The Case Against Fact Pleading in Louisiana

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"'When I use a word,' Humpty Dumpty said, in a rather scornful tone, 'it means just what I choose it to mean—neither more nor less.'

"'The question is,' said Alice, 'whether you can make words mean so many different things.'

"'The question is,' said Humpty Dumpty, 'which is to be master—that's all.'”

Through the medium of this colloquy in his fantasy, Lewis Carroll rather subtly makes the point that words sometimes prove to be the most elusive and slippery of labels. We are all Humpty Dumptys, so that words always mean just what we choose them to mean; but the difficulty lies in the fact that, without ever being aware of it, different persons do not always choose to make the same words mean the same things. When this occurs, divergent opinions are as apt as not to be bottomed on no more solid a foundation than unrecognized differences of definition. This is particularly true of our present subject, where the competing meanings of words represent merely a difference of degree.

These subtle differences of definition constitute the initial danger faced by anyone writing a criticism of the system of fact pleading in Louisiana and other American jurisdictions. As long as all schools of procedural philosophy agree that the functions of pleading include the giving of fair notice to the adversary and providing the basis of res judicata, there will be no disagreement upon the necessity of alleging some factual particulars. All systems of pleading insist upon averments of the circum-

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1. Carroll, Through the Looking-Glass, Chapter VI.

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stances of time and place and, at least in certain extraordinary types of cases, require allegations of the factual particulars giving rise to the controversy. This is true even of pleading under the Federal Rules of Civil Procedure, which has expressly repudiated "fact pleading." Under a regime of adjective law which regards the primary function of pleading as the giving of fair notice to the adverse party, specific averments of time and place are recognized as being indispensable. For this reason, the Federal Rules provide that for "the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter." Similarly, it is recognized that any claim or defense based on a contention of fraud or mistake, and yet averred only generally in the form of a legal conclusion, would signally fail in performing the function of giving adequate notice to the adverse party; hence, the requirement of the Federal Rules that in "all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." A complaint in an injunction suit would hardly provide adequate notice of the plaintiff's grievance, or just what contemplated actions of defendant the plaintiff was seeking to enjoin, if such conduct, as well as the irreparable injury claimed to be impending, were alleged generally, and then only by legal inferences. For this reason, under federal practice it is required that these matters appear from specific facts shown by either the verified complaint or an affidavit annexed thereto.

Our conception of "fact pleading," therefore, should not be regarded as including every form of pleading which either permits or requires some factual allegations. The writer, like Humpty Dumpty, has no intention of letting words become the master; but perhaps before going further into the subject, the writer should delimit and mark off the boundaries of his terms.

4. "No temporary restraining order shall be granted without notice to the adverse party unless it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss or damage will result to the applicant before notice can be served and a hearing had thereon." Rule 65 (b), Federal Rules of Civil Procedure. Even though only a preliminary injunction or permanent injunction is at issue, the complaint must allege the facts and circumstances with particularity. 3 Barron & Holtzoff, Federal Practice and Procedure, § 1434, p. 312 (1950); Patten v. Dennis, 184 Fed. 137 (9th Cir. 1913); Bowles v. John F. Casey Co., 5 F.R.D. 143 (D.C. Pa. 1946); Dickert v. Hickey, 47 F. Supp. 577 (D.C. N.Y. 1940). See, also, Bowles v. Deep Vein Connellsville Coke Co., 5 F.R.D. 140 (D.C. Pa. 1946).
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FACT PLEADING DEFINED

"Fact pleading" is universally restricted by American students of civil procedure to the particular system of pleading which originated in the Field Code of Procedure of New York in 1848. Its chief characteristic is the requirement of pleading ultimate facts (as distinguished from evidentiary facts on the one hand, and conclusions of law on the other). Generally, this system is regarded as possessing three additional characteristics, which actually are corollaries stemming from the principal requirement of pleading ultimate facts. These other characteristics consist of the prohibition against the inclusion of evidentiary facts in the pleading, the denial of any effect to be given the pleading of conclusions of law, and the requirement of pleading full factual particulars in all cases.

Possibly as a result of Louisiana's original heritage of simplicity of pleading and freedom from unnecessary technicalities, our administration of justice has never been burdened with rules which require the striking of evidentiary facts from the pleading, or which compel amendment of a pleading to delete allegations of evidentiary facts.5 The other characteristics of the system, however, have found complete recognition in the Louisiana cases of the past forty years. Hence, for present purposes, and specifically as applied to Louisiana law, fact pleading is to be considered as including only the following characteristics of our present system of pleading:

(1) the required pleading of the ultimate facts which constitute the cause of action and defense;6

(2) the denial of any legal effect to be given to the plead-

5. In years of research in the civil procedure of Louisiana, the writer has never read a case in which any objection had been made to a pleading on the ground that its allegations consisted of evidentiary, rather than ultimate, facts.

ing of conclusions of law not supported by allegations of ultimate fact;\(^7\) and

(3) the required pleading of full factual particulars in all cases, under penalty of compulsory amendment of an offending petition\(^8\) or exclusion of evidence to support a defense pleaded only generally.\(^9\)

**ORIGIN OF FACT PLEADING**

"At common law, facts also were to be pleaded; but, with the emphasis placed especially upon the development of an issue and the natural tendency of all pleading to become formal, common-law pleading had come in a large measure to employ formal general statements which did not distinctly set forth the pleader's case."\(^10\) Under the English equity system, since there was no separate body for the trial of facts, there was an absence of emphasis upon the formulation of issues. No formal trial with witnesses ordinarily was had in equity cases until relatively modern times; hence the pleadings in equity were quite detailed, since, being sworn to, they provided the facts upon which the case was decided.\(^11\)


8. The effect of the trial court's maintaining of an exception of vagueness is to require the removal of the vagueness, obscurity, or generality complained of through amendment of the petition, under penalty of dismissal of the suit for noncompliance with the order requiring amendment. Goldsmith v. Virgin, 122 La. 831, 48 So. 279 (1909); Dronette v. Meaux Bros., 156 La. 238, 100 So. 411 (1924); Moore v. Moore, 192 La. 259, 187 So. 670 (1939); Foster & Glassell Corp. v. Ackel, 166 So. 885 (La. App. 1936); Fearce v. United States Fidelity & Guaranty Co., 5 So. 2d 743 (La. App. 1942).


11. Ibid.
When New York in 1848, under the leadership of David Dudley Field, effected a fusion of law and equity through the adoption of its Code of Procedure,\(^\text{12}\) it suppressed the common law forms of actions and common law pleading. The draftsmen of the new procedural code attempted to simplify pleading even beyond the relative simplicity of contemporaneous equity pleading. "The complaint must contain . . . a plain and concise statement of the facts, constituting each cause of action, without unnecessary repetition."\(^\text{13}\) Other pleadings were placed on the same plane of apparent simplicity as the complaint. All pleadings were to consist of allegations of ultimate facts—the material, operative facts—as contradistinguished from the "evidential" or "evidentiary" facts, on the one hand, and "conclusions of law," on the other.\(^\text{14}\)

The system of fact pleading thus ushered in by the Field Code of Procedure spread like wildfire throughout the country, and within three-quarters of a century following its adoption in New York, twenty-seven other American jurisdictions had enacted procedural codes requiring fact pleading.\(^\text{15}\)

**DEFECTS OF FACT PLEADING**

This new American system of pleading had been founded upon certain assumptions which failed to materialize in actual practice. The distinction between ultimate facts, evidentiary facts, and conclusions of law—which had been thought to be very elementary and quite simple—caused untold difficulties to attorneys and judges alike who found themselves floundering in the "morass of decisions as to whether a particular allegation is one of fact, evidence or law."\(^\text{16}\) "Quite commonly an allegation has been held bad as a statement of law only."\(^\text{17}\) As a consequence, outright miscarriages of justice resulted through the dismissal of the action when, through inadvertence or lack of skill, the pleader failed to include sufficient ultimate facts in his complaint or petition to disclose a cause of action. Prolonged and useless delays resulted from the testing of the sufficiency of the

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\(^\text{13}\) New York Code of Procedure § 120 (1848).

\(^\text{14}\) Clark on Code Pleading 225 (2 ed. 1947).

\(^\text{15}\) Id. at 24.

\(^\text{16}\) 1 Moore's Federal Practice 553 (1938).

\(^\text{17}\) Clark on Code Pleading 228 (2 ed. 1947).
pleadings, and in amendments thereof when necessary and permitted.

Few attorneys ever make as complete a preparation of their case, and as thorough a sifting and evaluation of their evidence, before the drafting of their pleadings as they do prior to trial. Further, few attorneys know definitely where they stand with respect to the evidence available to the opposing party at the time the pleadings are drafted. As a consequence, the complaint or petition usually alleges every single fact having a tendency to sustain the claim, whenever supported to any extent by any evidence available to the plaintiff; and conversely, the answer usually denies every single fact in the initial pleading refuted by any evidence available to defendant. On the trial of the case, or through the use of discovery, the pleader may be confronted with such overwhelming proof to the contrary on some such allegations that they are not relied upon seriously thereafter. Unless counsel is a clairvoyant, however, or would be willing to abandon potential grounds of attack or defense on a hunch that he may not be able to establish them, these allegations will always be included in the pleading. In the light of these factors, in a number of jurisdictions which had adopted the system it was felt that fact pleading had failed signally in the execution of its intended functions of formulating the issues, and apprising the opposing party of the evidence available to the pleader.

Gradually, it became apparent that too much was expected of pleading; that pretrial procedure was a much more efficient device for narrowing the issues; and that an adequate system of discovery was much more effective in permitting the parties to determine what evidence would be available to their adversaries than any system of pleading could ever be.

THE REACTION AGAINST FACT PLEADING

By the end of the first quarter of the present century, it was realized by many students of procedure that, under the regime of fact pleading, entirely too much of the time and energies of counsel and of the courts was consumed in the determination of questions which had little if any bearing on the merits of the cases. A reaction against the system had definitely set in. The Illinois Practice Act, which went into effect in 1933, was the first procedural code which sought to avoid fact pleading—an effort

18. Professor Edward M. Hinton, then of the University of Chicago law faculty and one of the advisers of the committee which drafted the Civil
which was to prove unsuccessful. Complete success in escaping from the rules of fact pleading, however, was definitely obtained under the Federal Rules of Civil Procedure, which went into effect in 1938. The impetus toward the simplification of pleading given by this procedural reform became evident almost immediately.

Since 1938, six states have adopted the modified notice pleading of the Federal Rules without qualification, through the provisions of procedural rules or statutes taken almost verbatim from Federal Rule 8 (a). The new procedural provisions of an additional state, South Dakota, while definitely under the influence of the Federal Rules with respect to the desirability of suppressing fact pleading, incorporated rules which are strikingly similar to the simple system of pleading which obtained in Louisiana under the Practice Act of 1805 and the Code of Practice of 1825. The new Texas Rules of Civil procedure, which in
earlier drafts sought to suppress the technical rules of fact pleading, eventually incorporated two rule provisions which make it extremely difficult to classify the present system of pleading in that state.

While the impact of the Federal Rules upon procedural philosophies in America has been tremendous, and while all of the newer procedural rules have borrowed extensively from federal practice, considerable resistance has met efforts to eliminate the rules of fact pleading. As a result, six states which have adopted new rules of civil procedure, or which have amended their procedural codes and statutes to embody many of the

shall contain: (1) A plain statement of the claim constituting the cause of action. . . " 33:0903. "Each averment of a pleading shall be simple, concise and direct. No technical forms of pleading or motion are required." 33:0908.

23. "The proposed change which elicited the most discussion related to the definition and system of pleading. Under the suggested rules pleading will 'consist of a statement in plain and concise language of the plaintiff's grounds of recovery or the defendant's ground of defense. That an allegation be evidentiary or be of legal conclusion shall not be ground for objection when fair notice to the opponent is given by the allegation as a whole.' The effect of this change is to sweep away at one time the unworkable requirement of 'fact' pleading and the technicality incident to requirement of the statement of a 'cause of action.'" McDonald, Civil Rules Begin To Take Form, 3 Texas Bar J. 179, 180 (1940).

24. Texas Rules of Civil Procedure, Rules 45 (b) and 47. "Pleadings in the district and county court shall . . . (b) Consist of a statement in plain and concise language of the plaintiff's cause of action or the defendant's grounds of defense. That an allegation be evidentiary or be of legal conclusion shall not be ground for objection when fair notice to the opponent is given by the allegations as a whole. . . ." Rule 45 (b). "A pleading which sets forth a claim for relief, whether an original petition, counterclaim, crossclaim, or third party claim, shall contain (a) a short statement of the cause of action sufficient to give fair notice of the claim involved . . . ." Rule 47.

25. Apparently, the members of the profession participating in the drafting of the new Texas Rules were of the opinion that the rigors of fact pleading had been relaxed appreciably. On this point, see the comments, under a subtitle significantly labelled "Demotion of Fact Pleading," in Stayton, The Scope and Function of Pleading Under the New Federal and Texas Rules: A Comparison, 20 Texas L. Rev. 16, 23 (1941). On the other hand, the great majority of Texas practitioners consulted advised the officers of the Louisiana State Law Institute rather emphatically that the new Texas Rules made no change in their system of pleading in this respect, and that the rules of fact pleading still obtained in that state.

The reported Texas cases offer no convincing evidence on the subject, either pro or con, due to their failure to quote from, or to describe in sufficient detail, the allegations of the questioned pleadings. Some appear to support Judge Stayton's position, or at least to indicate a liberality of pleading seldom found in the Louisiana decisions of the past forty years. Cox v. Ekelstrom, 163 S.W. 2d 845, 846 (Tex. Civ. App. 1942); Winslow v. Boyd, 195 S.W. 2d 334, 336 (Tex. Civ. App. 1946); Andrews v. Daniel, 240 S.W. 2d 1018 (Tex. Civ. App. 1951). Others apply the pertinent provisions of the new rules in a manner, and with language, indicating rather strongly that the rules of fact pleading are presently in full operation. Hankey v. Employer's Casualty Co., 176 S.W. 2d 337, 360 (Tex. Civ. App. 1943); Garza v. De Leon, 193 S.W. 2d 844, 846 (Tex. Civ. App. 1946); King v. Harris County Flood Control Dist., 210 S.W. 2d 438, 441 (Tex. Civ. App. 1948).
provisions of the Federal Rules, have retained the requirement that the ultimate facts of the cause of action or defense be pleaded.26

PLEADING UNDER THE LOUISIANA PRACTICE ACT OF 1805

The Practice Act of 1805, commonly known as the Livingston Practice Act, was primarily a refinement and simplification of contemporary chancery practice.27 At least one of its more important provisions, however, bore on its face evidence of the influence of the Spanish procedural law which it superseded.28

The first section of this statute29 provided, in part:

"That all suits in the superior court shall be commenced by petition, addressed to the court, which shall state the names of the parties, their places of residence, and the cause of action, with the necessary circumstances of places and dates, and shall conclude with a prayer for relief, adapted to the circumstances of the case. . . ."

The provisions of the statute30 prescribing the rules for the pleading of the answer are to be found in the fifth section, and read, in part, as follows:

"That every answer . . . shall without evasion, answer every material fact stated in the plaintiff's petition; shall avoid all matter scandalous, libellous or impertinent, and where it contains a denial of the facts stated in the petition, or states any new fact in avoidance thereof, and the defendant wishes a trial by a jury, such [answer] shall conclude with a prayer to that effect . . . ."

These requirements of the answer immediately suggest a system of fact pleading, particularly the words "every material fact"—substantially the language of our present Pleading and Practice Act.31 If it is fact pleading, then certainly it cannot be

   Iowa: Rule 70, Rules of Civil Procedure.
   New Jersey: Rule 3:8-1, Rules Governing Civil Practice in the Superior Court.
   Washington: Revised Code (1951) 4.32.040.
30. Id. at § 5.
attributed to the influence of the Field Code of New York, for the latter was not adopted until some forty-three years later. Could it have been the reverse, and were these provisions the fountain-head of the American system of fact pleading? If so, then this most interesting fact has been completely missed by Professor Hepburn, Judge Clark, and all of the other students of procedure who have done such careful research into the source of fact pleading.

Before we impulsively jump at the conclusion that Edward Livingston was the originator of fact pleading, let us not forget that all systems of pleading require the allegation of some facts, and even some factual particulars. Where are the requirement of pleading ultimate facts, the prohibition against the pleading of conclusions of law, and the requirement of pleading full particulars in all cases? The statute sets forth none of these; but very convincing evidence is available that this act negatives two of these requirements—those of pleading ultimate facts and full factual particulars in all cases. The sixth section of the Practice Act\textsuperscript{32} provided, in part, that

"All facts intended to be relied on by the plaintiff or defendant and submitted to a jury shall, at least two days before such trial, be drawn up by the party intending to submit the same, and delivered to the judge or judges, together with an abstract of the substantial parts of the petition and answer, each prepared by the party filing the same, and upon receiving them, the court shall examine whether such facts are within the pleadings and strike out such as do not fairly arise out of the petition or answer . . . ."

This legislation was supplemented by an 1817 act\textsuperscript{33} which elaborated on the procedure to be followed in submitting special issues to the jury, and required the judge to pass upon the pertinency of the facts alleged in this statement.

Except in those cases where the plaintiff relied upon facts in avoidance of the defense, why would it have been necessary to prepare this statement of facts relied on by each party, if the pleadings were required to set forth the ultimate facts and full factual particulars in all cases? Would it not have been simpler in such a case to have required the parties to read their pleadings to the jury, just as is done even today in civil cases in Texas?

\textsuperscript{32} Acts of the Territory of Orleans (1805), c. 26, § 6.
If these statutes were intended to cover only those cases where the plaintiff relied on an avoidance of the defense, why were these statutes not limited to such cases? Workman, Edward Livingston's own attorney, in *Livingston v. Heerman*[^34] successfully contended that only the second statute was intended to apply to cases where the plaintiff relied on facts in avoidance of the defense. He argued that:[^35]

"The first law on this subject, 2 Martin's Digest, 156, ordains that the court shall examine whether such facts, &c, are within the pleadings, and strike out such as do not fairly arise out of the petition or answer. The next statute on the same point declares, that the pertinency of the statements of facts, shall be judged of by the court. The legislature adopted this last expression, no doubt, on considering the frequent scantiness and insufficiency of our written pleadings; and that many facts might be pertinent to a cause, although not fairly arising out of the petition or answer in it. This may often happen, from our very defective practice of not filing replications, even when pleas and exceptions are made, which contain new matter, and various distinct facts."

The court, in accepting this argument, said:[^36]

"There is another bill of exceptions in which the defendant objects to the opinion of the judge, on the pertinency of the facts submitted to the jury.

"The first law on this subject, contained in 2 Martin's Digest, 156, ordains that the court shall examine whether the facts are within the pleadings, and strike out such as do not fairly arise out of the petition and answer. The next statute on the same point, Act of the legislature, 1817, page 32, sec. 10, directs that the pertinency of the statement of facts shall be judged of by the court.

"If the legislature intended these statutes to have the construction contended for by the defendant in this case, that the facts stated in the petition and answer should be submitted, and nothing else, there would not have been any necessity to provide that the parties should draw up a state-

[^34]: 9 Mart. (O.S.) 656 (La. 1821).
ment of the facts, and that the pertinency should be judged of by the court."

Even more convincing evidence that ultimate facts and full factual particulars were not required in all cases is presented in the opinion in *Bethemont v. Davis*,37 decided one year earlier, where, in answering the question squarely, the court said:

"It is necessary, as we have already said, in the case of *Harvey v. Fitzgerald* [6 Mart. (O.S.) 530], that such certainty should prevail in pleading, as to put each party on his guard. Therefore, wherever a party attempts to introduce evidence in support of some ground of defence, distinct from those which are set up in the pleadings, such evidence ought to be refused. But, to require the suitors to specify in their pleadings particular facts, out of which, the truth of a general allegation will result, would, we apprehend, be creating embarrassment, in the administration of justice, for no possible good purpose."

In two cases decided during the period when the Practice Act of 1805 was in effect, the court did hold that evidence would not be admitted in support of a ground not pleaded adequately. One of these was *Harvey v. Fitzgerald*,38 cited in the quotation above, where the court refused to consider the defense of illegality of the contract sued on, which had not been raised in the defendant's pleadings. In the other,39 evidence was excluded on the ground that "The facts alleged in the defendant's answer in the present case, to avoid the plaintiff's claim, and which amount to a reconvention, are not set forth with a sufficient statement of circumstances of place and date." In both of these cases, the pleading failed to provide fair notice to the adversary; and in both the pleadings would have been held insufficient under any system of pleading.

Proof that no more was expected of pleading under the Practice Act of 1805 than is expected of it today in the United States district courts is afforded by *Ralston v. Barclay*.40 There, plaintiff sought to introduce evidence showing the gross negligence and fraud of defendant, when no specific allegations thereof had been set forth in the petition. The Supreme Court held that such allegations should have been made in the petition; but nonetheless

37. 8 Mart. (O.S.) 391, 392-393 (La. 1820).
38. 6 Mart. (O.S.) 530, 549-551 (La. 1819).
40. 6 Mart. (O.S.) 649, 12 Am. Dec. 483 (La. 1819).
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sustained the trial judge's action in admitting this evidence. The rationale of the court's position appears from the following excerpt from its opinion: 41

"Had the evidence in the present case been offered by the plaintiff, such as it appears to be, in support of the allegations in his petition, and were there no circumstances exhibited by the record, which show that the counsel for the defendants had perfect knowledge of the charges which they were called on to contest, we should probably be of opinion that the exception ought to be sustained. But it appears they had such knowledge before they entered on the trial of the cause, from the manner in which the cross-examination of the plaintiff's witnesses is conducted, and other incidents; it is believed, that now to overrule the opinion of the district court, in admitting the evidence, would be doing injustice, as the object of certainty and explicitness, in setting forth the [cause] of action in a petition, is to inform the defendant of the claims and pretensions against which he has to contend."

Fair notice to the adversary was the primary objective of the pleadings, and if the adversary had such knowledge aliunde the pleadings, then the latter's insufficiencies could be disregarded. This is definitely not fact pleading, but a modified notice pleading in its most liberal aspects.

PLEADING UNDER THE LOUISIANA CODE OF PRACTICE OF 1825

The new procedural code adopted in 1825 retained the original simplicity of pleading of the Livingston Practice Act, though perhaps it moved a degree closer to the procedural law in Spain. The requirements of the petition included all those set forth in the first section of the Practice Act, but now Partida 3. 2. 40 was tracked by the requirement of a clear and concise statement, not only of the cause of action but also "of the object of the demand, as well as the nature of the title." 42

The essentials of the answer were stated more fully than in the Practice Act in a number of articles in the new code. The initial one 43 provided that:

"The answer must . . . express the name, surname and

41. 6 Mart. (O.S.) 649, 650, 651.
42. Art. 172 (4), La. Code of Practice of 1825.
residence of the defendant, as well as the name of the plaintiff; and it must be free from all abusive, defamatory, or impertinent expressions.

"It must conclude by praying that the demand of the plaintiff be rejected, and that he be sentenced to pay the costs of the suit; unless the defendant himself should incidentally plead compensation or some other exception."

A general denial was expressly permitted. "When the defendant answers to the merits, he is not bound to answer specially to all the allegations contained in the petition; it is sufficient to deny, generally, all of the facts stated, except he be called upon either to acknowledge or to deny his signature." The pleading of additional facts by the defendant found express recognition in the new code. "The defendant in his answer may allege facts different from those alleged by the plaintiff, and bring an incidental demand, when the same grows out of the action, or is specially permitted by law." Despite the criticism of the Livingston Practice Act voiced by attorneys trained under the common law because of its failure to permit replications, an express prohibition of replicatory pleadings was embodied in the new code. "When the defendant in his answer alleges on his part new facts, these shall be considered as denied by the plaintiff, therefore, neither replication nor rejoinder shall be admitted.

The Code of Practice of 1825, like its predecessor, the Practice Act of 1805, required the pleading of some facts in all cases. But the articles made no mention of ultimate facts, contained no requirement of the pleading of full factual particulars (except as noted in the following sentence), and did not expressly prohibit the pleading of conclusions of law. That full factual particulars were not considered necessary in all cases was attested by the new code provisions expressly requiring a statement of the full factual particulars in the petitions for conservatory writs and extraordinary writs, which had to be verified by the affidavits of plaintiff or his counsel. The Code of Practice provisions dropped the word "material" from the "material facts" of the Livingston Practice Act, but this was a matter of no consequence.

as the new code actually made no change in the rules of pleading in ordinary cases in Louisiana.

During the first three-quarters of a century following the adoption of the Code of Practice of 1825, the decided cases offered no evidence that the technical rules of fact pleading played any part whatsoever in our procedure. We find no mention of ultimate or evidentiary facts, no requirement of the pleading of full factual particulars in all cases, and no prohibition against the pleading of conclusions of law. In one of the very first cases decided under the new procedural code, the Supreme Court of Louisiana indicated a spirit of liberality to accord with the simplicity of pleading contemplated by the new code. In Ory v. Winter,49

"The plaintiff objected to [the] proof being received, because the fact was not put at issue by the pleadings. The court below sustained the objections; and gave as a reason for doing so, that pleas should be so certain that the opposite party might be apprised of the nature of the defence set up, and of the proof that will be probably introduced.

"One of the most valuable features of our jurisprudence, is the simplicity with which parties are permitted to bring their rights before the tribunals of justice. Those technicalities which, in other countries, embarrass and obstruct the progress of justice, are unknown to it. All it requires is, that each party should allege his grounds of attack or defense so specially, that the adversary shall not be taken unawares, by matters springing up on the trial of which he is not apprised by the pleadings; and that the judgment which may be rendered on the issue joined, will enable him, against whom it has been given, to protect himself by the plea of res judicata, should a subsequent demand be made for the same thing."

In this case the Supreme Court admitted that the answer did not afford fair notice to the plaintiff of the ground supported by the evidence offered, but held that this was of no consequence, as the plaintiff had knowledge of the ground of defense from the questions asked in the taking of depositions before trial. Ralston v. Barclay50 was relied upon.

The Ory case was not an isolated one. The Supreme Court

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49. 4 Mart. (N.S.) 277, 279-280 (La. 1826).
50. 6 Mart. (O.S.) 649, 12 Am. Dec. 483 (La. 1819). This case is discussed supra, p. 380.
repeatedly held that the primary purpose of pleading was fair notice to the adversary, and even if this had not been given by the pleadings, if the adverse party had been informed otherwise of the ground of attack or defense so that the evidence offered had not surprised him, the evidence should have been admitted. Knowledge aliunde the pleadings was held a satisfactory substitute for sufficient pleadings if it was received by the adverse party through the taking of depositions prior to trial, information given to his counsel before the trial, the urging of the ground at a prior trial, evidence attempted to be introduced at a prior trial, letters written to the adverse party prior to institution of suit, or however received if the testimony of the objecting party showed he had such knowledge prior to trial.

Further, even in those cases where the only notice to the adversary was that afforded by the pleadings, the allegation of full factual particulars or details was not deemed necessary. All the cases required was that the substance of the demand or defense had to be set forth in the pleadings. This is made quite clear from the opinion in *Florance v. Nixon*, where it was said:

"The form which the petitioners have given to their action; and the necessity imposed on them to furnish proof of the special damage they may have sustained, formed the principal matter of argument at the bar. We have already expressed an opinion on the first point, in disposing of the exception; and we may add that our law has not prescribed any particular form in which parties shall state their cause of action. It requires nothing more than that the substance of the case should be plainly set out; and if this is done, exceptions merely technical cannot affect it."

If the "substance of the case" consisted of allegations which actually were conclusions of law, this proved quite immaterial. Thus, in *La Ferriere v. Bynum*, in a suit brought against the makers and endorsers of a note, the court held a petition sufficient which annexed the note sued on and averred "That at the proper

52. Tracy v. Tuyes, 7 Mart. (N.S.) 354, 356 (La. 1829).
57. 3 La. 289, 292 (1832).
58. 12 La. 587 (1838).
time, due and legal demand was made of the payment of said note, at the proper place, and payment refused." All requirements of fair notice were met, as the "proper time" could only mean the date of maturity, and the "proper place" could only mean the place stipulated in the note for its payment. But whether the note was presented for payment at the proper time and at the proper place depended upon factual particulars which were not stated in the petition. What a field day some of our fact pleading enthusiasts would have had, arguing an exception of no cause of action in behalf of the endorsers and levelled at the allegations that the presentment of the note at the proper time and place were conclusions of law, not supported by the necessary factual particulars as to when and where the note was presented for payment.

Similarly, in Clay v. Fisher, the Supreme Court held a petition sufficient, in a suit brought to recover certain movables in the possession of defendant. The fact that conclusions of law were given full legal effect, as long as they gave fair notice, is indicated by the following passage from the opinion:

"The judge did not, in our opinion, err, in overruling the defendant's exception. The averments that the defendant took illegal possession of the objects claimed, and continued to withhold them wrongfully, are sufficiently distinct and explicit to put the defendant upon his defence, if any he had to oppose the action."

Limitations of space will not permit the review of a number of other cases illustrating the liberality with which our Supreme Court viewed pleadings during this period, the generality of averment which was sanctioned, and the complete absence of technical rules limiting allegations to those of ultimate fact and giving no effect to the pleadings of conclusions of law.

The revision of the two Louisiana codes following the Civil War did nothing more than delete all references to slaves and


Conversely, there are a few cases where the pleadings were held bad, but all likewise would have been held insufficient under the Practice Act of 1805. These cases include: Pargoud v. Guice, 6 La. 75, 25 Am. Dec. 202 (1833); Cox v. Robinson, 2 Rob. 313 (La. 1842); Perkins v. Potts, 8 La. Ann. 14 (1853); Compton v. Compton, 9 La. Ann. 499 (1854); Pickett v. Vance, 14 La. Ann. 668 (1859).
slavery, and to integrate therein all of the special statutes passed since 1825 which related to the various subjects regulated by these codes. The Code of Practice of 1870 made no change whatsoever in the rules of pleading, and retained verbatim the language of all provisions relating to pleading under identical article numbers.

There was, however, one discordant note sounded late in this period. The earlier Louisiana cases had always permitted amendment of the petition freely, even when the amendment removed the basis of an exception of no cause of action which had been sustained. In 1880, in *Burbank v. Harris*, our Supreme Court reversed its position and held that no amendment of the petition would be permitted after an exception of no cause of action had been sustained. This technical rule was applied at least five times during the next fourteen years. These cases were not the result of the influence of the rules of fact pleading, as none of these rules was applied; and in all of the cases the pleadings were so deficient that they would have been held insufficient even during the regime of the Livingston Practice Act. But they indicated a weaning from the liberality which had obtained during the first fifty years under the Code of Practice of 1825. The legal profession in Louisiana was becoming prepared mentally for the reception of the technical rules of fact pleading.

**Fact Pleading in Louisiana**

Apparently, the influence of fact pleading began to assert itself in Louisiana somewhere around the turn of the present century. No Louisiana cases of this period could be found which conclusively indicated this; but one or two of the forms con-

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tained in a formulary published in 1903 offer fairly convincing proof that, at least in negligence cases, the pleading of full factual particulars was either required or considered the safer practice. Six years later the rules of fact pleading were accepted by the Supreme Court of Louisiana.

*State v. Hackley, Hume & Joyce* was not only one of the most important cases ever decided by our Supreme Court, but one of the most interesting as well. There, the State of Louisiana sued to recover certain lands, and to annul the patents thereto, on the ground of fraud alleged to have been practiced upon the sovereign by the original entrymen, the ancestors in title of the defendants. To negative the possibility that the defendants might be considered purchasers in good faith without knowledge of the fraud of the entrymen, the state alleged that the defendants claimed the land under a title which had emanated from the entrymen, and that the defendants were "holders in bad faith." The trial court had sustained an exception of no cause of action which had been based on the contention that the state had failed to tender the price which had been paid by the entrymen, together with taxes and interest on both amounts. On the state's appeal to the Supreme Court, the defendants again urged their exception; but in the appellate court they further contended that the petition had not alleged that the defendants had been parties or privies to the alleged fraud of the entrymen, or that the defendants had ever had knowledge thereof, actual or constructive. "No particulars, or facts, or circumstances of any kind, are set forth which would constitute defendants possessors in bad faith. This charge is therefore a general and vague charge, without any specifications whatever."

Under the settled principles of the Louisiana pleading of that period, since the plaintiff's petition had been sufficiently definite to have afforded notice to the defendants of the substance of the cause of action, and to have afforded defendant the protection of res judicata, the petition should have been held sufficient. It was so held on the original hearing, where the courts said:

> "A pleader in the courts of this state has the right to make use of terms which are specifically defined by the law"

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65. Flemming, A Formulary of Civil Procedure (1903). See, in particular, the form of the petition in a personal injury suit, p. 252.
66. 124 La. 854, 50 So. 772 (1909).
67. 124 La. 854, 858, 50 So. 772, 774.
of the state, without giving the definitions. Thus, when one
sues an universal legatee, a widow in community, or the
indorser of a note, he is not required to recite the provisions
of law which establish these relations, and so, we think,
that, in alleging that the defendants are holders in bad faith
of the land here claimed, plaintiff has sufficiently alleged
that they assumed, and are assuming, to be the owners of it,
well knowing that the titles under which they claim are
vicious or defective, and, if that allegation be true (and it is
taken as true, for the purposes of the exception), plaintiff is
entitled to recover. The exception of no cause of action
should therefore have been overruled."

This original opinion was rendered by the Supreme Court
on April 26, 1909. A rehearing was applied for and was granted.
Volume 31 of the *Cyclopedia of Law and Procedure* (31 Cyc.)
was released by the publisher during the same year, and appar-
ently had not been available at the time defendants' original
brief had been written. This volume contained an excellent
monograph on the subject of "Pleading" written by Professor
Edson R. Sunderland, of the University of Michigan Law School,
which had integrated into the subject all of the rules of fact
pleading, then so popular throughout the country. Excerpts from
this monograph changed the procedural philosophy of Louisiana
immediately. The opinion on rehearing in the *Hackley, Hume &
Joyce* case, rendered on November 29, 1909, reversed the former
position of the Supreme Court, and affirmed the judgment of the
trial court which had maintained the exception. In its opinion
on rehearing, the court said: 68

"The said allegation of the defendants being holders in
bad faith, or in other words, of their title being vicious or
defective and their knowing it, being nothing more than the
allegation of a conclusion of law, is no allegation at all, since
the allegation of a conclusion of law is no allegation. It 'does
not aid a pleading.' 31 Cyc. 51. 'Facts, not conclusions of
law, must be alleged in pleadings.' Id. An exception of no
cause of action admits the well-pleaded facts, not the con-
clusions of law, contained in the petition. 6 Eng. Pl. & Proc.
336; 31 Cyc. 333; Fertilizer Co. v. Wolf, 48 La. Ann. 631, 19
South. 558; State ex rel. v. Judge, 50 La. Ann. 266-273, 23
South. 839.

68. 124 La. 854, 863-864, 50 So. 772, 775-776.
“A pleader is not required to allege the evidentiary or intermediate facts; but he must at least allege the ultimate facts. Otherwise how can his adversary know what facts he must come prepared to disprove. In the instant case, the evidentiary or intermediate facts are all the circumstances from which the state seeks to draw the conclusion that the defendants and their several predecessors in title acquired the lands without valuable consideration, or else with notice of the alleged fraud. The ultimate fact is their having acquired the lands without consideration, or else with notice of the alleged fraud. This ultimate fact needed to be stated, because until it was stated there was nothing to show that the said titles, constituting the alleged chain of title of defendants, were not good. ‘Ultimate facts of necessity are conclusions drawn from intermediate and evidentiary facts; but legal conclusions cannot be pleaded as ultimate facts.’ 31 Cyc. 70.

‘... The pleader is allowed to dispense with the evidentiary or intermediate facts, and to content himself with alleging the ultimate facts; but further than this it is not possible to go, without losing sight of the principal object of pleading, which is to inform the adversary of what he must come prepared to meet with his evidence. It is not possible to go a step further and hold that even the ultimate facts may be dispensed with, provided a conclusion of law is allowed from which they may be deduced with a certain degree of cogency. ...’

Why a conclusion of law which fairly apprised the adversary of what he must come prepared to prove should not have served the purposes of the administration of justice was a matter which the court did not take the trouble to explain. It simply was against the rules of fact pleading. Further, the court never seemed to realize that it was extremely difficult to justify its position that an allegation that the defendant was a holder in bad faith was a conclusion of law; while allegations that the defendants acquired the lands without valuable consideration, or that they acquired these lands with notice of the alleged fraud were held to be allegations of ultimate fact. As with Humpty Dumpty, words were to mean exactly what the court intended them to mean; and if the court saw fit to label one word pregnant with legal connotations as a conclusion of law, and others as ultimate facts, why that was the court’s privilege.
Further, the only two Louisiana precedents cited in the opinion on rehearing to support its position on ultimate facts and conclusions of law were *conservatory writ cases*—injunction suits. In both, Article 304 of the Code of Practice expressly required the petitions to contain factual particulars, and to be verified by the affidavits of the plaintiffs or their attorneys. Naturally, in both cases the Supreme Court earlier had refused to act upon statements consisting only of legal inferences, unsupported by the required factual particulars, that the plaintiffs would have suffered irreparable injury and were entitled to the injunctive relief sought. These pleadings would be held insufficient in injunction cases in federal courts today.

In 1912, the Pleading and Practice Act was adopted. This legislative measure had been prepared by the Committee on Jurisprudence and Law Reform of the Louisiana Bar Association, after a study lasting more than two years. The primary objectives of this act were the abolition of the general denial and the requirement that the facts alleged or denied be set forth in numbered paragraphs. As adopted, the measure went somewhat further than this. It required the verification of all pleadings which set forth facts—thus placing all pleadings upon the same basis as the petition in conservatory writ and extraordinary writ cases. It also created the converse of the exceptions of no right or no cause of action—the motion for judgment on the pleadings. For present purposes, however, the most important feature of this statute, which does not appear to have constituted an objective of its draftsmen, was the words "material facts" in the requirement that facts be pleaded in numbered paragraphs. After the decision in the *Hackley, Hume & Joyce* case, these words could only mean "ultimate facts"—with all of the resulting implications. Fact pleading was now required by statute.

The reception of the technical rules of fact pleading was not the only damage done by *State v. Hackley, Hume, & Joyce*. In that case, the state requested, in the event the exception was maintained, that the suit not be dismissed but that the proceed—

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71. See 12 La. Bar Ass'n Reports 135 et seq., 159-160 (1910); 13 La. Bar Ass'n Reports 98 et seq., 103-108.
ings be remanded to the trial court to permit amendment of the petition so as to state a cause of action. This request was denied. The court refused to permit amendment and cited *Burbank v. Harris* in support of its position. It was held that "Unless a cause of action is alleged, there is no suit, and hence nothing to amend." This was judicial legerdemain. Nevertheless this rule was the law of Louisiana until 1936, when in *Reeves v. Globe Indemnity Company of New York* it was repudiated, and the cases applying it overruled expressly.

Its companion rule, however, is still playing hob with the administration of justice in this state. This is the requirement that the full factual particulars of any affirmative defense be pleaded in the answer, under penalty of the exclusion of all evidence in support thereof on timely objection. Here, the rules of fact pleading are something more than nuisances—they are deadly. Once the die is cast in the original answer, there can be no amendment since it is said that this would change the issues. These rules are still being applied in actual practice.

There have been, however, light spots on the dark background. The liberal attitude of many of our present judges has proven most encouraging. In the most important area of the real actions, pleading has been greatly facilitated by the decision that the allegation of "real and actual possession" was one of ultimate fact and not a conclusion of law. In a case decided during the...
past term, and which involved the validity of a writ of attachment—an area where the strictest rules of pleading have always been applied—the Supreme Court held that an allegation "that the four named defendants, on or about May 13th or 14th, appropriated and converted" one hundred and ninety odd thousand gallons of molasses "to their own use" was one of ultimate fact and not a conclusion of law. While it is somewhat difficult to reconcile the holdings of these two cases with State v. Hackley, Hume & Joyce, these later cases are in complete harmony with our Supreme Court's present trend towards liberality of pleading.

PLEADING UNDER THE NEW CODE OF PRACTICE OF LOUISIANA

The Louisiana State Law Institute has now been working for more than two years under its mandate to prepare and submit to the legislature the draft of a new Code of Practice. One of the most controversial of all the decisions which the Institute will have to make in its work on the new procedural code is the determination of whether fact pleading will be retained or suppressed. Originally, three alternatives competed for acceptance with regard to this decision. The first of these possibilities was the adoption of the modified system of notice pleading in use in the federal courts, through the drafting of code provisions tracking the pertinent Federal Rules of Civil Procedure. The second of these alternatives was the return to the original simplicity of the Code of Practice of 1825, through the suppression of the pertinent language of the Pleading and Practice Act and the adoption of relevant articles of the 1825 code modified by language which would work a legislative overruling of State v. Hackley, Hume & Joyce. The last of these possibilities was the retention of our present system of pleading, through the blending of appropriate provisions of the Pleading and Practice Act with pertinent articles of the present Code of Practice.

The first alternative proved rather hypothetical even initially, as considerable opposition manifested itself quite early to the acceptance of any system which would not require that the cause of action be set forth in the petition. Perhaps even more decisive

80. This case was discussed in more detail in The Work of the Louisiana Supreme Court for the 1951-1952 Term, 13 LOUISIANA LAW REVIEW 306, 320 (1953).
81. La, Act 335 of 1948 directed the Louisiana State Law Institute "to prepare comprehensive [projets] for the revision of the Civil Code of Louisiana and for the revision of the Code of Practice of Louisiana."
82. Under Rule 8 (a), Federal Rules of Civil Procedure, it is not necessary for the complaint to state a cause of action. It must contain only "a short
was the general feeling of members of the Council that the system of pleading contemplated by the Federal Rules of Civil Procedure worked effectively only through the extensive use of discovery procedure, and that the small amounts involved in the great bulk of cases in the state courts would not justify the expense of any generous use of discovery.

The controversy which consumed the time of the Council of the Institute for more than six months involved the choice between the second and third alternatives stated above. On December 12, 1952, by a vote of 13 to 10, the Council rejected the writer's recommendation of a return to the original simplicity of the Code of Practice of 1825, and decided to retain in principle our present system of fact pleading. The deadly effect of this system upon affirmative defenses pleaded only generally was sought to be eliminated through the utmost liberality of amendment within the discretion of the trial judge.

No opponent of fact pleading would ever be justified in accusing the Law Institute of taking hasty or precipitate action on the subject. This matter monopolized the major portion of the time of the Council for more than six months. Several full dress debates on the subject were had, and the matter was discussed pro and con informally during the major portion of twelve days of the Council's sessions. During the period while this issue was under consideration, pleadings in typical cases illustrative of the concrete differences between the two systems were drafted by the writer, and studied by members of the Council. Correspondence was had with prominent members of the bars of states which had recently adopted new procedural rules, to obtain the benefit of their experience. The final decision was reached after careful consideration and evaluation of all possible factors. While the writer naturally feels that the decision was unfortunate, he has accepted it in good faith and as the considered judgment of a representative cross-section of professional opinion in Louisiana. The purpose of this paper, therefore, is not to attempt to obtain Council reconsideration of the issue. The writer has concluded that the profession in Louisiana is not yet prepared to accept what it considers so radical a change. But, in his opinion, the retention of fact pleading in the new Code of Practice is only transitional.

and plain statement of the claim showing that the pleader is entitled to relief." Dioguardi v. Durning, 139 F. 2d 774 (2d Cir., 1944). This language was selected advisedly, so as to abandon completely the concept of the code "cause of action." Clark on Code Pleading 146 (2 ed. 1947).
It is contemplated that the new procedural code will retain the pretrial\textsuperscript{83} and discovery\textsuperscript{84} procedures adopted at the last session of the Legislature of Louisiana, and that it will further provide for an effective motion for summary judgment. The present draft of the title on Pleading, tentatively approved by the Council of the Law Institute, includes all three. The writer is of the opinion that, through the continued use of these procedural devices for not more than ten years, the profession in Louisiana will realize that we have expected entirely too much of the pleading, and that our very high expectations will not have materialized. Pretrial and discovery procedures will afford for the first time effective means of formulating and narrowing the issues, and in permitting the parties to determine what evidence is available to their adversaries. The motion for summary judgment in time will take over from the technical rules of fact pleading the function of relieving litigants from the necessity of going to trial on frivolous demands or defenses. (These rules of pleading do not screen the frivolous from the meritorious demands and defenses; they merely sift out the demands and defenses of the inept pleader, which is not the same thing at all.)

For these reasons, the writer believes that the suppression of fact pleading in Louisiana is not only logical and desirable, but also (if he may be permitted to hazard the prediction) inevitable.\footnote{83. La. R.S. 1950, 13:5151, as amended by La. Act 84 of 1952. 84. La. R.S. 1950, 13:3741 through 13:3794, as added by La. Act 202 of 1952.}