 (1946).
[142] THE ANNUAL PRACTICE 1946-1947, Order 13, rule 5.
[143] Id., Order 13, rule 12.
[144] ODGERS, PRINCIPLES OF PLEADING AND PRACTICE, 13th ed., 48 (1946).
[145] Thorp v. Holdsworth, 3 Ch. D. 637 at 639 (1876).
[146] THE ANNUAL PRACTICE 1946-1947, Order 19, rule 4.

each party must deal specifically with each allegation of fact of which he does not admit the truth, except damages."[147] In reply to a defense which is not by way of counterclaim, the plaintiff may merely "join issue."[148] "Such joinder of issue shall operate as a denial of every material allegation of fact in the pleading upon which issue is joined."[149] Failure to reply will have the same effect.[150] If, however, the plaintiff wants to confess and avoid he must file a reply.[151] Pleadings subsequent to the reply cannot be delivered without an order.[152] If a rejoinder is not ordered, or if ordered and not delivered, the allegations of the reply are deemed denied.[153] The same is true of the surrejoinder and later pleadings.[154] The common-law rule against "departure" from an earlier pleading, is expressed as follows: "No pleading, not being a petition or summons, shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same."[155] While Jessel, M.R., may have gone too far in saying that the forming of issues is the "whole" object of pleading under the English rules, it must be recognized that the "issue function" is as vital today as it was at common law.

Pleadings as record of matters adjudicated. It not infrequently happens that a party will plead one material fact, and later, at the trial, attempt to prove a different fact. If the opposite party objects on the ground of variance, the objection, ordinarily, will be sustained. The court may, however, in its discretion, permit an immediate amendment of the pleading in order to let in the proof.[156] If an objection on the ground of variance is not made, the trial may proceed on an issue made by the evidence—an issue which is different from that made by the pleadings before trial. Since it is for the parties to form the issues they wish to try, is there any reason for refusing to permit them to submit an issue formed by evidence at the trial? The only reason seems to be: The records of a court of record should show that matters were adjudicated in each action determined by the court, and the evidence is not a part of the record. The traditional method of creating a record is

[147] Id., Order 19, rule 17.
[148] Id., Order 19, rule 18.
[149] Ibid.
[150] ODGERS, PRINCIPLES OF PLEADING AND PRACTICE, 13th ed., 199 (1946).
[151] THE ANNUAL PRACTICE 1946-1947, Order 19, rule 15.
[152] ODGERS, PRINCIPLES OF PLEADING AND PRACTICE, 13th ed., 205 (1946).
[153] THE ANNUAL PRACTICE 1946-1947, Order 27, rule 13.
[154] Ibid.
[155] Id., Order 19, rule 16.
[156] Id., Order 28, rule 1.

by entering or filing the pleadings and the verdict or findings. The courts can force the parties to make a record by refusing to recognize an issue formed by evidence. Whether they should do so, is an important problem of modern pleading. In *Hyams v. Stuart King* (1908)[157] the plaintiff's statement of claim, indorsed on the writ of summons, stated a claim for a balance on an "account stated." The evidence at the trial showed that a balance was due plaintiff on certain bets made on horse races; that a check was issued for this amount, but not paid because of insufficient funds. As these transactions were illegal, the plaintiff proved that after the balance was stated between the parties, the defendants made a new agreement to pay plaintiff the sum due if he would not reveal to the defendants' other customers that defendants had failed to pay their check. The trial court gave judgment for the plaintiff, holding that the new contract was not illegal. On appeal, Fletcher Moulton, L.J., after referring to the power of the trial court to allow amendments, "even during the course of the trial," said: ". . . nothing in my opinion permits the Court to give judgment on a claim (other than a claim of the nature of an account) which is neither formulated in the pleadings nor satisfactorily defined in any way."[158] Farwell, L.J., expressed a similar view: "In my opinion it is the duty of the plaintiff's counsel, a duty which ought to be enforced by the judge, when he asks for an amendment which raises a fresh issue or a fresh cause of action, to formulate and state in writing the exact amendment that he asks, in justice to the defendant, in order that he may know exactly the new case that he has to meet, and to the judge in order that he may know exactly what he is asked to try, and to the Court of Appeal in order that they may know what has been tried and decided."[159] In the more recent case of *Blay v. Pollard and Morris* (1930)[160] Scrutton, L.J., said: "Cases must be decided on the issues on the record; and if it is desired to raise other issues they must be placed on the record by amendment. In the present case the issue on which the judge decided was raised by himself without amending the pleadings, and in my opinion he was not entitled to take such a course."[161] Three reasons for requiring amended pleadings when a new issue is formed by evidence, appear in Farwell's opinion, supra. Two others may be suggested: (1) If the trial court or a jury makes special findings of the facts proved at the trial, the facts found will be different

[157] [1908] 2 K.B. 696.
[158] Id. at 717.
[159] Id. at 724.
[160] [1930] 1 K.B. 628.
[161] Id. at 634.

from those pleaded. This inconsistency in the record, unless removed by amendment, may prevent a judgment.[162] (2) In a second action between the same parties proof of what was actually tried in the first action may be rejected on the ground that it contradicts the record of that action.[163] While liberal in allowing amendments at the stage of the trial to let in proof of facts which differ from those pleaded, the English judges recognize the need of a formal record of matters adjudicated, and seem inclined to insist that such a record be made.

Pleadings as notice of claims and defenses. Where, as under the English rules, pleadings have several functions, it is difficult to discuss the "notice" function apart from the others. The easiest approach is to see, first, how much notice is given in the performance of the other functions, and then see what further matters must be pleaded in order to give adequate notice. This approach is neatly illustrated by Scott's opinion in *Bruce v. Odhams Press* (1936), quoted above.[164] After *all* the "material facts" have been pleaded, further particulars may be needed to "fill in the picture of the plaintiff's cause of action with information sufficiently detailed to put the defendant on his guard as to the case he has to meet and to enable him to prepare for trial." In other words, an affirmative pleading may contain material facts sufficient to serve as the basis of a judgment, to enable the opposite party to form specific issues of fact, and to serve as a record of matters decided, and yet not contain enough to enable the opposite party to prepare for trial. A denial may be specific, and yet give no notice of what the pleader expects to prove in support of his denial. The rules provide: "A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading, notice, or written proceeding requiring particulars, may in all cases be ordered, upon such terms, as to costs and otherwise, as may be just."[165] The rules also provide for "discovery" before trial. A party may call upon his opponent to produce a document for inspection;[166] he may require him to answer interrogatories concerning matters in issue under the pleadings.[167] The availability of discovery has raised a new question concerning the "notice" function of pleading. Should particulars and other information needed to prepare for trial be

[162] 3 BLACKST. COMM., Wendell ed., 393 (1854).

[163] See Chapter 3, Proof of the Judicial Decision, in SPENCER BOWER, RES JUDICATA (1924).

[164] Supra, note 133.

[165] THE ANNUAL PRACTICE 1946-1947, Order 19, rule 7.

[166] Id., Order 31, rule 15.

[167] Id., Order 31, rule 1.

furnished by "pleadings" or by "discovery"? When both methods are available it is not always easy to determine which should be used. Where pleading of particulars will not be ordered, discovery offers the only chance to obtain the needed information. For instance, it has been held that particulars of a denial will not be ordered.[168] If the plaintiff wishes to know whether the defendant really intends to dispute all the facts denied or if he wishes to know what the defendant expects to rely on in support of his denial, interrogatories directed to him may bring the needed information.[169] With further developments of the methods of discovery, the purely notice function of pleading may tend to disappear.

4. Federal Rules, 1938

By an act passed June 19, 1934, Congress provided that "the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law."[170] The act further provided that "the court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both." Acting under the authority thus given, the Supreme Court appointed an advisory committee to draft one set of rules for both law and equity cases. Rules prepared by this committee, and approved by the Court, went into effect September 16, 1938. Amendments to the rules, prepared by the same committee, went into effect March 19, 1948. Part III of the rules deals with "Pleadings and Motions"; Part V, with "Depositions and Discovery." Rules in Part III are entitled: (7) "Pleadings Allowed; Form of Motions." (8) "General Rules of Pleading." (9) "Pleading Special Matters." (10) "Form of Pleadings." (11) "Signing Pleadings." (12) "Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on the Pleadings." (13) "Counterclaim and Cross-Claim." (14) "Third-Party Practice." (15) "Amended and Supplemental Pleadings." (16) "Pre-Trial Procedure; Formulating Issues." In a recent discussion of the rules, Judge Charles E. Clark, who, as a member of the Advisory Committee, drafted the rules, said: "The cornerstone of the new reform is a system of simple, direct, and unprolonged allegations of claims and defenses by the litigants, resting, in turn, upon

[168] Weinberger v. Inglis, [1918] 1 Ch. Div. 133.

[169] See ODGERS, PRINCIPLES OF PLEADING AND PRACTICE, 13th ed., 230 (1946).

[170] 48 Stat. L. 1064, 28 U.S.C. (1946) §§ 723b, 723c.

a blending of the old law and equity systems and upon the concept of a civil action inclusive in content of all points of dispute between the parties. This keys the entire reform."[171]

Pleadings as basis for judgment. The rules provide: "Averments in a pleading to which a responsive pleading is required, other than those as to amount of damage, are admitted when not denied in the responsive pleading."[172] While the effect of this admission is not stated, it seems obvious that it is the same as at common law. Under the common law, facts admitted need not be proved. If all facts alleged by the plaintiff are admitted he is not required to make any proof, except the amount of his damage. If some facts are admitted and others denied, he need prove only those denied. If he succeeds in his proof, judgment is based in part on the verdict or findings and in part on the admissions shown by the pleadings. When all the facts are admitted, the pleadings constitute the sole basis of the judgment, except as to the amount of damages proved. The Federal Rules provide that "a judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment."[173]

Although demurrers are abolished,[174] provision is made for objection to a statement of claim on the ground that it fails "to state a claim upon which relief can be granted."[175] This objection can be made by motion[176] or by answer.[177] The rules, as amended, provide that "any insufficient defense" may be stricken on motion.[178] The rules further provide that "the defense of failure to state a claim upon which relief can be granted" and the "objection of failure to state a legal defense to a claim" are not waived by failure to present them at the first opportunity, but may be made "by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits."[179] If objection to the legal sufficiency of a claim or defense is postponed until the trial, it must be disposed of as provided in Rule 15(c) "in the light of any evidence that may have been received."[180]

While it is clear that a pleading under the Federal Rules must be

[171] Clark, "The Influence of Federal Procedural Reform," 13 L. AND CONTEM. PROB. 154 (1948).
[172] 28 U.S.C.A. (1941) foll. § 723c, Rule 8(d).
[173] Rule 54(c).
[174] Rule 7(c).
[175] Rule 12(b).
[176] Ibid.
[177] See Form 20.
[178] Rule 12(f).
[179] Rule 12(h).
[180] Ibid.

legally sufficient, the rules do not indicate what a pleading must contain to meet this test. Under the common law a party had to mention in some form *all* the substantive elements of a legally recognized claim or defense. Under codes patterned after the New York Code, a plaintiff is required to state *all* the "facts" which constitute his "cause of action." A pleading under the English Rules must contain *all* the "material facts" necessary to constitute a "legally complete" claim or defense. Whether a statement of claim or defense under the Federal Rules must be "legally complete," is an important current problem.[181]

In *DeLoach v. Crowley's Inc.* (1942)[182] Judge Sibley, of the Fifth Circuit, stated: "Under the Rules of Civil Procedure a case consists not in the pleadings, but the evidence, for which the pleadings furnish the basis. Cases are generally to be tried on the proofs rather than the pleadings. Demurrers are abolished. A petition may be dismissed on motion if clearly without any merit; and this want of merit may consist in the absence of law to support a claim of the sort made, or of facts sufficient to make a good claim, or in the disclosure of some fact which will necessarily defeat the claim." These views are in line with the traditional view that a statement of claim must be "legally complete." In a case decided in the same court a few weeks later (*Foley-Carter Ins. Co. v. Commonwealth Life Ins. Co.*)[183] the traditional view was followed. The plaintiff had undertaken to state a claim for commissions based on the reasonable value of his services in the sale of certain real estate, but his "petition" had been dismissed. The appellate court affirmed, Hutchinson, circuit judge, saying:

> "The law governing suits for commissions is simple and well understood. They may be on either express or implied contracts. If on an express contract the petition should show the express agreement for commissions and that the agreement was complied with. If on an implied contract, the petition should state facts from which a contract for commissions will be implied and facts showing performance by plaintiff of that contract. Plaintiff's suit is upon an implied contract. Its petition must therefore be searched first for facts from which a contract for commissions will be implied, and second, for facts from which it might be found that the contract thus implied has been performed."[184]

The "petition" in this case was in two counts, each containing thirteen

[181] See Fee, "The Lost Horizon in Pleading under the Federal Rules of Civil Procedure," 48 COL. L. REV. 491 (1948).

[182] 128 F. (2d) 378 at 380.

[183] (C.C.A. 5th, 1942) 128 F. (2d) 718.

[184] Id. at 720.

paragraphs. It clearly identified the transaction involved, and gave a general outline of the plaintiff's claim, but this was not enough.

In the second edition of his book on Code Pleading (1947) Judge Clark states: "The prevailing idea at the present time is that notice should be given of all the operative facts going to make up the plaintiff's cause of action, except, of course, those which are presumed or may properly come from the other side."[185] Without committing himself on whether this principle is to be applied under the Federal Rules, he does say that Form 9, attached to the Rules, "probably goes as far in the direction of simplified pleading as will now be found acceptable."[186] According to Form 9 it is enough in a running-down case to allege that on a certain date on a certain public highway "defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway"; that "as a result plaintiff was thrown down" and suffered specified injuries. While this form is very brief and does not specify the details of the negligence, it does set forth enough to show that plaintiff has a legally sufficient claim against defendant. The fact that plaintiff and defendant were using the same public highway is enough to show that defendant owed plaintiff a duty to use reasonable care not to injure him. The fact that defendant "negligently" drove his vehicle against plaintiff is enough to show a breach of the duty owed by defendant to plaintiff. The fact that plaintiff "as a result" of the negligence "was thrown down" and injured, is enough to show that plaintiff suffered injury as a proximate consequence of defendant's negligence. The details of the injuries suffered are alleged, not as elements of the claim, but in addition thereto in order to give notice of what will be proved at the trial.

Aside from giving notice, a chief reason for requiring a "legally complete" statement of a claim or defense is to set the stage for the forming of issues. If the factual basis of each substantive element is set forth, the opposite party can raise a specific issue of fact as to any one. If *all* the elements must be pleaded, an issue of law as to their legal sufficiency can be raised. In all schemes of procedure, a judgment on a claim or defense necessarily involves a consideration of whether the claim or defense is one recognized by law. If the factual basis of each element of the claim or defense must be set forth in a pleading, the consideration can be had at once without waiting until proof has been introduced. If *all* the elements need not be pleaded, but only enough to give notice of the identity of the transaction involved and of the

[185] CLARK, CODE PLEADING, 2d ed., 240 (1947).

[186] Id. at 241.

nature of the claim or defense presented, consideration of the legal sufficiency of the claim or defense must wait until the trial. By providing that the question may be raised before trial by objection directed to pleadings, the Federal Rules recognize the desirability of affording an opportunity for deciding any question of legal sufficiency before the case comes on for trial.

Under the common law verdicts of juries establish the probable truth or falsity of facts put in issue by pleadings. In rendering judgment the courts look only to the formal record, and not to any evidence which may have been introduced. If the plaintiff has pleaded all the elements of a legally recognized claim, and the jury has found that all the facts pleaded are probably true, judgment is entered for the plaintiff. If the verdict is for the defendant on an affirmative defense, and that defense is legally sufficient, judgment for the defendant is entered. In rendering judgment, the court must, of necessity, base its decision as to the legal sufficiency of the claim or defense on matters set forth in the pleadings. What was true at common law is true under the Federal Rules with this notable exception: In rendering judgment the court may, in some cases, consider the evidence as well as the formal record. "When," for instance, "issues not raised by 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."[187] This being true, a verdict may find facts put in issue by evidence. In rendering judgment on such a verdict, the court may not look to the record alone in determining the legal sufficiency of the claim or defense, but must look to the pleadings *and* evidence. To this extent the common-law practice of basing a judgment on the formal record has been destroyed.

Pleadings as means of forming issues. The Federal Rules provide that a party "shall admit or deny the averments upon which the adverse party relies."[188] A general denial may be used only when the pleader intends "in good faith" to controvert "all" the averments of the preceding pleading.[189] While an issue as to the legal sufficiency of a claim or defense is ordinarily raised by motion,[190] sufficiency of the complaint may be raised by the defendant's answer.[191] A reply to a counterclaim is required, but not to any other answer unless ordered by the court.[192] "Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided."[193] It thus appears that the old scheme of "issue" pleading is provided for two or three stages of pleading, but not beyond. Two new methods of forming issues are also

[187] Rule 15(b). [188] Rule 8(b). [189] Ibid. [190] Rule 12.
[191] See Form 20. [192] Rule 7(a). [193] Rule 8(d).

provided:(1) Introduction of evidence. (2) Agreement at a pre-trial conference. When issues are formed by evidence, an amendment of the pleadings is permitted, but not required.[194] When issues are formed at a pre-trial conference, the judge makes an order "which recites the action taken at the conference."[195] This order has the effect of amending the pleadings.[196]

Pleadings as record of matters adjudicated. In a discussion of Simplified Pleading Judge Clark indicates that the "final test" of the sufficiency of a pleading is whether it will protect the parties against "relitigation of the same matter." To afford this protection a pleading should "isolate the events in question from others sufficiently to show the affair which the judgment settles."[197] Referring again to Form 9, Judge Clark says:

> "Of course, if one were merely to claim 'damages for X for $10,000 for personal injuries,' there would be little to afford a basis for res judicata in the case. On the other hand, under Federal Form 9, as under its progenitor in the old declaration in trespass on the case, we have the claim particularized to a running down accident with the defendant's automobile while the plaintiff was crossing a certain street on a particular date. That this affords adequate basis for res judicata is clear; the plaintiff will not have many accidents of that kind at that time and place."[198]

According to Judge Clark, the sufficiency of a pleading should be determined by its usefulness as a record of matters adjudicated.

When issues raised by evidence are different from or in addition to those pleaded, there will be no record of the matters adjudicated unless they are stated in a verdict or findings or unless the pleadings are amended. The rules permit amendment of the pleadings but provide that "failure so to do does not affect the result of the trial of these

[194] Rule 15(b).

[195] Rule 16.

[196] Rule 16 provides: "Such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice." In United States v. Wood, (D.C. Mass. 1945) 61 F. Supp. 175 at 180, Judge Sweeney stated: "The pre-trial proceeding is the latest summary of the state of the case before trial, and is controlling on the issue now sought to be raised by this defendant concerning the scope of the pleadings." Also see McDonald v. Bowles, (C.C.A. 9th, 1945) 152 F. (2d) 741. If attorneys at a pre-trial conference agree on issues different from those pleaded, and the agreement is recited in an order "entered" by the court, the order supersedes the pleadings to the extent of the difference. As the order is "entered" on the record, agreement on issues at a pre-trial conference is a new way of amending the pleadings.

[197] CLARK, SIMPLIFIED PLEADING, A.B.A. Monograph, Series A, No. 18, p. 10 (1941).

[198] Id., p. 11.

issues."[199] In interpreting this rule it may be important to distinguish between wholly new claims or defenses, and new details of the same claim or defense. If a wholly new claim or defense is proved, and the pleadings are not amended, the record may not show enough to protect the parties against "relitigation of the same matter." If, however, the claim or defense proved is the same as that pleaded, proof of a new or different detail will not cause difficulty in the future because the record will truly show what claim or defense was actually adjudicated. It does not appear, however, that the distinction suggested has been made by the courts. While in most of the cases which have applied the rule, the matters proved but not pleaded were new details of the same claim or defense,[200] in at least one case a wholly new defense was introduced.[201]

Pleadings as notice of claims and defenses. The Federal Rules as originally adopted provided: "A party may move for a more definite statement or for a bill of particulars of any matter which is not averred with sufficient definiteness or particularity to enable him properly to prepare his responsive pleading or to prepare for trial."[202] An amendment effective March 19, 1948, reads: "If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing pleading." In recommending this amendment the Advisory Committee stated:

> "References in this subdivision to a bill of particulars have been deleted, and the motion provided for is confined to one for a more definite statement, to be obtained only in cases where the movant cannot reasonably be required to frame an answer or other responsive pleading to the pleading in question. With respect to preparations for trial, the party is properly relegated to the various methods of discovery provided in the rules for that purpose. . . .

[199] Rule 15(b).

[200] Rogers v. Union Pac. R. Co., (C.C.A. 9th, 1944) 145 F. (2d) 119 (proof of overpayments in action for wages). John L. Denning & Co. v. Fleming, (C.C.A. 9th, 1947) 160 F. (2d) 697 (proof of amount of freight overcharges in action for violation of price regulations). Hutchinson v. Akron, Canton & Youngstown R. Co., (C.C.A. 6th, 1947) 162 F. (2d) 189 (proof in action for personal injuries that defendant's employee opened switch and signalled plaintiff to come on, the negligence pleaded being that the employee threw the switch before car had completely crossed switch). Swanson Mfg. Co. v. Feinberg-Henry Mfg. Co., (C.C.A. 2d, 1945) 147 F. (2d) 500 (proof of use of display cards in action for patent infringement and unfair competition).

[201] United States v. Cushman, (C.C.A. 9th, 1943) 136 F. (2d) 815 (proof of fraud in action on government life policy). In this case the trial court made special findings of fact showing that the defense not pleaded was actually litigated.

[202] Rule 12(e).

> Rule 12(e) as originally drawn has been the subject of more judicial rulings than any other part of the rules, and has been much criticised by commentators, judges and members of the bar. . . . The tendency of some courts freely to grant extended bills of particulars has served to neutralize any helpful benefits derived from Rule 8, and has overlooked the intended use of the rules on depositions and discovery. The words 'or prepare for trial'—eliminated by the proposed amendment—have sometimes been seized upon as grounds for compulsory statement in the opposing pleading of all the details which the movant would have to meet at the trial. On the other hand, many courts have in effect read these words out of the rule. . . ."[203]

In thus indicating the respective functions of *pleading* and *discovery* the Committee has done much to clarify the place of pleading in the federal system. With the exception of "items of special damage," which must still be pleaded,[204] details of a claim or defense needed to prepare for trial should be obtained by discovery. This does not mean, however, that pleadings will not serve the function of giving some notice which will be useful in preparing for trial. As we have seen, a pleading must state in some form the factual basis of each substantive element of the claim or defense. Furthermore, it must identify the transaction or occurrence involved so as to serve as a record of the matters adjudicated. If these two requirements are observed the opposite party will have notice sufficient to enable him to frame a responsive pleading. If, in addition, items of special damage are set forth, he may have notice sufficient to enable him to prepare for trial. If notice thus given is not sufficient for trial preparation, such further notice as may be necessary must be obtained from discovery, and not from pleading.

III

SUMMARY OF COMMON-LAW PRINCIPLES

1. A judgment of a court of record is a conclusion drawn from premises appearing on the face of the judgment record.

2. A judgment record contains statements of claim and defense, verdicts, and findings of fact, but not evidence introduced at trial.

3. In rendering judgment on a claim or defense the court must determine the legal sufficiency of the claim or defense.

4. In determining the legal sufficiency of a claim or defense the court looks only to the pleadings which form a part of the record.

5. For the court to be able to determine the legal sufficiency of a claim or defense it must be legally complete.

[203] REPORT OF PROPOSED AMENDMENTS (June, 1946).
[204] Rule 9(g).

6. A question of legal sufficiency may be raised before judgment by demurrer or motion, or after judgment by writ of error.

7. If before trial a claim or defense is found to be legally insufficient judgment is for opposite party unless amendment is allowed.

8. If before trial a claim or defense is found to be legally sufficient judgment is for pleader unless opposite party is allowed to raise an issue of fact.

9. If after trial a claim or defense is found to be legally insufficient judgment is for opposite party even though verdict is for the pleader.

10. If after trial a claim or defense is found to be legally sufficient judgment is for pleader if the facts pleaded are found to be true.

11. In determining the truth of a legally sufficient claim or defense the court looks only to the pleadings and verdict or findings.

12. Material facts pleaded by one party and not denied by the other party are deemed to be true.

13. Material facts pleaded by one party and denied by the other party are deemed true or false in accordance with the verdict or findings.

14. Pleadings serve as a record of matters admitted by failure to deny, and of matters found by a general verdict.

15. The record of a court of record, which includes the pleadings, is an indisputable record of matters adjudicated.

16. For the record to be true, matters proved may not "vary" from matters pleaded.

17. Having pleaded one material matter, a party may not surprise his opponent by proving a different matter.

18. To prevent surprise at the trial the plaintiff must plead items of special damage.

19. To prevent surprise at the trial the plaintiff may be required to furnish a bill of particulars.

20. To prevent surprise and future relitigation a claim or defense should be identified by details such as time and place.

Except to the extent that parties are permitted to form new issues by evidence introduced at the trial, the above principles are as valid today as they were at common law. Even where new issues are formed by evidence there is ordinarily an amendment of the pleadings to conform to the proof so as to preserve the common-law scheme. Where, as under the Federal Rules, an amendment is not required, the ancient system is completely abandoned. While this abandonment is possible, it can occur only when one party strays from the pleadings and the other party is willing to follow. If the second party is not willing to follow, he can force the first party to stick to the issues made by the pleadings by objecting to any evidence outside those issues.