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COMMON LAW PLEADING MODIFIED VERSUS
THE FEDERAL RULES*

Marlyn E. Lugar**

IV. PLEADING LEGAL AND EQUITABLE RIGHTS—
UNION OF LAW AND EQUITY

The preceding parts of this paper have dealt with West Virginia rules which may unnecessarily delay or defeat a hearing on the merits of claims between parties to litigation, but the rules there discussed pertained to actions on one side of the court. Primarily the application of those rules on the law side or to actions at law has been treated, for it is there that the existing procedure is most restrictive. This part of the paper will also deal with limitations on the assertion of rights between the parties, but here will be discussed only those restrictions which resulted from the historical accident that established two systems of courts when one might have been sufficient. The text which follows demonstrates that all rights of the parties may be as adequately protected in one as in two systems.

A. The Federal Rule

The major reform accomplished by the Federal Rules to prevent the necessity of multiple actions is embodied in one of the shortest of the rules. Rule 2 provides that "there shall be one form of action to be known as 'civil action'." It abolishes the distinctions between law and equity as separate and distinct

* This is the fourth and last of a series of articles by the writer on this subject. The first concerned the joinder of parties and causes of action [52 W. V.A. L. Rev. 137 (1950)], the second discussed amendments [53 W. V.A. L. Rev. 27 (1950)], and the third dealt with counterclaims [53 W. V.A. L. Rev. 142 (1950)].

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systems of justice and abolishes the forms of action of common law pleading. For West Virginia courts the rule might expressly provide, in part, that "the distinctions between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing, are abolished." This combined procedure is found in most code pleading states.

To those who have not had experience with a system which makes no distinction in pleading between legal and equitable rights, it may be profitable to state initially that this procedure does not abolish legal and equitable remedies. No change in substantive rights is involved. In West Virginia remedies both legal and equitable are available to the parties in the same court. The change would mean merely that both types of remedies would be available in the same proceeding and that there would be no distinction in pleading whether either or both types or remedies were sought.

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2 This was the language of the first statute abolishing the distinction between actions at law and suits in equity. It further provided that in the future there should be but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which would be denominated "a civil action". N.Y. Laws 1848, c. 379, § 62. For other representative statutes, see 2 Moore, Federal Practice § 2.02 n. 13 (2d ed. 1948). Citations to other similar statutes are collected in Clark, Code Pleading 82 n. 24 (2d ed. 1947). A simpler statement of the rule accomplishing the same results was necessary for the federal courts when the rule was adopted, for by virtue of the Conformity Act the common law forms of action were procedurally unimportant in federal courts sitting in code states. 2 Moore, Federal Practice § 2.06.

Compare the language of the West Virginia rule governing all proceedings to obtain relief under the Uniform Declaratory Judgments Act, which reads: "... all procedural distinctions between the forms of actions at law and between claims and causes, at law and in equity, are hereby abolished." 128 W. Va. xv. See also the West Virginia statute quoted in the text at note 199 infra.

3 Clark, Code Pleading 82.

4 "While the formal distinction between proceedings in law and in equity is abolished by the new rules of civil procedure, ... yet remedies both at law and in equity are available to parties in the same court and in the same case. Neither legal nor equitable remedies have been abolished. What was an action at law is still an action at law, and what was a bill in equity is still a civil action founded on principles of equity. ..." New England Mut. Life Ins. Co. v. Barnett, 39 F. Supp. 761, 763 (S.D. Ala. 1941).

5 "All distinctions as to forms in the federal courts between actions at law and suits in equity have been abolished; but the difference in substance in federal judicial power between law and equity is imbedded in the Constitution and remains unaltered. ..." Commercial Nat. Bank in Shreveport v. Parsons, 144 F.2d 231, 240 (5th Cir. 1944). Other cases supporting this proposition are cited in 2 Moore, Federal Practice 304 n. 7.

6 See notes 4 and 5 supra. There would no longer be a law side and an equity side of the court; there would be no actions at law or suits in equity; there would be only a "civil action" in which all relief would be obtained that formerly could have been obtained on either side of the court.
B. West Virginia Procedure Compared

1. Uniform Declaratory Judgments

Under the Uniform Declaratory Judgments Act, the pleading rules in West Virginia are comparable to those which apply in all actions under the Federal Rules. Effective April 1, 1947, the Supreme Court of Appeals, under its rule-making power, prescribed that in all proceedings under the act all procedural distinctions between the forms of action at law and between claims and causes, at law and in equity, were abolished. Since declaratory relief is strictly neither equitable nor legal, in principle being sui generis, the adoption of this rule for proceedings under the declaratory judgments act cannot alone be urged as a compelling reason for the adoption of similar procedure where the remedy to be enforced is clearly legal or equitable.

However, some of the problems which will be encountered in this combined procedure are no different from those involved in a combined procedure for all civil actions. This is recognized in part in the rule itself. It is provided that any party shall have the right to a trial by jury of any disputed question of fact as to which he is entitled to a trial by jury under existing law. As will appear more fully herein, the question of right to trial by jury is the only serious problem involved in a merger of law and equity pleading. If this difficulty can be surmounted by the bench and bar in one phase of the practice, there is no reason to believe that any greater difficulty will be encountered if the combined procedure is adopted for all civil actions.

7 W. VA. CODE c. 55, art. 13 (Michie, 1949).
8 Id. at c. 51, art. 1, § 4.
9 128 W. Va. xv.
10 BORCHARD, DECLARATORY JUDGMENTS 239, 399, 439 (2d ed. 1941).
11 Compare the following provision in the act: "When a proceeding under this article involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending." W. VA. CODE c. 55, art. 13, § 9 (Michie, 1949).
12 Judge Clark states that the most striking problem in the adoption of one form of action is the form of trial in view of the constitutional right of trial by jury. CLARK, CODE PLEADING 89. Professor Moore terms this right of jury trial "the outstanding feature and problem of code pleading." 2 MOORE, FEDERAL PRACTICE 312 n. 4. Stated in a more succinct manner: "... Only two things can prevent a complete procedural union of law and equity in cases properly before the federal courts: (1) a psychological attitude which goes back to the historical conflict between Coke and Ellesmere, and (2) the Seventh Amendment. The Amendment is not an obstacle; it is only a fact to be considered. . . ." 2 MOORE, FEDERAL PRACTICE 505.
2. Equitable Defenses

To a limited extent it has long been recognized in West Virginia that in any civil litigation two proceedings ought not to be necessary merely because rights are involved which originally were enforceable only by separate courts. From the formation of this state statutes have provided for the use of certain so-called equitable defenses at law, making unnecessary a separate proceeding in equity to assert these matters against the law plaintiff. The defendant was permitted, but not required, to set up as defenses in the law action matters which would entitle him to relief, by a separate proceeding, in equity from the remedy sought in the law action. These statutes, however, have always been greatly limited in scope. One statute now provides that the defendant may set up in any action on a contract any matter which would entitle him to relief in equity, in whole or in part, against the obligation of the contract. However, this statute does not permit the court to use a form of relief which would be peculiar to equity. Therefore, the defendant must institute a separate suit, if the "defense" which he desires to assert would involve more than a judgment in common law form. For example, he can not assert a defense in a law action which would involve recision of a contract for the sale of land if he has previously acquired the title, for the law court can not reinvest the title or compel or supervise the conveyance. The other statutes now permitting equitable defenses are limited to actions of ejectment.

11 Article XI, section 8 of the West Virginia Constitution of 1863, provided that such parts of the common law and of the laws of the State of Virginia as were in force within the boundaries of this state when the constitution became effective, and were not repugnant thereto, were to be the law of this state until altered or repealed by the legislature. Equitable defenses at law had long before this been permitted, but not required, within the boundaries of this state. Va. Code c. 135 §§ 20-22 and c. 172, §§ 5-6 (1849).

12 "In any action on a contract, the defendant may file a plea alleging... any other matter, as would entitle him either to recover damages at law from the plaintiff, or the person under whom the plaintiff claims, or to relief in equity, in whole or in part, against the obligation of the contract; or, if the contract be by deed, alleging... any such other matter, as would entitle him to such relief in equity... ." W. Va. Code c. 56, art. 5, § 5 (Michie, 1949).

13 Tyson v. Williamson, 96 Va. 636, 32 S.E. 42 (1899); Mangus v. McClelland, 93 Va. 786, 22 S.E. 364 (1895). Both of these cases were decided under statutes which are identical with the present West Virginia statute. For a more detailed discussion of the limitations under this statute resulting from the narrow scope of common law judgments, see Burks, Pleading & Practice 409 (3d ed., Williams & Burks, 1934); Moreland, Counterclaim and Equitable Defense in Virginia, 3 W. & L. L. Rev. 47, 54 (1941).
and unlawful entry and detainer. They permit the defendant, under certain circumstances, to prevent a judgment against him in these actions if he would be entitled to a decree in equity vesting the legal title to the land in him.

These statutes not only are limited in their applicability; none of the statutes permit the defendant to obtain in the same proceeding affirmative relief against the plaintiff to which he may be entitled in equity. In addition, none of the statutes require the defendant to assert these equitable defenses. He may elect to plead the equitable right in the law action or bring an independent bill on the equity side of the court to obtain relief.

No delay in asserting such defenses ought to be permitted if the issue involved is to be tried by the court, as it would be if the matter were asserted in a suit in equity. There should be a complete determination of the dispute in one proceeding if it can be accomplished without any change in substantive rights of the parties. But, if the defendant asserts his right in the law action,

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10 Hogg, Pleading & Forms §§ 280, 282 (4th ed. 1934). These statutory provisions were first inserted only in that part of the Code which relates to ejectment. Although the treatise cited reaches the conclusion that these provisions apply also to actions of unlawful entry and detainer, there is not cited therein the section which was added by the revisers in 1931 to the article dealing with unlawful entry and detainer and which expressly provides that these equitable defenses shall be applicable. W. Va. Code c. 55, art. 3, § 6 (Michie, 1949).

17 One section provides: "A vendor, or any person claiming under him, shall not at law recover against a vendee, or those claiming under him, lands sold by such vendor to such vendee, when there is a writing stating the purchase, and the terms thereof, signed by the vendor or his agent." Id. at c. 55, art. 4, § 11.

The other section adds: "The payment of the whole sum, or the performance of the whole duty, or the accomplishment of the whole purpose, which any mortgage or trust deed may have been made to secure or effect, shall prevent the grantee or his heirs from recovering at law, by virtue of such mortgage or trust deed, property thereby conveyed, whenever the defendant would in equity be entitled to a decree revesting the legal title in him without condition." Id. at c. 55, art. 4, § 12.

Although the language of these sections does not indicate that the procedure is merely permissive, that will appear from the first statute cited in note 19 infra.

18 The statutes permitting the equitable defenses in ejectment and unlawful entry and detainer provide merely that the plaintiff shall not recover a judgment if the facts there specified shall be shown by the defendant. These sections are quoted in note 17 supra.

In an action on a contract the defendant may plead matters which would entitle him to relief in equity against the obligation of the contract. See statute quoted in part in note 14 supra. "No one would suggest that a common law court could under the statute supervise an accounting, grant an injunction, or order specific performance or cancellation." Moreland, supra note 15, at 55.

19 W. Va. Code c. 55, art. 4, § 13 and c. 56, art. 5, § 6 (Michie, 1949).
the defense becomes a "legal" one for submission to the jury.\textsuperscript{20} The defendant must bring an independent suit in equity if he prefers to avoid trial of the issue by a jury. The Federal Rules would require these defenses to be asserted, but as equitable matters they would be decided by the court.\textsuperscript{21}

That the West Virginia rules are very restrictive may be shown by comparison with the practice which existed in federal courts for many years \textit{prior} to the adoption of the new rules. Section 274b of the Judicial Code provided:

"In all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense or seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ or error of by appeal the appellate court shall have full power to render such judgment upon the records as law and justice shall require."\textsuperscript{22}

Although this statute did not permit the plaintiff to join legal and equitable causes of action, as do the new Federal Rules, it applied to \textit{any} action at law and permitted \textit{any} equitable defense to be interposed even though it involved a form of relief peculiar to equity.\textsuperscript{23}

Professor Moore has pointed out that under this statute some courts even permitted the plaintiff to combine, in a devious way, what would have been at common law legal and equitable causes of action. This was permitted by the weight of authority where

\textsuperscript{20} Moreland, \textit{Equitable Defenses}, 1 W. & L. L. Rev. 154, 164 (1940). \textit{But see Clephane, Equity Practice & Pleading} 409 (1926). See Davis v. Teays, 44 Va. (3 Gratt.) 270 (1846). Contrast the procedure in the federal courts prior to the adoption of the new rules. Under the Equitable Defense Act of 1915, when an equitable defense was pleaded in a federal court an equitable issue was raised and was tried by the court. Moreland, \textit{supra} at 177. See 2 Moore, \textit{Federal Practice} 346-7.

\textsuperscript{21} "While today equitable defenses when availed of become law defenses and are tried by the jury with the other issues, it is perfectly feasible to have issues in a law action retain their character as equitable issues to be tried by the court." Moreland, \textit{Counterclaim and Equitable Defense in Virginia}, 9 W. & L. L. Rev. 47, 60 (1941). See text which follows.


\textsuperscript{23} More tersely stated, it permitted "equitable defenses and equitable relief in actions at law." 2 Moore, \textit{Federal Practice} 341.
the defendant pleaded a legal defense and then the plaintiff pleaded equitable grounds in avoidance by replication. However, the Second Circuit, in *Keatley v. United States Trust Co.*, held that where the defendant pleaded a legal defense, the statute did not permit a replication interposing an equitable defense.

The facts in the *Keatley* case were strikingly similar to those in *Janney v. Virginian Ry.*, decided recently by the West Virginia court. In the *Janney* case, the plaintiff sought to recover damages under the Federal Employers' Liability Act for injuries suffered by him while acting as a brakeman for the defendant. The defendant pleaded a release of the claim, and the plaintiff by replication alleged that the release had been executed by him under a mistake of fact. The court sustained the demurrer to the replication, saying ".... we are impressed that nothing short of the formality of a suit in equity should be deemed sufficient to deal properly with the situation." No question was raised in the case concerning the possibility of establishing the mistake as the basis for equitable relief in the law action, and certainly there is no basis for considering this proper under the existing rules. However, both of these cases emphasize the uselessness of requiring two actions simply because a matter equitable in nature, a matter proper for the court to decide, is involved. If anything remains for a jury to decide after the court has decided the equitable issue, that right can be protected without the necessity of two actions. Transferring the case to the equity side of the court, the procedure next to be discussed, was not

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24 Id. at 342. The possibility of combining legal and equitable causes of action by virtue of this statute also existed where the plaintiff sued at law and the defendant had both a legal and an equitable claim arising out of the transaction sued on. Id. at 343. As to these claims the defendant could not have joined them if he had sued, but as defendant he might join them. Note this possibility under W. Va. Code c. 56, art. 5, § 5 (Michie, 1949).

25 249 Fed. 296 (2d Cir. 1918). Factually this case held that where the defendant's answer did not pray for affirmative relief, but pleaded a release which on its face was a complete legal defense to the action, the plaintiff could not, by filing a replication, obtain cancellation of the release, and that cancellation of the release could be obtained only by a bill in equity.

26 A summary of the facts in this case is set forth in note 25 supra.


28 Id. at 253, 193 S.E. at 189. Italics supplied.

29 Existing West Virginia statutes are more restrictive than was Section 274b of the Judicial Code, so that even the majority rule thereunder, discussed above in the text, offers no possibility of a different conclusion in this state. None of the statutes permit the plaintiff to establish equitable rights in a law action even as defenses to claims asserted by the defendant.

30 The manner in which this can be accomplished is discussed in the text at notes 121-129 infra.
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mentioned in either of these cases. The Virginia court followed this procedure in a similar case. Since the action was “properly brought on the law side of the court”, it is questionable whether the court should have permitted transfer of the case. In any event, even if this were done, it would not avoid the possible need for two actions since it would merely prevent the pending case from being dismissed. A second action would be needed if the release were held invalid.

3. Transfer of Case to Proper Forum

A more recent development to prevent the necessity of starting two proceedings because of the distinction between legal and equitable rights is the section inserted in the West Virginia Code in 1931 to permit the transfer of cases brought on the wrong side of the court. Prior to that time where a case had been brought on the wrong side of the court, the action or suit was dismissed, and the plaintiff was required to start another proceeding in the proper forum. Under the present statute, if the only question concerns the proper forum, the court must transfer the case to the proper forum and direct such changes in the pleadings as may be necessary to conform them to the proper practice. Thereafter the case proceeds and is determined on the amended pleadings, the defendant being allowed a reasonable time after such transfer in which to prepare the case for trial.

To digress for a moment, the action of the revisers in adopting this solution rather than abolishing the distinction between pleadings in actions at law and suits in equity seems inconsistent with other action taken in this state to eliminate similar prob-

\[\text{\footnotesize 31 In Edge Hill Stock Farm v. Morris, 155 Va. 103, 154 S.E. 473 (1930), the plaintiff brought an action at law (notice of motion for judgment) to recover damages for injury to its property caused by the negligence of the defendants. The defendants filed a special plea of arbitration and award. Plaintiff's special replication attacking the award on equitable grounds was not allowed by the trial court. The appellate court affirmed the trial court's ruling that the plaintiff had proceeded in the wrong forum, but remanded the case with leave to the plaintiff "to have the same transferred to the equity side of the court and to amend its pleadings so as to conform them to the proper practice." Id. at 111, 154 S.E. at 475.}

\[\text{\footnotesize 32 See text which follows.}

\[\text{\footnotesize 33 "No case shall be dismissed simply because it was brought on the wrong side of the court, but whenever it shall appear that a plaintiff has proceeded at law when he should have proceeded in equity, or in equity when he should have proceeded at law, the court shall direct a transfer to the proper forum, and shall order such change in, or amendment of, the pleadings as may be necessary to conform them to the proper practice. . . ." W. Va. Code c. 56, art. 4, § 11 (Michie, 1949).}

\[\text{\footnotesize 34 Burks, PLEADING & PRACTICE 320.}

\[\text{\footnotesize 35 Ibid. See also the statutory language quoted in note 33 supra.}

\[\text{\footnotesize 36 This part of the statute was not quoted in note 33 supra.} \]
When cases were dismissed and new actions necessitated because the pleader had chosen the wrong form of action, for example, trespass rather than trespass on the case, because of technical distinctions between the two, the forms of action were consolidated. Thereafter, a demurrer to a declaration in the form which had been abolished would probably be sustained, and an amendment be necessary to allege properly a cause of action in the combined form. Being a formal change, this ought not to require even a continuance, but delay in the trial of a case can be expected where it is transferred from the law

37 A point of interest in the adoption of this procedure, in addition to that which follows in the text, appears from a comparison with the federal procedure existing when this change was made in 1931. Basically the procedure adopted is the same as that which was provided by Section 274a of the Judicial Code which had been enacted in 1915. This was recognized by the revisers. (Section 1251a, U. S. Compiled Statutes 1916 cited in the Reviser's note to this section is the same statute.) The only material difference was the omission of this provision: “All testimony taken before such amendment, if preserved, shall stand as testimony in the cause with like effect as if the pleadings had been originally in the amended form.” However, even prior to the Act of 1915, the Equity Rules of 1912 had provided for the transfer of a suit in equity to the law side if the proceeding had been brought on the wrong side. (Rule 22). Another of these Rules of 1912 provided that if a matter normally decided at law arose in an equity suit, it would be determined in that suit “according to principles applicable, without sending the case or question to the law side of the court.” (Rule 23). This latter procedure was not inserted by the revisers, with the result that equity suits must be suspended, where such matters arise, until they can be decided in an action at law. Under the federal rule the law action was not needed, even though the issues proper for trial by jury were so tried and with the same effect as if a separate action had been brought. 2 MOORE, FEDERAL PRACTICE § 2.05. Compare the method of assuring right to trial by jury under a combined system for legal and equitable remedies. See text at notes 121-129 infra.

38 W. VA. CODE c. 55, art. 7, § 10 (Michie, 1949). Compare also the statute abolishing the action of replevin (Id. at c. 55, art. 7, § 4) and the statutory changes in the action of detinue to make available to the plaintiff some of the advantages which he might have obtained in an action of replevin at common law (Id. at c. 55, art. 6). On the latter, see Note, 32 W. VA. L. Q. 137 (1926).


40 This may be the one place where the change in the statute embodying the general rules on amendments would have practical significance. The revisers inserted the provision that the court might permit pleadings to be amended “changing the form of action.” W. VA. CODE c. 56, art. 4, § 24 (Michie, 1949). The common law rule which did not allow an amendment which changed the form of action had never been used by the West Virginia court as the basis for denying the right to amend even prior to this change in the statute. Lugar, Common Law Pleading Modified Versus the Federal Rules, 53 W. VA. REV. 27, 31 (1950).

41 Id. at 42.
side to the equity side, or vice versa. The distinction between an adequate and an inadequate remedy at law may be as fine-drawn as the difference between a direct and indirect injury.

In any event, although transferring a case from one side of the court to the other may avoid starting a new action to obtain some relief, it does not avoid the possible need of another action or actions to obtain the complete relief to which the plaintiff or plaintiffs may be entitled. This is especially likely to be true when the case is transferred to the law side. Equity may grant complete relief once it has assumed jurisdiction, but the law court does not possess such power, especially because of limitations existing in the forms of action and the limited scope of the common law judgment.

Note that this same criticism can be made of the rule that an amendment is not allowed if it changes the cause of action. Where a case is transferred to the other forum, the statute anticipates a delay before the case is tried. It provides that the defendant shall be allowed a reasonable time after the transfer to prepare the case for trial. W. Va. Code c. 56, art. 4, § 11 (Michie, 1949). See also the suggested form for an order transferring a case from law to equity. Hoge, PLEADING & FORMS 696. Note also the omission in the West Virginia statute as to testimony taken on the wrong side of the court. See note 37 supra.

The adequacy of the remedy at law is the usual defense to a suit in equity. "It would be difficult, and perhaps impossible, to state any general rule which would determine, in all cases, what should be deemed a suit in equity as distinguished from an action at law, for particular elements may enter into consideration which would take the matter from one court to the other..." Per Mr. Justice Field, in Whitehead v. Shattuck, 138 U.S. 146, 151 (1891).

This was a distinction to be drawn in determining whether trespass or trespass on the case was the proper form of action at common law. Lugar, supra note 39, at 170 n. 160.

For example, see Thomas Branch & Co. v. Riverside & Dan River Cotton Mills, 147 Va. 522, 137 S.E. 614 (1927), in which, on transfer of the case to the law side as an action for damages, six of the plaintiffs who had been joined in the suit for specific performance were dropped to conform the pleadings to the practice in the law court; a result made necessary in this case by the more restrictive rules of joinder as to parties and causes of action on the law side. These rules were criticized in the first part of this paper.

"... where a court of equity has obtained jurisdiction over some portion or feature of a controversy, it may, and will in general, proceed to decide the whole issues, and to award complete relief, although the rights of the parties are strictly legal, and the final remedy granted is of the kind which might be conferred by a court of law..." Pomeroy, Equity Jurisprudence § 281 (5th ed., Symons, 1941). This doctrine has been often applied by the West Virginia court. One example will suffice. Williams v. Victory Coal Co., 119 W. Va. 200, 192 S.E. 329 (1937).

This deficiency as to common law judgments has been noted with respect to the limitations thereby imposed on the assertion of equitable defenses at law. See text at notes 14-15 supra. No attempt is here made to discuss the existing limitations at law on joinder of parties and causes of action. They were discussed in the first part of this paper.
Even where the transfer is from law to equity, the court may decide that an amendment in the pleadings will not be allowed if matters are included in the bill which were not and could not have been properly included in the law-action declaration. It might be deemed a change in the cause of action.\footnote{48} A change from law to equity based on the same general factual situation ought to be protected by the statute allowing amendments where the transfer is ordered. After the transfer the pleader ought to have the same freedom in drafting his pleadings as if he were originally starting a suit on that side of the court based on the same general factual situation which was the basis of his original pleading;\footnote{49} but as long as the general statute on amendments contains the limitation and the court retains the sometimes restrictive, but sometimes liberal, view of what is a new cause of action, no prediction can be safely made.

Moreover, it may be that a transfer will not be allowed in many cases. The statute provides that a case shall not be dismissed "simply because it was brought on the wrong side of the court." The Virginia court, in construing the statute from which ours was copied,\footnote{50} has indicated that this language justifies dis-

\footnote{48} The statute permitting the transfer would seem to prevent this view or at least to make the amendment proper as long as the changes in the pleadings refer only to the relief sought and the legal theory of recovery. The Virginia court in deciding whether such amendments were proper commented: "... This was not a new action in this case. The order remanding the cause and permitting its transfer to the law side of the court and amendment necessarily implied that the action should sound in damages for breach of the contract which this court found, because of the circumstances of the case, could not be specifically enforced. ..." Thomas Branch & Co. v. Riverside & Dan River Cotton Mills, 147 Va. 522, 533, 137 S.E. 614, 617 (1927). The same reasoning should apply where the case is transferred from law to equity. However, any change in the facts on which recovery is based will raise the question of whether the amendment should be permitted. Are the changes merely "necessary to conform them to the proper practice" or do the facts as changed amount to a new cause of action? \textit{Id.} at 534, 137 S.E. at 618. Will the court apply the comparatively liberal view of equity as to what amounts to a change in the cause of action or the restrictive approach on the law side of the court? The limitations on the law side were discussed in the second part of this paper.

\footnote{49} So long as new parties are not involved, adequate protection against the assertion of stale claims would seem to be embodied in a rule which would permit the amended pleading to assert any claim which arose out of the "conduct, transaction, or occurrence" set forth or attempted to be set forth in the original pleading. This prevents recovery on stale claims but avoids a restrictive construction of the term "cause of action". Compare Rule 15(c), Fed. Rules Civ. Proc., 28 U.S.C.A. (1950).

\footnote{50} See Reviser's note to this section.
missing a bill in equity where the subject matter would require more than one action at law. 51

Apart from the likelihood that in many cases the statute will not make it unnecessary for the plaintiff to bring several actions to obtain complete relief, it seems that the defendant may not rely upon the statute to avoid another proceeding to obtain equitable relief. It is clear that the defendant may not under the statute obtain a transfer of an action purely legal to the chancery side of the court in order to assert a purely equitable defense 52 or so that the case may be heard with a cause pending on the chancery side. 53 If the plaintiff has stated a legal cause, the defendant must proceed with an independent suit in equity unless he has one of the equitable defenses which may be asserted at law. 54 Even assuming that the plaintiff has not stated a legal cause, and assuming further that the facts alleged indicate that he may obtain relief in equity, it is not clear that the defendant can obtain a transfer of the case by interposing a demurrer to the action at law or moving to transfer the cause. 55 If the court

51 Brame v. Guarantee Finance Co., 139 Va. 394, 124 S.E. 477 (1924); see French v. Stange Mining Co., 135 Va. 602, 602, 114 S.E. 121, 130 (1922). In the latter case the court said: "... since two separate actions must be brought against these parties, a transfer of the cause to the law side of the court with directions to reframe the pleadings would have little, if any, advantage over dismissing the suit without prejudice, which, in effect, was what the court did. In no just sense can it be said that the suit was dismissed 'simply because it was brought on the wrong side of the court.'" Ibid. Compare, however, Thomas Branch & Co. v. Riverside & Dan River Cotton Mills, 147 Va. 522, 137 S.E. 614 (1927), wherein the action was transferred to the law side and one party proceeded alone against the defendant, six plaintiffs who had been associated in the bill of complaint being dropped in the law action to conform with that practice.

Presumably the plaintiffs would have one year from the dismissal within which to start their actions at law, if the statute of limitations had not run on the claims when the suit was started, even though the original periods of limitations expire prior to that time. See Lugar, supra note 40, at 36 n. 40 (1950).


54 See text at notes 13-18 supra.

55 Prior to the time that the court was authorized to transfer a case brought on the wrong side of the court, the defendant might demur to the bill of complaint or a declaration for lack of jurisdiction of the subject matter, and apparently a demurrer may still be used to raise the point. Burks, PLEADING & PRACTICE 320. Perhaps a better method to raise the point would be by motion to have the cause transferred. See Thomas Andrews & Co. v. Robinson, 155 Va. 362, 366, 154 S.E. 514, 515 (1930). Certainly this was true when a comparable procedure prevailed in the federal courts, since a demurrer would be sustained only when the pleadings failed to state a cause on either side of the court. 2 Moore, FEDERAL PRACTICE 338.
would dismiss the case "simply because it was brought on the wrong side of the court," it is mandatory that the court transfer the case on motion of the plaintiff;\(^5\) but the statute is primarily for the benefit of the plaintiff,\(^7\) and if he stands on his pleading and refuses to transfer the case, he is deemed to have waived the benefit of the statute and cannot rely upon it on appeal.\(^6\) This has been the position of the Virginia court. None of the cases has, however, involved a situation in which a cause proper for the other side of the court was alleged and the plaintiff did not desire a transfer but the defendant requested one.\(^5\) Similar problems arose under the former comparable procedure in the federal courts.\(^6\)

\(^5\) Nash v. Harman, 148 Va. 610, 139 S.E. 273 (1927) (defendant demurred; demurrer sustained; plaintiff moved to transfer). This was the court's reasoning: ". . . It sufficiently appears that the real reason for the court's action in dismissing the suit was because it was brought on the wrong side of the court. Where this is the case, the statute is mandatory." Id. at 615, 139 S.E. at 275. Note here that the plaintiff had moved for the transfer.


\(^5\) The Virginia court, in taking the position that dismissal of a case under these circumstances was not "simply because it was brought on the wrong side of the court", stated: ". . . In this case the court did not dismiss the proceeding simply for that reason, but because after complainants had been offered and had rejected the privilege of amending their pleadings, they signified 'their intention to stand by their bill... ' and made 'no motion to remand this cause to the law side of the court... '" French v. Stange Mining Co., 133 Va. 602, 632, 114 S.E. 121, 130 (1922). Note, however, that even under these circumstances the dismissal should be without prejudice to the right of the plaintiff to institute an action or suit on the proper side of the court. George H. Rucker & Co. v. Glennan, 130 Va. 511, 107 S.E. 725 (1921). Compare the dictum in J. S. Salyer Co. v. A. J. Doss Coal Co., 157 Va. 144, 150, 160 S.E. 54, 56 (1931), to the effect that the court should have transferred the case even if the demurrer had been properly sustained on the basis that the action was in the wrong forum, no mention being made of the necessity for a motion by the plaintiff to transfer the case. See also the Virginia case discussed in note 31 supra.

\(^5\) In Foreman v. Clement, 139 Va. 70, 123 S.E. 396 (1924), the defendant made a motion that the case be transferred to the chancery side of the court, but the court held that the motion was properly overruled since the matter involved in the defendant's plea, the basis on which the motion to transfer had been made, did not make a basis for equity jurisdiction. Note the dictum in J. S. Salyer Co. v. A. J. Doss Coal Co., supra note 58, to the effect that a demurrer alone may result in a transfer of the case.

Of interest is the decision in Thomas Andrews & Co. v. Robinson, 155 Va. 362, 154 S.E. 514 (1930). Basing the holding on this statute, the court held that the defendant could not raise the point that the law court was without jurisdiction since that issue had been waived by not moving that the case be transferred to the chancery side.

\(^6\) 2 Moore, Federal Practice § 2.05, especially pages 334-335, 339. As to the federal cases, it is important to note, however, that the Virginia court has taken the position that the state statute does not place as great a burden
In West Virginia the court has applied the statute in three cases, only two of which have any bearing on the questions discussed here, and neither of those is very enlightening since the court merely directed transfers where the cases had been started on the wrong side of the court without discussing the points considered by the Virginia court. It may be that the West Virginia court will place, as has the Virginia court, less emphasis on the provision in the statute that the case shall be transferred than on the introductory provision that no case shall be dismissed simply because it was brought on the wrong side of the court. In *Wilson v. Mutual Protective Ass'n of W. Va.*, the court made this observation:

“For the reasons thus stated we are of opinion the circuit court committed no error in sustaining the demurrer to the bill, but following such ruling, the cause should have been transferred to the law side of the court under Code, 56-4-11, which provides that 'no case shall be dismissed simply because it was brought on the wrong side of the court', but shall be transferred to the proper side.”

However, as applied, the plaintiff may be entitled to the benefits of the statute in West Virginia even though he does not move to transfer the case. It may be that this right may be invoked in the appellate court even though he was offered and rejected the privilege by the trial court which dismissed the action for this reason. It seems to be unnecessary for the plaintiff to take upon trial courts as to reforming the pleadings as was imposed by the federal statute. *Burks, Pleading & Practice* 390 n. 56.

61 120 W. Va. 465, 199 S.E. 258 (1938).
62 Id. at 468, 199 S.E. at 259.
63 Note that in the *Wilson* case there was no motion by the plaintiff to transfer the case, but the court took the position that, after sustaining a demurrer to a bill in equity on the basis that the remedy at law was adequate, the trial court should have transferred the cause to the law side of the court. See quotation from this case in text above. Compare the decree entered by the trial court in *Murray v. Price*, 114 W. Va. 425, 427, 172 S.E. 541 (1933), in which the demurrer being sustained since the plaintiff had shown no grounds of equity jurisdiction, the bill was dismissed without prejudice to the right of the plaintiff to have the case transferred. See, however, the cases cited in note 87 infra.
64 In *Vinson v. Home Ins. Co.*, 123 W. Va. 522, 16 S.E.2d 924 (1941), a demurrer to the declaration was sustained and the case was dismissed with prejudice, the plaintiff having declined “to amend”. On writ of error brought by the plaintiff the court affirmed the judgment of the lower court in so far as it sustained the demurrer and remanded the case “with directions to transfer to the chancery docket”. In neither the court's opinion nor in the order entered by the trial court (Record p. 22) does it appear that the leave given to amend was for the purpose of changing the action to a suit in equity, and further the order of the trial court does not disclose the basis on which the demurrer was sustained. In his brief at pages 5 and 6 counsel for the defendant
this risk. If the court sustains a demurrer to a bill in chancery and dismisses it even without prejudice to the plaintiff's right to transfer the cause to the law side, the decree is appealable. The plaintiff is not compelled to have his rights determined in a court of law before ascertaining whether the chancellor erred in denying equity jurisdiction. The ruling of the trial court, sustaining a demurrer on the basis that the action is in the wrong forum, may also be certified to the Supreme Court of Appeals; and if the ruling of the trial court is affirmed, the cause may then be transferred to the proper side of the court. Also, where the trial court properly ruled that the plaintiff could not proceed at law, the appellate court, on writ of error brought by the plaintiff, may remand the case with directions that it be transferred to the chancery docket for further proceedings. The Virginia court has also taken this position. The earlier Virginia case in which the plaintiff was not permitted to claim the benefit of the statute on appeal, not having accepted the privilege of transfer in the trial court, was not mentioned in the decision.

states that argument on the demurrer was based on the proposition that the proper remedy was in equity and that the court concurring in this view offered the plaintiff an opportunity to change his action to a suit in equity. It is interesting to note, however, that counsel raised these points to charge the plaintiff with the costs of the appeal, while conceding that the judgment should be modified to transfer the case to the equity side of the court. In Virginia a different result might have been reached. See note 58 supra and the text which it accompanies. See also the West Virginia cases cited in note 87 infra.

Murray v. Price, 114 W. Va. 425, 172 S.E. 541 (1933), 40 W. Va. L. Q. 274 (1934). The court says that to require a determination of rights first at law not only would work hardship on the plaintiff but would also "tend, in many instances, to occasion and to prolong useless litigation." Id. at 429, 172 S.E. at 542. Compare the result where a writ of error is granted after the demurrer is sustained to a declaration at law and the case is dismissed with prejudice. See note 64 infra.

"Any . . . challenge of the sufficiency of a pleading . . . may, in the discretion of the circuit court in which it arises, and shall, on the joint application of the parties to the suit, in beneficial interest, be certified by it to the supreme court of appeals for its decision, and further proceedings in the case stayed until such question shall have been decided and the decision thereof certified back . . . ." W. Va. Code c. 58, art. 5, § 2 (Michie, 1949).


Vinson v. Home Ins. Co., 123 W. Va. 522, 16 S.E.2d 924 (1941). This case is discussed more in detail in note 64 supra.

Edge Hill Stock Farm v. Morris, 155 Va. 103, 154 S.E. 473 (1930). The facts in this case have been summarized in note 31 supra. Note that the plaintiff had not moved that the case be transferred.

See note 58 supra and the text which it accompanies.
That holding seems to have been limited strictly to the facts there involved by this later decision.\(^71\)

No complaint is voiced as to the West Virginia decisions since it will often be difficult for the plaintiff to determine on the facts of his case whether relief is obtainable at law or in equity, and the statute should be liberally construed to permit recovery without a new action.

It may be that under this statute the defense that the proper remedy lies on the other side of the court will not be used as often as it has been in the past. The defendant no longer can expect to gain the delay incident to the starting of a new action if he prevails in such defense. Nor is there a possibility that he may succeed on a plea of the statute of limitations to the amended pleading, where the statutory period expires after the original action was started, so long as there is no change in the cause of action.\(^72\)

Another former rule in federal courts made even a transfer unnecessary for decision of legal issues. However, there is no statute or rule in West Virginia comparable to the former federal rule which permitted a matter ordinarily tried at law to be determined in an equity suit according to the legal principles applicable, without sending the case or question to the law side of the court.\(^73\) The rule seems sensible, but the formality of suspending the equity suit until the matter can be determined at law prevails in this jurisdiction,\(^74\) unless the question to be decided is one that would be decided by the court, rather than by the jury, in the

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\(^71\) It seems that on appeal or writ of error the plaintiff will be granted the privilege of transferring the case even though he has made no motion for such transfer in the trial court, so long as he has not declined to accept the privilege if offered by the trial court. Some question may arise even as to this limitation in West Virginia. See note 64 \textit{supra} and the text which it accompanies.

\(^72\) Thomas Branch & Co. v. Riverside & Dan River Cotton Mills, 147 Va. 522, 137 S.E. 614 (1927). See discussion of this case in note 48 \textit{supra}. The leading case for this proposition is Friederichsen v. Renard, 247 U.S. 207 (1918).

\(^73\) See note 37 \textit{supra}.

\(^74\) The principal case to support this proposition is Freer v. Davis, 52 W. Va. 1, 43 S.E. 164 (1902), wherein the court decided that the equity court might grant relief to preserve the status quo pending the determination of the matters at law, "if it appears from the bill that the complainant intends immediately to put the question . . . into a course of judicial determination and prosecute it diligently." See Pardee v. Camden Lumber Co., 70 W. Va. 68, 73 S.E. 82 (1911), where the action at law had been started before relief was sought in equity. For other West Virginia cases, see Note, 43 W. Va. L. Q. 70 (1936).
action at law.75 Although this federal rule has been superseded by the new Federal Rules, the same result is accomplished thereunder, the right to trial by jury having been preserved. Since the equity suit is suspended in West Virginia only where the matter to be decided at law would be decided by the jury, there seems to be no reason why the entire case should not be decided in one proceeding if issues formerly proper for the jury continue to be so decided and with the same effect, if either party demands a jury trial as to those issues. This would be the result under the Federal Rules.

The statute permitting transfers from law to equity, or vice versa, was originally inserted in the Virginia Code of 1919. Judge Burks, one of the revisers of that code, stated that it was one of the two changes which together would give advocates of the code pleading “full opportunity to develop the merits” of that system.76 Statements of this nature by eminent members of the bench and bar may have led many to believe that our existing procedure is as modern as any code pleading system and that little can be gained by adoption of a new system.77 As herein indicated, the similarity between this procedure and modern code pleading is negligible. However, as applied by the Virginia court, the statute has shown that there is no fundamental reason why there should be two sides of the court. That court has held that it is not reversible error for a court of equity to retain jurisdiction of a case which should

75 “...The dispute, to defeat an injunction to restrain a trespass, must be such as makes the intervention of a trial by jury necessary. If the facts relating to the title are undisputed, the question is one of law only, and a jury trial is not only unnecessary, but impossible except as to mere matter of form, for the jury must take the law from the court. ...” Suit v. Hochstetter Oil Co., 63 W. Va. 317, 323, 61 S.E. 307, 310 (1908) (applied to the construction of a clause in a deed). For similar expressions of the rule, see Ephraim Creek Coal & Coke Co. v. Bragg, 75 W. Va. 70, 72, 83 S.E. 190, 191 (1914); Pocahontas Coal & Coke Co. v. Bower, 111 W. Va. 712, 718, 163 S.E. 421, 424 (1932); United Thacker Coal Co. v. Newsome, 129 W. Va. 86, 90, 38 S.E.2d 660, 662 (1946).

76 Burks, The Code of 1919, 5 Va. L. Reg. (N.S.) 97, 120 (1919). The other change to which he referred was the enlargement of the notice by motion proceeding to permit it in lieu of any action at law. After referring to Judge Burks’ statement, the West Virginia court had this to say: “... The language of the statute itself mirrors the legislative intent to adhere to the prevailing distinction between courts of equity and courts of law. Hence, consideration of cases based on code practice is unnecessary.” Murray v. Price, 114 W. Va. 425, 429, 172 S.E. 541, 542 (1933).

77 Note also this reference to the statute authorizing transfer of cases from one forum to the other. “It is but a step from this statute to another abolishing the distinction between a common law action and a bill in chancery.” 1 Hogg, Equity Procedure § 855 (3d ed., Miller, 1943). A step, but what a step!
have been transferred to the law side of the court, or to transfer a case to the equity side which should have been retained on the law side, if the court gives the defendant every substantive right to which he would be entitled on the proper side. The court acting may be deemed to act as a substitute for the proper court. The desirability of this result seems unquestionable, especially where, as in West Virginia, the same judge presides in both courts.

It is not likely that the West Virginia court will be impressed by the Virginia court's view that an equity court may act as a substitute for the law court. This court has taken the position that an equity court has no jurisdiction, in the sense of power, to decide a matter where the remedy is properly at law, and that the appellate court has a duty to correct any decree of a lower court which exceeds its jurisdiction in this respect. This view not only permits the defendant to raise the objection for the first time after a

78 Iron City Savings Bank v. Isaacsen, 158 Va. 609, 164 S.E. 520 (1932) (acts as a substitute for a court of law rather than as a court of chancery); Sacks v. Theodore, 136 Va. 466, 118 S.E. 105 (1923) (on the facts in the case awarding an issue out of chancery to ascertain the damages protected the rights of the parties to trial by jury).

79 Quick v. Southern Churchman Co., 171 Va. 403, 199 S.E. 489 (1938) (all essential facts were admitted; sole questions presented were questions of law).

80 The Virginia cases are cited in notes 78 and 79 supra. The leading case for the general proposition here involved is Liberty Oil Co. v. Condon National Bank, 260 U.S. 235 (1922).

81 Where the equity court acts when the action should have been at law, the question most likely to arise is whether the parties have been deprived of a right to trial by jury. Note the soundness of this reasoning by the Virginia court: "It must be admitted that a party has a right to a trial by jury, when the facts are in conflict. In such a case, to deprive a person of that right is a denial of a substantive right. Unquestionably, however, the right may be waived, and it is equally true that if there is no issue of fact to be submitted to a jury, and there is nothing to be decided by a jury, a denial of a jury trial is not a denial of a substantive right." Quick v. Southern Churchman Co., 171 Va. 403, 415, 199 S.E. 489, 494 (1938). As to waiver of the right, Professor Moore takes the position that not even a motion to dismiss (demurrer in West Virginia) the equity suit should protect the right and that unless the defendant moves to transfer the case he should be deemed to waive his right to jury trial. 2 Moore, Federal Practice 335. See, however, the conservative view taken by the West Virginia court both as to waiver of the right and power of one court to act as a substitute for the other. See text which follows.

82 Freer v. Davis, 52 W. Va. 1, 43 S.E. 164 (1902). In this case the plaintiffs brought a suit in equity to recover possession of land from the defendants who were claiming under adverse titles. The court found that there was such a conflict in the facts as to the title that the parties had a right to trial by jury, that the equity court therefore had no jurisdiction to pass upon the question of title even though the error in its doing so was induced by the plaintiffs, that consent cannot confer jurisdiction, and that the court has the duty, on its own motion, to correct this excess of jurisdiction.
full hearing on the merits, but it also makes it possible for the plaintiff to choose the equity court and then, after a final adjudication against him, permits him to compel the defendant to go through an action at law on the same facts. Although the parties in an action at law may waive the right to trial by jury, they are not permitted to do so by submission of the matter to an equity court for decision. The only penalty attached is that the plaintiff who loses, appeals, and wins on this basis, must pay the costs of the appeal for not having raised the question in the trial court. Under the present statute the appellate court might remand these cases with direction that they be transferred to the law side of the court for proper amendment and retrial. In any event, on a retrial on the law side if both parties waive trial by jury, the court would be required to hear the same evidence again, if still available, and presumably would reach the same conclusion. Certainly there seems to be no justification for this result when neither party originally indicated any desire for trial by jury. If this ap-

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83 Even the vigorous dissent in Freer v. Davis, note 82 supra, concedes that if the decree had been against the defendants, they could have raised the question of jurisdiction. For the majority view, see note 84 infra.

84 Although the court acted on its own motion in Freer v. Davis, note 82 supra, the court also expressed the opinion that the better view would permit the plaintiff to raise the question of jurisdiction even though he had sought relief in that court. Accord, Sprinkle v. Duty, 54 W. Va. 559, 46 S.E. 557 (1904). Note that the decree in this case which was set aside was an order of dismissal. The dissent vigorously asserted that equity had jurisdiction in the sense of power to act, that it was not a matter of conferring jurisdiction by consent, and that the parties waived the right to trial by jury when they submitted the case to an equity court. The view of the dissent is sound and is the majority view today. “There is no longer any doubt that equity has the power to try that issue [title in trespass cases] without a jury if the parties waive jury trial. The plaintiff waives by bringing his action on the equity side of the court, and the defendant waives by pleading without raising the question of his right to jury trial.” Walsh, Equity 165 (1930). For a detailed discussion of the question, see Chafee, Some Problems of Equity 286-249 (1950). The majority in the case took the position that this would be a waiver which was accomplished “irregularly and indirectly by the court and counsel and probably without the plaintiffs having been apprised of the waiver.” Note that this case was followed in Nolan v. Guardian Coal & Oil Co., 119 W. Va. 545, 194 S.E. 347 (1937) and Arnold v. Mylius, 87 W. Va. 727, 105 S.E. 920 (1921). See Bishop’s Ex’rs v. Bishop’s Heirs, 119 W.Va. 415, 417, 193 S.E. 910, 911 (1937).

85 See note 84 supra.


87 See notes 63 and 68 supra and the text which they accompany; but this action was not taken in Nolan v. Guardian Coal & Oil Co., 119 W. Va. 545, 194 S.E. 347 (1937), or Thacker v. Ashland Oil & Refining Co., 129 W. Va. 520, 41 S.E.2d 111 (1946).

88 Compare Denison v. Keck, 13 F.2d 384 (8th Cir. 1926), and the criticism thereof in 2 Moore, Federal Practice 340.
proach is to be followed, an interesting question arises as to what result would follow if both parties waived the right to trial by jury in an action at law and the appellate court then decides that only an equity court has "jurisdiction".\(^8\)

It appears therefore that there are basic differences between the combined procedure in federal courts and that which exists in West Virginia courts. Aside from the difficulty of determining to what extent the existing statutes were designed to alleviate the delays which were necessary from a separation of courts to enforce legal and equitable rights, it is clear that the time which could be saved from a merger of the two systems cannot be attained under the present law. Are there reasons why the delay now experienced may be necessary in order to protect the rights of parties to litigation? This will now be considered.

**C. Possible Objections to the Federal Rule**

Designing any tool to replace two which were formerly used offers certain problems. However, not many would prefer to continue the use of the two instruments if a new one can be used as efficiently for any of the operations for which the separate tools were formerly employed. The number should be even smaller if the one tool can accomplish the complete assignment more efficiently than the two formerly did. Litigants who pay the price of obstructive technicalities are certainly interested in this objective.\(^9\)

Some practitioners feel, however, that the combined procedure should not replace the existing bifurcated system of law and equity. Some of the objections, which merit consideration, are on constitutional grounds, but more often the opposition is in terms of fear that some other substantive right will be affected. The objections most often raised will be discussed.

**1. Constitutionality**

There may be some who would raise an objection based on the constitutional provision which gives the circuit courts jurisdiction of "all matters at law where the amount in controversy,\(^8\)

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\(^8\) For cases in which the defendant proceeded to trial at law without objecting that the proper remedy was in equity, when the transfer procedure existed in federal courts, see 2 Moore, Federal Practice 338.

\(^9\) "...many members of the bench and bar ... are inclined to forget that both bench and bar are merely servants of the people, the better to enable the administration of justice to be accomplished." Borchard, Declaratory Judgments viii.
exclusive of interest, exceeds fifty dollars”, and in a separate phrase provides that they shall have jurisdiction of “all cases in equity”. Does this mean that cases at law and in equity must be treated separately, as they were when the constitution was adopted? A similar provision in the Constitution of the United States provides that the judicial power of the United States “shall extend to all Cases, in Law and Equity,” arising under the constitution, laws of the United States and treaties. There are many dicta that this provision requires a separation of legal and equitable proceedings. However, analysis of those cases indicates that what the courts really had in mind was that legislation could not take away power of the courts to give both legal and equitable remedies, not that the procedure under which those remedies were made available could not be amalgamated. Professor Moore has taken the position that the main provision refers to all cases, and the phrase in law and equity is in form explanatory of all, adding emphasis to it, and that no intent is indicated to require one single means of enforcing these rights. As previously noted, and to be developed more in detail, the new Federal Rules did not alter any of the legal or equitable remedies or rights—only the method of enforcing those rights was changed. A similar combined procedure would seem to satisfy the requirements of the comparable provision of the state constitution, for not only are the same considerations present, but in addition the separate listing of cases at law and in equity was needed because of the monetary limitation on jurisdiction for actions at law.

The other constitutional provision, which creates greater problems under a combined proceeding but does not prevent a union of law and equity procedure, reads: “In suits at common law, where the value in controversy exceeds twenty dollars exclusive of interest and costs, the right of trial by jury, if required by either

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93 Bennett v. Butterworth, 11 How. 669, 674 (1850); McFaul v. Ramsey, 20 How. 523, 525 (1857); Lantry v. Wallace, 182 U.S. 536, 550 (1900). These statements and others to the same effect are discussed in Pound, Law and Equity in the Federal Courts—Abolishing the Distinction and Other Reforms, 73 Cent. L.J. 204 (1911).
94 Pound, supra note 93, at 207.
95 2 MOORE, FEDERAL PRACTICE 313.
96 For a general discussion of the problem here involved, see Clark and Moore, A New Federal Civil Procedure—I. The Background, 44 Yale L.J. 387, 394-401 (1935), noting also the other articles therein cited.
party, shall be preserved. . . "97 This provision is strikingly like the one in the Constitution of the United States which preserves the right to trial by jury,98 and neither it nor similar provisions in other state constitutions prevent the adoption of a unified procedure.99 It is now well settled that the restriction applies only to the trial and is operative only at the trial stage of a contested case with respect to the issues as they have been formulated. The early view that it forced various differentiations in the forms and details of pleading has lost favor.100 The right to trial by jury should be treated as a problem at the trial stage, if, but only if, the case reaches that stage and a jury is requested by either party. The pleadings need not be affected by the right.101

Apart from the constitutional right to trial by jury, this right has also been given by statute for the determination of certain issues of fact.102 These statutory rights may be altered by legislation, but they need not be affected by a union of law and equity. These rights may be protected as easily as the constitutional right, and by the same approach to the problem. This method will now be described.

The constitution preserves the right to trial by jury as it existed at common law prior to the time the constitution was adopted.103 Where the issue is one to be decided in a suit in equity, the chancellor may submit issues of fact to a jury as a matter of discretion,104 but the constitution preserves no right to a jury trial on such issues.105 Where remedies have been created since the adoption of the constitution, no right to a trial by jury

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98 "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . ." U.S. CONST. AMEND. VII.
100 2 MOORE, FEDERAL PRACTICE 312.
101 CLARK, CODE PLEADING 93-94. The views expressed here will be developed further in the text.
102 For example, W. VA. CODE c. 41, art. 5, § 11 and c. 56, art. 4, § 55 (Michie, 1949). See generally 7 M.J., Equity § 133 (1949).
104 W. VA. CODE c. 56, art. 6, § 4 (Michie, 1949). For details on this procedure, see 7 M.J., Equity §§ 131-156 (1949).
105 Statutes may give the right to jury trial on such issues. See note 102 supra.
is preserved. Legal claims may have been settled in equity, or equitable doctrines may have been applied in actions at law, at the time of the adoption of the constitution. These questions may arise independently of any problems in a union of law and equity. They will determine constitutional rights of jury trial under any combined system. If the constitution does not preserve and assure a right to trial by jury, then statutes would be applied to determine whether trial of the issue formulated should be by jury. Where the right to trial by jury exists, the same examination would be made to determine the effect to be given to the verdict. The rule preserving the right to trial by jury under a combined procedure may be worded in different ways, but it need require only a determination as to whether the disputed question of fact is one as to which a party would be entitled to a trial by jury under the present law and what binding effect the verdict has. That this is all that is involved has already

107 James, supra note 103, at 1023.
108 "... Due largely to the rule that equity, once having obtained jurisdiction, would go on to give complete relief, many legal claims were actually disposed of in equity. On the other hand, certain equitable doctrines had worked over into the law, such as equitable estoppel as a defense to ejectment..."CLARK, CODE PLEADING 92.
109 It may be a matter formerly triable in equity but by a jury rather than by the court by virtue of a statute existing when law and equity procedure were combined. Conversely, it might be a matter formerly triable at law when the merger was effected by virtue of a statute triable by the court and not by a jury. The latter type statute would meet the constitutional test if the remedy were created after the adoption of the constitution (see text above) or the matter were cognizable only in equity prior to the adoption of the constitution. Fisher v. Sommerville, 83 W. Va. 160, 98 S.E. 67 (1919).
110 For example, assume that the issue being tried involves an equitable right but is one which by virtue of a statute an equity court would have submitted to a jury, it is the type in which the verdict would be merely advisory or would it be binding?
111 There are two general ways in which this has been done. Some states have provided expressly that the historical test of issues formerly triable to a jury shall determine the right to jury trial. Others have attempted to enumerate the kinds of action which shall be tried by a jury under the merged system. CLARK, CODE PLEADING 95-102. The first method seems preferable for the question when raised may be decided thereunder by "a comparatively limited historical investigation." Note how simply a rule of this type may be stated: "The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate." Rule 38(a), Fed. Rules Civ. Proc., 28 U.S.C.A. (1950). Rules of the second type are difficult to phrase and if literally applied often indicate that jury trial is required where it clearly was not prior to the merger.
112 As limited to the constitutional right, Judge Clark succinctly states the problem in this way: "... And in practice this means that if the issue would have been tried to the jury in the law court just prior to the adoption of the codes, either party may now claim such trial as of right." CLARK, CODE
been recognized by the Supreme Court of Appeals in the rule establishing a unified proceeding for declaratory judgments in West Virginia.\textsuperscript{113} Thus, if the relief sought is clearly legal and no so-called equitable defense\textsuperscript{114} is asserted or if the relief is to be clearly equitable, no problem as to jury trial arises.

Even where legal and equitable claims and defenses are asserted in the same action, the problem ought not become complicated if it is kept in mind that actions under a unified procedure are neither legal nor equitable; it is an action in which rights formerly legal or equitable, or both, are being enforced. An attempt to classify the action as legal or equitable may result in the requirement of a jury trial where one would not have been needed in enforcing the same remedy under the former procedure. The terms of the rule effecting a unified procedure ought to be interpreted in the light of the history surrounding the remedy. To use an example given by Judge Clark, an action to reform a contract and to recover on it as reformed is not a combined legal and equitable action, but is an action to enforce an equitable remedy and is triable to the court.\textsuperscript{115}

The use of an historical approach in the construction of the rule is especially important when so-called equitable defenses are set up. The form of the pleading ought not be controlling, that is, whether the claim is set up as a defense or a counterclaim, but rather the nature of the claim should determine the right to jury trial. If the issue raised by the "defense" would formerly have been triable only in equity, such issue should be tried to the court.\textsuperscript{116} The real problem in West Virginia would be in contract actions where the defense may be now asserted at law by virtue of the statute with a right to jury trial or it may be made the

\textsuperscript{92} See also Walsh, Equity 116 (1930). The same test may be applied broadly to the right under existing statutes if the merger is made without any attempt to specify particular actions or issues which shall be tried by a jury. See note 111 supra. For a discussion of some problems which may arise where a statute attempts to enumerate actions which shall be tried by a jury after the merger, see Clark, Code Pleading 103-106. Statutes of this nature are needed only if the right to trial by jury is to be granted where it did not exist prior to the merger.

\textsuperscript{113} See text at note 11 supra.

\textsuperscript{114} The term as used here refers to matters relied on by the defendant for his defense which prior to the merger would have been cognizable only in equity as the basis for affirmative action. This does not include matters which may now be set up as defenses at law or may be used as the basis for relief in equity. See text at notes 117-120 infra.

\textsuperscript{115} Clark, Code Pleading 99. Other examples of this approach with citation of authorities are there given.

\textsuperscript{116} Id. at 103-106.
basis of an independent suit in equity. The same problem could arise in the “equitable defenses” now available in unlawful entry and detainer and ejectment. To the extent that these defenses were not available at common law at the time the constitution was adopted, the right to trial by jury could be clarified by legislation. In the absence of legislation, a general rule preserving the right to trial by jury as it existed immediately before the merger should be interpreted to give the defendant, but not the plaintiff, the right to demand a determination of the issue by a jury. Substantive rights are not to be changed by the combining of procedure, and the defendant now has the right to determine whether the issue shall be tried by a jury under existing law by electing whether to set up the defense at law or by a separate suit in equity. Under the merger he would be required to assert his defense in the same action but that is not to affect his remedial rights.

Where both legal and equitable issues are formulated in the same action, the order in which the issues shall be tried may present a problem. Where the equitable remedy asserted would prevail over the legal right presented, and there is no waiver of trial by jury, the court may try the equitable issues first and then the legal issues may be heard by the jury if determination of the equitable issues has not settled the case. This will usually be the preferable procedure since the establishment of the equit-
able remedy would nullify the legal right. However, in some cases it may be more convenient for the court to hear the equitable issues at the same time that the jury is hearing the legal issues, to the extent that the same evidence is material.\(^{123}\) This might be the better procedure if it appear that the defendant is not likely to prevail on the equitable issues.\(^{124}\) Where issues of both types are heard, findings of fact as to each will permit the appellate court to decide the case without sending it back for a new trial because it was decided on the wrong issues.\(^{125}\) If the equitable issues are such that a party has a statutory right to trial by jury\(^{126}\) or the court in its discretion decides to obtain an advisory verdict,\(^{127}\) the court may send the entire case, including the legal issues, to the jury and give the same effect to its findings on the issues submitted as are now given to a jury's verdict on those issues.\(^{128}\)

Often the problems here suggested will not arise since the case may never come to trial; where it does, the issues may be entirely questions of law or, if there be issues of fact, the parties may have waived the right to trial by jury.\(^{129}\) This raises a related question concerning the existing West Virginia practice. The constitution preserves the right to trial by jury if required by either party".\(^{130}\) However, the statute goes further and provides in effect that if the defendant has appeared, then both parties or their counsel must waive the right to a jury by consent entered of record before the case may be heard and determined by the court.\(^{131}\) Earlier statutes containing almost identical language\(^{132}\) were construed to mean that waiver of the jury by both parties

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\(^{123}\) Additional evidence applicable to the equitable issues but not to the legal issues may be heard by the court in the absence of the jury, either before or after the trial of the legal issues.

\(^{124}\) 5 Moore, Federal Practice § 39.04.

\(^{125}\) For an excellent illustration of the advantages from this procedure, see the case discussed in 2 Moore, Federal Practice § 2.05[4].

\(^{126}\) See note 102 supra and text to which it refers.

\(^{127}\) See note 104 supra and text therewith.

\(^{128}\) For a more detailed discussion of the methods which may be used to establish the form of the trial where both legal and equitable issues are present, see Clark, Code Pleading 106-110. Compare, however, Union Pacific R.R. v. Syas, 246 Fed. 561 (8th Cir. 1917).

\(^{129}\) Referring to the waiver of jury trial, Judge Clark states that the parties will be indifferent as to the form of trial in a surprisingly large number of cases if no procedural advantage such as delay is to be obtained. He gives judicial statistics to support this conclusion. Clark, Code Pleading 93.


\(^{131}\) W. Va. Code c. 56, art. 6, § 11 (Michie, 1949).

\(^{132}\) The present section of the code is a composite of two sections which appeared in different chapters of the earlier code. See Reviser's note.
might be by either words or conduct but the record must affirmatively show the waiver. Waiver of the right may not be inferred merely from the fact that the court tried the case without objection. Furthermore, if the defendant has "appeared to the action," although neither he nor his counsel is present when the case is called for trial three years later, the court may not hear the case without a jury even though the record shows that the plaintiff did not desire a jury. That the constitution does not require this procedure seems clear. 

Our court, in construing the statute providing for a jury trial on an appeal from a decision by a justice of the peace if either party requires a jury, held that a positive act was necessary to secure a jury trial. The court took the position that a statute requiring a demand was not a denial of the constitutional right but was mere a reasonable regulation, adding this observation: "... The object of the statute doubtless is to secure trials of such actions without the expense of a jury unless either of the parties requires it." The decision is especially persuasive since it is by appeal

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135 The filing of a plea of the general issue is sufficient for this purpose. See the cases cited in note 136 infra.

136 Salzer v. Schwartz, 88 W. Va. 569, 107 S.E. 298 (1921); accord, Shamblen v. Hall, 100 W. Va. 375, 130 S.E. 496 (1925); Matheny v. Greider, 115 W. Va. 763, 177 S.E. 769 (1934). In the last case, holding that a judgment obtained in such proceeding is void and subject to collateral attack, the court stated that it reached this conclusion since it was "bound by precedent to an extremely rigid rule respecting the matters urged." Id. at 764, 177 S.E. at 769.

137 The language of the present statute, namely, that trial by jury be waived "by consent entered of record", was inserted in the Virginia Code of 1849 (c. 162, § 9). At that time the constitutional guaranty of jury trial was contained in the Virginia Bill of Rights and was in a form different from that which now exists in the West Virginia constitution. The West Virginia court has recognized this historical background and has implied that the legislature may now "dispense with the statutory requirement as to the manner in which such waiver shall be evidenced." Lipscomb's Adm'r v. Condon, 56 W. Va. 416, 445, 49 S.E. 392, 404 (1904). See also text which follows. See, however, the questions raised in the notes by Professor Carlin in 33 W. Va. L.Q. 183 (1927); 41 W. Va. L.Q. 249 (1935).

138 W. Va. Code, c. 50, art. 15, § 9 (Michie, 1949). Compare the statutory provision for trial by jury of an issue arising in a motion proceeding. Id. at c. 55, art. 2, § 7.


140 Id. at 139, 128 S.E. at 82.
to the circuit court that a party obtains his constitutional right to a jury trial.\(^{141}\)

Federal Rule 38 (d) provides that the failure of any party to demand a trial by jury in the manner required by the rule constitutes a waiver by him of trial by jury.\(^{142}\) Whether this provision would preserve the right to trial by jury was once questioned;\(^{143}\) but the courts have not raised any question as to the validity of the practice under the Constitution of the United States,\(^{143a}\) and this procedure seems to be sanctioned in West Virginia by the decision already mentioned. The rule seems fair if a litigant really desires a jury trial, but it does not permit him to remain silent with the hope that lack of a jury may later be used to secure a delay or reversal in the case.\(^{144}\) Our court has expressed dissatisfaction with the existing rule.\(^{145}\) The objective of saving expense, recognized by the court in the quotation above,\(^ {146}\) seems to be an additional reason for changing the rule.

If the procedure in law and equity is united, it is especially important that the court know in advance of trial whether there will be a demand for trial by jury. Although no great problem will be involved in most cases in determining whether a party is entitled to a jury trial if he demands one, as noted above, there may be cases in which some time will be required to determine this question. In addition, if no demand for jury trial is made, the merged system will offer no jury problem, regardless of what the issues may be. The federal rule provides that the demand may be made at any time after the commencement of the action but not later than ten days after the service of the last pleading directed to the issue triable of right by a jury.\(^{147}\) Recognition of the need for a rule of waiver by nondemand and of pre-trial notification

\(^{141}\) Vetock v. Hufford, 74 W. Va. 785, 82 S.E. 1099 (1914); Lovings v. Norfolk & W. Ry., 47 W. Va. 582, 35 S.E. 962 (1900).

\(^{142}\) Fed. Rules Civ. Proc., 28 U.S.C.A. (1950). When trial by jury has been demanded in the manner provided, waiver thereof may be accomplished by means comparable to those used in West Virginia. Rule 39 (a) provides: "... The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury. ..."

\(^{143}\) Ohlinger, Questions Raised by the Report of the Advisory Committee etc., 11 U. of Cin. L. Rev. 445, 463 (1937); but see Ohlinger, Problems of Jurisdiction and Venue etc., 26 CORNELL L.Q. 240, 255 (1941).

\(^{143a}\) E.g., United States v. Moore, 71 Sup. Ct. 524 (1951).

\(^{144}\) See cases cited in note 136 supra.

\(^{145}\) See quotation in note 136 supra.

\(^{146}\) See quotation in text at note 140 supra.

where law and equity are merged is shown by the present trend to adopt such rules in states having code pleading.149

2. Relief Obtainable

Having considert briefly, but for the purpose of this paper sufficiently, the objections which may be made on constitutional grounds to an amalgamated system of pleading, the question most likely to arise in the mind of a common-law pleader should be noted, namely, how can one determine from the pleadings what relief the opposing party will be permitted to obtain under this combined procedure? The answer is that one cannot, unless there be a judgment by default.

Federal Rule 54 (c) reads:

“A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.”

The opposing party may expect fair notice of the facts which the other party makes the basis for his recovery, but whether he is entitled to legal or equitable relief, and the nature thereof, will depend upon the proof if there is not a default judgment.

148 CLARK, CODE PLEADING 115.

149 Fed. Rules Civ. Proc., 28 U.S.C.A. (1950). Rule 55 provides when a judgment by default may be entered. Professor Moore suggests that a broader scope might be given to Rule 54 (c) if it had read: A judgment by default for want of appearance shall not be different in kind from or exceed in amount that prayed for in the demand for judgment; and that in all other cases the judgment should grant the parties the relief to which they are entitled on the merits. 2 MOORE, FEDERAL PRACTICE 1670. For a discussion of the confusion which may arise and make “a jest of the fusion of law and equity” where the code provision states that the judgment shall not be more favorable than that in the demand for relief “where there is no answer”, see CLARK, CODE PLEADING 266-269. For example, under such provisions it may be held that relief other than that claimed is not justified where the defendant has only demurred, permitting the complaint to be held insufficient even though it shows a basis for relief other than that asked.

150 Note that this approach may be used as to problems arising either from the fusion of law and equity or from the abolition of the common law forms of action, for even as to the latter the relief obtainable depends upon the form chosen. The relief to which a party is entitled ought to be regarded as a matter of substantive right and ought to be granted upon proof of the facts which support that right if fair notice of the facts claimed is given to the opposing party. Any limitations placed upon the right by the mere form in which the demand is made seem difficult to justify. See CLARK, CODE PLEADING § 18. Of course, where the defendant has failed to appear, he should be able to rely upon the demand made as limiting the relief to be granted since this restriction is needed to satisfy the idea of fair notice.
The facts in the case as proved will determine whether he obtains a decree for specific performance, an injunction, or a judgment for money damages, or whether he obtains damages for breach of a contract or damages for injuries sustained from a tort. No longer will cases be dismissed merely because the declaration "sounds in contract" when the proof discloses a right to recover damages for a tort which was basically the same occurrence alleged in the declaration. The opposing party may be entitled to additional notice of the facts on which the claim is based, involving an amendment and possibly a continuance, but the demand for particularly relief is no part of the cause of action. Stated more directly:

"A [complaint] may be dismissed on motion if clearly without any merit; and this want of merit may consist in an 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. But a complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim. Pleadings are to be liberally construed. Mere vagueness or lack of detail is not ground for a motion to dismiss, but should be attacked by a motion for a more definite statement."

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151 This problem will usually arise where the prayer seeks equitable relief but the facts indicate a basis for only money damages or vice versa. Within limits the equity court now will award damages even though injunctive relief is not granted. Webber v. Offhaus, 62 S.E.2d 690 (W. Va. 1950). Aside from the constitutional right to trial by jury the only limits on this power flow from the historical separation of the courts of law and equity. As shown later in the text, the right to jury trial can be protected without limiting the power of a court by the technicality of the side of the court on which the proceeding was started and without the need of transferring the case to the other side. Like considerations apply to the complete denial of the power of a law court to grant any equitable relief.

152 This result would follow: "Common-law forms of action have quite generally lost their significance except as mental pegs upon which to hang discussions as to whether or not a plaintiff has a right of action at law." 2 Moore, Federal Practice 355.

153 Being basically the same occurrence, fair notice of the facts on which recovery is based would have been given (see note 150 supra); and the form of action used by the plaintiff will have lost any significance (see note 152 supra). In West Virginia right to recover in the same action would be denied. Being a change in the cause of action, an amendment would not be permitted to meet the variance in proof. See Lugar, Common Law Pleading Modified Versus the Federal Rules, 53 W. Va. L. Rev. 27 (1950).

154 The facts constitute the cause of action—the legal conclusion to be drawn therefrom is for the court. Clark, Code Pleading 271-273, 332. See also cases cited in 2 Moore, Federal Practice 1670 n. 6.

155 Italic by Professor Moore. See also Clark, Code Pleading 273.
To this counsel for the defense may be opposed, but it makes sense.

Thus, if the facts alleged show that the pleader is entitled to any relief, legal or equitable, the complaint would not be dismissed merely because the pleader has asked for the wrong relief on the facts pleaded; the demand for relief not being a part of the cause of action, and law and equity having been combined as to pleadings. For example, if the facts alleged show that the pleader is entitled to damages for breach of a contract, he may obtain that relief although he has asked for, but was not entitled to, specific performance of the contract.

Changes in the theory of the pleadings of the nature mentioned here will be discussed more fully presently. That this treatment of the pleadings does not involve a denial of the right to trial by jury will also be shown.

3. Other Stated Objections

Aside from the inability to determine from the pleadings, unless there be a judgment by default, what relief will be granted, which some may term an objection to the suggested procedure, other nonconstitutional objections to the combined procedure have been advanced from time to time. These might be specified in detail and be answered in the same manner, but a general summary of these objections with a general approach to the answers thereto seems more appropriate in view of the length which this paper has already acquired. This is especially true when it can be summarily stated that all of the objections which have been raised can be met in the same general manner as the complaint concerning the right to trial by jury, and that method has already been developed herein at length.

A concise classification and summary of these objections has been stated by Judge Clarks as follows:

"1. Inherent differences in manner of trial and of appellate review, referring to the constitutional right of trial by jury in 'law cases' and to the different methods of appellate review in 'law' and 'equity' cases.

"2. Inherent differences in manner or amount of relief to be granted, referring to the specific relief of equity as distinguished from the money damages ordinarily given at law; or to a possible variance in the amount of money damages recoverable, depending on the form of action chosen; or to particular remedies granted only in certain forms of actions, such as execution on the defendant's body."
"3. Inherent differences as to jurisdiction and venue, referring to the fact that certain actions must be brought in certain courts or at certain places.

"4. Inherent differences as to the application of certain statutes, such as statutes of limitations which were drawn along the lines of the old procedural divisions.

"5. The necessity of forming clear and exact issues, both for the trial and also to support the judgment and thus make the plea of res judicata thereafter available to the parties."

This list of objections seems adequately to cover the more meritorious complaints which may be voiced to the combined procedure; yet, if the pleadings contain sufficient information to apprise fairly the court and parties concerning the cause to be tried, neither separate sides of the court nor technical forms on either side are needed to safeguard the substantive rights involved. The remedy or other substantive rights in issue may be substantially different depending upon the cause which is asserted, but this seems to stress the need for a procedure which assures that those rights will be protected regardless of technicalities as to the manner in which the cause is asserted rather than being dependent upon such formal requirements. Why should the relief to be granted, or the form of trial, or any other substantive right be dependent upon distinctions in the form of pleadings if the opposing party has fair notice of the cause of action?

All of these substantive rights can be protected in the same manner as the right to trial by jury. If on the facts alleged or the facts proved a particular substantive right may be involved and that right is claimed by the party entitled thereto, that issue may be settled on the pleadings, if there raised, or on the facts as proved. There may be differences of opinion as to the degree of detail which should be required in the pleading to give fair notice of the cause to the opposing party, but no formal distinction between forms of action at law and between suits in equity and actions at law is needed to protect the rights which the voiced objections indicate that some fear may otherwise be denied.167

D. Principal Beneficial Change Effected

No attempt will be made to suggest that the changed procedure may not produce great differences in the results which may be

166 Id. at 88.
167 A detailed discussion of the matters here generally discussed may be found in CLARK, CODE PLEADING §§ 18, 35-55 and 2 Moore, FEDERAL PRACTICE §§ 2.06, 2.08, 2.10.
achieved for litigants. That is the desired objective. Many of the devices which are now used to delay, limit, or defeat recovery or defense will be eliminated. Naturally a litigant may continue to be deprived of his rights through the errors of his counsel, but the probability of substantive rights being defeated is lessened by rules which make it clear that the more restrictive procedural principles have been eliminated in order to permit substantive rights to prevail. The principal beneficial change which would be made by the adoption in West Virginia of these suggested rules will here be examined.

Perhaps the most restrictive of existing procedural doctrines is the one commonly called the "theory of the pleadings." It means that a pleader must have and maintain in his pleadings a definite legal theory on which his client may recover. Although the facts as proved may show that a basis for recovery exists, the client loses unless that was the theory on which counsel proceeded.\textsuperscript{158} This doctrine is applied in West Virginia in a limited form,\textsuperscript{159} even though a recent decision contained this liberal language: "... We would attach no particular importance to the fact that the declaration proceeds upon a theory of recovery not recognized in this jurisdiction, should the plaintiff establish a right to recover on the facts pleaded."\textsuperscript{160} The case involved an action based on injuries sustained by a child five years of age and caused by an unguarded fire. Presumably the action was in the form of trespass on the case. It was prosecuted on the theory that the bonfire in question was an attractive

\textsuperscript{158} The principle has often been summarized by this statement of the Indiana court, which has consistently enforced it: "It is an established rule of pleading that a complaint must proceed upon some definite theory, and on that theory the plaintiff must succeed, or not succeed at all. A complaint cannot be made elastic so as to take form with the varying views of counsel." Mescall v. Tully, 91 Ind. 96, 99 (1883); see Ott v. Perrin, 116 Ind. App. 315, 63 N.E.2d 163 (1945). Courts have differed as to whether this principle also applies to the defendant's pleading. Whittier, The Theory of a Pleading, 8 Col. L. Rev. 523, 534 (1908).

\textsuperscript{159} As an example of the extreme to which this doctrine can be carried, see Scott v. McIntosh, 167 S.C. 372, 166 S.E. 345 (1932), wherein two causes of action were set up in the complaint, the first based on a written contract and the second on quantum meruit. Under each cause of action $500 was alleged to be due and the complaint sought recovery of $500. This was obviously a case in which two counts were used to meet a possible variance in the proof. However, the court held that the causes of action were inconsistent and that the plaintiff should have been required to elect upon which of the causes he would go to trial for the reason that "the evidence necessary to establish the one differs from that necessary to establish the other." Id. at 375, 166 S.E. at 345.

\textsuperscript{160} Tiller v. Baisden, 128 W. Va. 126, 128, 35 S.E.2d 728, 729 (1945).
nuisance. That doctrine has been repeatedly rejected in West Virginia. On the trial of the action, the lower court sustained a motion at the conclusion of the plaintiff's case to strike out his evidence. The jury was directed to return a verdict for the defendant, and the judgment was rendered in his favor. The appellate court reaffirmed the rejection of the attractive nuisance doctrine. However, since no particular importance was attached to the plaintiff's having proceeded on that theory, the court examined at length the possibility of justifying recovery on another basis on the facts proved. No detailed discussion seems necessary to point out the fairness of this result to the person injured or the advantages gained in development of the substantive law rather than deciding the case on a mere technicality in the pleading. There is nothing in the case to indicate that the plaintiff would have been accorded this liberal treatment if he had chosen the wrong form of action. The other basis of recovery considered by the court would also have supported an action of trespass on the case. To evaluate this case and find the limitations on the doctrine in West Virginia the concept needs to be further developed.

That the theory of the pleading may not be changed is not confined to limitations on the right to amend. The problem there is whether the changed theory will result in a change in the cause of action, and consideration has been given to that issue elsewhere in this paper. Whether a pleader can change his theory of recovery by an amendment is one question, and that he can under the Federal Rules has been shown, but the broader problem is whether a party may obtain a judgment by proving a right to recover on a theory different from that on which the pleading was prepared even without amending to indicate the new theory. This problem assumes that there are sufficient

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161 Ibid.
162 The cases are collected and cited in the principal case.
163 In this case the court, after stating that the action was prosecuted on the theory that the bonfire in question was an attractive nuisance, added this comment: "The declaration refers to it as such." 128 W. Va. at 128, 35 S.E.2d at 729.
164 See citation in note 153 supra.
165 It is sometimes suggested that the pleader be required to follow one theory until he amends to state another. CLARK, CODE PLEADING 260 n. 150. The question may also arise in the appellate court where an amendment has not been made in the lower court. Ibid. See also the West Virginia cases cited in note 160 supra and the accompanying discussion in the text. See text at notes 205-212 infra.
facts alleged in the pleading to sustain the proof needed for the new theory. Sometimes they may have been alleged merely in aid of the original theory of recovery. This may appear from either the form of action used or from the facts stressed. On the other hand, the facts needed to support the new theory may be provable under the general allegations which supported the original theory.

At common law the problem can only arise when the original theory and the new theory both support the same form of action, which is another way of saying that the rule preventing recovery on proof of facts sufficient to support a form of action not originally used is an illustration of the requirement that a pleader can not change his theory of the case. Even though recovery would be within the same form of action, or assume that the forms are abolished, the question may arise since the manner in which the facts are alleged will show the theory on which recovery is sought.

In many cases the pleader may find that the evidence at the trial develops differently than expected or that the court takes a different view of the law than anticipated. To a limited extent the pleader may meet this problem in West Virginia by including in his declaration separate statements of the “same cause of action” in different counts, or in effect different theories of recovery, representing the same general state of facts in different ways.

There is no limit to the number of different versions of the facts

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163 See Whittier, supra note 158, at 524. Was it the intent of the revisers to permit the theory of the action to be changed by providing that amendments changing the form of action might be made? Was this idea negativized by the limitation that the amendment was not to change the cause of action? See citation in note 153 supra.

167 This is illustrated by the fact that certain courts in code pleading jurisdictions have adopted the principle. Clark, Code Pleading § 43. After referring to the limitations imposed by the forms of action at common law, Judge Clark states as to this doctrine: “The development of the idea in code pleading seems to have been due largely to judges trained in the common law, who were seeking a logical justification for enforcing the strict rules made necessary by that system.” Id. at 264. See note 210 infra.

168 This is frequently done where damages are sought on the basis of negligence to assert different ways in which the defendant may have been negligent and where damages for breach of an express contract are sought to assert a quasi-contractual basis of recovery if proof of contract fails. One of the best cases to illustrate the advantage of this procedure is Cochran v. Craig, 88 W. Va. 281, 106 S.E. 633 (1921). In this case in which the common counts had been used with a special count on the contract, the court approached the problem in this way: “... If the contract was made as claimed, the plaintiff was entitled to recover [on] it, nevertheless. There was no abandonment of this claim. Assertion of the alternative claim is not incon-
that the pleader may insert to cover fairly possible doubt as to the legal theory which may be held applicable or as to the facts which may be proved, so long as he does not join "inconsistent causes of action". This seems to mean merely misjoinder as to parties or forms of action. But, apart from the detailed pleading consistent with adherence to it, if that would be material. The law does not compel a plaintiff to elect at his peril between alternative claims. He may assert both, leaving it to the jury or court to say which he is entitled to . . . .

Id. at 296, 106 S.E. at 639. See also points 5 and 7 of the syllabus. See also Campbell v. Kanawha & Hocking Coal & Coke Co., 122 W. Va. 231, 9 S.E.2d 135 (1940). Good illustrations of the need for alternative counts are shown in Lawson v. West Virginia Newspaper Pub. Co., 126 W. Va. 470, 29 S.E.2d 3 (1944) (contract action), and Jenkins v. Spitzer, 120 W. Va. 514, 199 S.E. 368 (1938) (tort action).

169 SHIPMAN, COMMON-LAW PLEADING § 81 (3d ed., Ballentine, 1923). " . . . thus, in practice, a great variety of counts often occurs in respect of the same cause of action, the law not having set any limits to the discretion of the pleader, in this respect, if fairly and rationally exercised." Id. at 204. See many illustrations in 1 TIDD, PRACTICE *616-617 (3d Am. ed. 1840), including two declarations held proper which contained 480 and 286 counts respectively.

170 In an earlier part of this paper the writer discussed at length the limitations imposed by the rules as to what forms of action are joinable and the liberalization permitted by the West Virginia statutes concerning the forms of actions which may be maintained. Restrictions on joinder of parties was also discussed. Lugar, Common Law Pleading Modified Versus the Federal Rules, 52 W. Va. Rev. 137. Whether there is any other limitation on the counts which may be joined in West Virginia is not clear. In Collins v. Dravo Contracting Co., 114 W. Va. 229, 171 S.E. 757 (1933), the court held that a count alleging two theories of recovery, one for negligence and the other for intentional injury, was merely duplicitous and not subject to demurrer for that reason. The court said that the remedy is for the objecting party to require an election as to the theory on which the pleader will rely, and further that even in the absence of election the matters alleged might be so inconsistent as to destroy each other. On the facts the court found that the matters alleged were not so inconsistent but implied that an election would have been required had one been sought by the defendant. Would the court reach the same conclusion if separate counts in joinable forms of action had been used to allege the two theories? Clearly an election should not then be required. See Professor Carlin's note in 40 W. Va. L.Q. 241 (1934); but see Campbell v. Kanawha & Hocking Coal & Coke Co., 122 W. Va. 231, 239, 9 S.E.2d 135, 139 (1940). See also Humphrey v. Virginian Ry., 54 S.E.2d 204, 215 (W. Va. 1948). Might the court yet take the position that the matters alleged in the separate counts were so inconsistent as to destroy each other? Compare the statement by the court quoted in note 168 supra. If the court takes the position that some test of inconsistency between counts exists other than the rules as to what forms of actions are joinable, where the parties are the same, there will be an even greater need for modification of existing rules to permit different theories of recovery to be asserted. See note 159 supra as to the results which may flow from the application of other rules as to inconsistency between "causes of action". The very purpose of inserting the various counts may be defeated. See notes 351-352 infra. The court may have in mind the idea, as earlier expressed, that misjoinder of parties or forms of action produces "inconsistent causes of action" and that the plaintiff here must amend to drop one group of the misjoined counts or elect to proceed on matters joinable if all are in one count. Grass v. Big Creek Development Co., 75 W. Va. 719, 723, 84 S.E. 750, 751 (1915). As to inconsistent pleas, see notes 373-381 infra.
required by this method, the limitations on joinder of forms of action, as well as separation of power in the courts, will prevent or delay recovery by the most careful and prolific pleader if the facts proved or the law held to apply shows a right to recover in equity rather than at law, or vice versa, or in a form of action which he did not and could not have joined with the form on which his action was based. This is true even though there be no variance between the allegations in the pleading and the proof, which could easily happen where the allegations are not too specific or the proof needed on the new theory was supported by allegations in aid of the original theory or theories. The theory of recovery would be different from that or those on which counsel had proceeded. It will be noted incidentally that the pleader's right to amend to meet such variances in theory, rather than joinder in his initial pleading, is even more restricted under West Virginia procedure.

In addition to these limitations, the West Virginia court by a recent dictum would prevent a pleader from joining and relying on even consistent causes of action or theories if he combines them in one count. This defect in pleading appears to be merely so-called duplicity, a formal defect which can be reached only by a special demurrer. Demurrers for formal defects have been abolished in this state. Nevertheless, the court took the position that if the plaintiff committed this error, he could be forced to elect the ground upon which he would rely at the trial if timely advantage were taken of the double averment.

The result is the same as if the plaintiff had misjoined forms of action in different counts and after a demurrer was required to amend to drop one group of misjoined counts to cure the defect, except that the dictum would presumably require the plaintiff to stand

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171 A practice called "cumbersome and confusing". Clark, Code Pleading 257. See also Shipman, Common-Law Pleading 204 n. 25. See note 169 supra.
172 No attempt is here made to discuss the possibility of transferring the case to the proper forum. On this subject, see text at notes 33-72 supra. Even where permitted, delay will be involved.
173 The possibility of joining the improper count or counts and then amending if a demurrer to the declaration is sustained, as well as the defect being cured by verdict, has been discussed earlier in this paper. Lugar, supra note 39, at 168.
174 Lugar, supra note 153, at 33.
175 Collins v. Dravo Contracting Co., 114 W. Va. 229, 171 S.E. 757 (1933). This case is discussed more in detail in note 170 supra. Professor Carlin's note there cited criticizes this case at length.
177 114 W. Va. at 233-234, 171 S.E. at 758-759.
on one ground if many are grouped in one count whereas the
misjoinder might be cured without limiting the plaintiff to one
ground of recovery. 178

Despite the merited criticism which this recent case received, 179
the court did not disapprove this procedure in a recent case which
also serves to show how restrictive the doctrine of the theory of
the pleadings can be. This is the case of Wellman v. Drake, 180
in which the plaintiff sued for damages sustained when a dentist
began to fill her tooth, refused to fill it after the nerve was exposed,
and with force removed her from the dental chair. The declaration
contained only one count, but the plaintiff contended that it
set up two causes of action: one for malpractice and the other
for assault and battery. After the plaintiff had introduced her
evidence, the defendant asked that she be required to elect upon
which cause she relied, and she elected to rely upon the allegation
of assault and battery. After the defendant introduced his evi-
dence, the court instructed the jury that the plaintiff was trying
the case on the theory of assault and battery. The appellate
court construed the declaration to embody only the theory of
malpractice, the language relied upon to sustain the theory of
assault and battery being merely a charge of conduct in aggrava-
tion of the malpractice. The verdict of $500 for the plaintiff
was set aside because the plaintiff had tried the case on the theory
of assault and battery when the declaration did not sustain that
theory. 181

One hope as to the theory of his pleading that the pleader
has is that the court may deal liberally with him in construing

178 The plaintiff's right to amend by dropping the misjoined counts has
been discussed earlier in this paper. Lugar, supra note 153, at 34. If a number
of counts in each form had been originally joined, correction of the defect
could be accomplished by eliminating either group of the misjoined counts
but leaving various theories of recovery on the counts which remain. The
only limitation on the remaining theories would be that imposed by the rules
as to joinder of forms of action if the pleader inserted originally all
desired theories in the joinable forms and thus avoided the possibility of
restrictive rules as to the assertion of a new theory by amendment in a join-
able form. Compare Humphrey v. Virginian Ry., 54 S.E.2d 204 (W. Va. 1948),
a case in which separate counts were used to set forth different theories.
179 See note 170 supra.
180 130 W. Va. 229, 43 S.E.2d 57 (1947).
181 Although the court was of the opinion that the plaintiff was entitled
to a new trial on the theory of the malpractice alleged in the declaration,
there is no indication that the court thought an amendment would be proper
to assert the theory of assault and battery. This may be another instance in
which it is safer to rely upon lengthy pleadings, even though an election
may be required, than to wait for trial to determine whether an amendment
may be desired.
the allegations of the pleading despite the general rule that his pleading will be construed strictly against him. Occasionally the court has done this. Perhaps the best example of this treatment is found in Bell v. Kanawha Traction & Electric Co., in which the plaintiff sued to recover the value of the consideration given by him for free transportation, promised by the defendant but no longer legally permissible, to the extent that such transportation had not already been furnished. The declaration was styled as an action of trespass on the case and the language which was used was that ordinarily used in declarations in that action. However, the court took the position that the substantial question was whether a cause of action was presented and held that the declaration was good since it did state a cause in implied assumpsit. This theory of recovery was deemed to be clear from the facts stated. Said the court:

"... Language is used which ordinarily is used in a declaration filed in an action of trespass on the case, but this matter may be treated as surplusage; it is nonessential. The defendant is fully informed of the cause of action against him, and because the pleader improperly styles it an action of trespass on the case we will not hold it bad. Though inartistically drawn it is sufficient in form to fully advise the defendant of the ground upon which recovery is sought..."  
This treatment may help the plaintiff, but it may also work to his detriment if recovery can be allowed only on a theory different from that which the court construes to have been his real theory.
Under the Federal Rules and the more advanced code states, the plaintiff is permitted to obtain such relief as the facts pleaded and proved justify, irrespective of the theory on which the pleading was framed. This seems proper since the prayer for relief constitutes no part of the cause of action at the trial stage, and the pleader having stated the facts which constitute the cause of action, the court is to determine therefrom whether the plaintiff has stated any basis for judicial relief. This does not mean that the pleader should not have a theory or theories on which his client is entitled to recover or that he is not to indicate in his pleading the basis on which the facts pleaded justify relief. If he does not do so, he may have his action dismissed unless he amends to cure the defect. But, if the facts proved show a right to the relief asked on the theory advanced by the pleader, the problem here discussed does not arise. However, where the facts alleged and proved show a right to relief different from that demanded or relief of the same nature but on a different theory from that indicated in the pleading, the rejection of the doctrine permits the relief to be granted. This does not seem unjust to the opposing party so long as he has fair notice of the facts on which the claim is asserted, since he will know prior to the trial that the plaintiff is not limited by his theory of the pleading nor by the relief demanded. If the change in either is so great that the opposing party could not have been reasonably expected to anticipate the shift in position, which should rarely occur in view of his advance knowledge of the facts likely to be proved, a new trial may become necessary. This treatment is necessary where he is actually surprised that the

Id. at 189, 2 S.E.2d at 278. Might not the court under other circumstances have held the “and” to include “or”? Would not this be only duplicity? See the dissenting opinion. Compare also Burks, Pleading & Practice § 99. Note the inconsistency within the section cited as to whether the words “agreed” or “undertook” indicate a contract or tort count. See note 184 supra.


187 See note 154 supra.


189 CLARK, CODE PLEADING 260, 265; 2 Moore, Federal Practice 1657. Judge Clark recognizes that unless the pleading does have a theory it will be a “meaningless jumble”.

190 See the cases cited in 2 Moore, Federal Practice § 8.14 nn. 9, 10, 11. See also the quotation in the text at note 155 supra.

191 CLARK, CODE PLEADING 119.
facts developed show the plaintiff entitled to legal relief rather than equitable relief, for otherwise he would be deprived of his right to trial by jury. If the shift could have been expected, the right to jury trial should be deemed waived unless the request was made in advance of trial, for otherwise the right could be asserted as a mere technicality to subject the other party to a new trial.102 The other advantages of requiring a demand for a jury in advance of trial have been discussed previously herein.103

The theory of the pleading may become important in West Virginia at the pleading stage, that is, the plaintiff may have sufficient facts stated for a cause of action but may have used the wrong form of action or in equity may have asked for the wrong relief. This would be tested by a demurrer. No additional consideration need be given to this phase of the doctrine, for it has already been shown that under the Federal Rules the demurrer would not be sustained merely because the pleader asked for the wrong relief on the facts alleged.104

It may be appropriate to give an illustration of how the abandonment of the doctrine of the theory of the pleading would in practice avoid the deciding of cases on what a layman would certainly think of as a technicality. The client who loses his case on a technical point is likely to be critical of the law, as well as his lawyer, and the objective of eliminating what are viewed by laymen as technicalities should therefore be worthwhile to even the most sagacious pleader.105

One of the cases most often cited to show that the Federal Rules have eliminated the doctrine is Nester v. Western Union Telegraph Co.106 It is particularly enlightening to the West Virginia practitioner since it involved a change in the theory of

102 CLARK, CODE PLEADING 117-120, including an excellent criticism therein of Jackson v. Strong, 222 N. Y. 149, 118 N.E. 512 (1917), a case in which the principle here urged was not applied. See also WALSH, EQUITY 109-111 (1930); James, Trial by Jury and the New Federal Rules of Procedure, 45 YALE J.L. 1022, 1028 (1936).
103 See text at notes 142-148 supra.
104 See text at notes 154-155 supra.
105 "'Loose pleading' is the cry of an alarmist who unconsciously would punish the client because of the latter's unfortunate choice of a lawyer who chanced to be a poor pleader." 2 Moore, FEDERAL PRACTICE 1606. Or, who is a good pleader, but is not permitted by the system under which he is pleading to insert enough safety valves. From an historical viewpoint, compare: " . . . when it was proposed finally to allow amendment of pleadings, Baron Parke exclaimed in opposition, 'think of the state of the record!' . . ." Albertsworth, supra note 185, at 202.
the case which cannot be covered in this state even by inserting separate counts in the declaration.\textsuperscript{197} The plaintiff sued for damages caused by the defendant's negligent failure to transmit a money order. Although the duty which was violated arose from a contract, the plaintiff treated the negligence of the defendant as the basis of an action in tort and so framed his complaint. However, the proof failed as to the damages which he had alleged. Nevertheless, the plaintiff was permitted to recover, under the facts alleged and proved, a sum stipulated as liquidated damages in the contract, and this without amending the pleadings to conform to the evidence. The basis of the decision was this:

"... Under the liberal rules of the reformed procedure, a plaintiff is entitled to recover, not on the basis of his allegations of damages, but on the basis of the facts as to damage shown in the record. This liberality is carried over into the new rules. In fact, it is broadened. Differences in the forms of claims being abolished, the plaintiff should be denied relief only when, under the facts proved, he is entitled to none. ..."\textsuperscript{198}

In a sense there is really nothing new about this procedure to West Virginia practitioners. It has long been provided that in proceedings before a justice of the peace: "The forms of action now existing shall not apply. . . ., and there shall hereafter be but one form of such action in such courts, which shall be deminated a civil action."\textsuperscript{199} The material language is the same as that in the federal rule under which the \textit{Nester} case was decided,\textsuperscript{200} and it has been construed by the West Virginia court to have the same effect in trials before a justice or in the circuit court on an appeal from the judgment entered by a justice. In

\textsuperscript{197} In West Virginia causes \textit{ex contractu} cannot be joined with those \textit{ex delicto}. The cases are collected in Lugar, \textit{supra} note 39, at 175 n. 193.

\textsuperscript{198} 25 F. Supp. at 481. When this case reached the Supreme Court, it was held that the sum specified in the contract did not fix a definite liability but only a maximum limit on recovery if damage were proved. The case was reversed on this basis. Western Union Telegraph Co. v. Nester, 309 U.S. 582 (1940).

\textsuperscript{199} W. VA. CODE c. 50, art. 4, § 1 (Michie, 1949).

\textsuperscript{200} The court relied upon Rule 2 which reads: "There shall be one form of action to be known as 'civil action'". Fed. Rules Civ. Proc., 28 U.S.C.A. (1950). Compare also Rule 8(a) (2) which contains the general rule of pleading under that system, namely, the pleading shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief," with W. VA. CODE c. 50, art. 4, § 4 (Michie, 1949), which provides that in a justice's court the complaint "shall state in a plain and direct manner the facts constituting the cause of action."
Lovings v. Norfolk & Western Ry., the plaintiff brought his action before a justice "for the recovery of money due for a wrong." Judgment was entered for the plaintiff and the defendant appealed the case to the circuit court. At the trial in that court the defendant requested instructions which would have denied the plaintiff relief unless the jury found that the defendant had committed a tort. It was held that the instructions had been properly rejected, the court explaining that "... the plaintiff could recover in said action whatever he showed himself entitled to recover in the action either ex contractu or ex delicto." 

Ironically the plaintiff with a small claim may thus expect to obtain relief in a justice's court or on appeal therefrom when the facts proved show that he is entitled thereto, irrespective of the theory of his case, although the litigant entitled to a larger sum or more important relief may have to suffer delay, inconvenience, and additional expense before obtaining his relief because it develops at the trial that his lawyer chose the wrong theory to justify recovery. As every practitioner knows, this error may occur in a well prepared case when the proof does not develop as the pleader had every reason to believe that it would or the court does not agree with the pleader's determination of the law applicable to the facts proved. To the extent that the pleader cannot protect his client from these contingencies, it seems clear that the rules of pleading should be changed if it can be done without any unfairness to the opposing party. This the Federal Rules have done by abolishing the doctrine of the theory of the pleadings.

To hold that the theory of recovery cannot be changed in the appellate court may also result in a denial of justice. When a case has been tried on one theory, may an appellate court affirm the judgment on a different theory? This is not a suggestion that the court should, if the facts on which the decision would rest are disputable and the issue was not actually tried. But suppose that the facts on which the decision would rest are not

201 47 W. Va. 582, 35 S.E. 962 (1900).
202 See the statutory form of summons in justice's courts. W. VA. CODE c. 50, art. 3, § 4 (Michie, 1949).
203 Point 3 of the syllabus by the court. See also O'Connor v. Dils, 43 W. Va. 54, 26 S.E. 254 (1896). The result here can also be supported by the statute which provides that a variance between the proof and the allegations of a pleading shall be disregarded as immaterial unless the adverse party has been misled to his prejudice thereby. W. VA. CODE c. 50, art. 4, § 10 (Michie, 1949).
in dispute or that the parties had a fair opportunity to introduce all relevant evidence on the issue at the trial since it was a controlling issue on the original theory, shall the judgment be reversed merely because it was decided on the wrong principles of law? Our court has stated that

"... Litigation is not, and ought not be regarded as a contest presided over by the court and determinable by the skill of the actors, as in the case of a game. A correct ruling based upon a wrong or untenable reason should always be upheld. . . ."\textsuperscript{204}

On the premises suggested above the same principle should be applied, since the plaintiff in error can show no prejudice from an affirmance. Only a technicality would require a retrial.

The fairness of this result appears in a case decided under the Federal Rules.\textsuperscript{205} The decision was supported in part by a federal rule which permits a case to be decided on the issues tried by the parties although not raised by the pleadings,\textsuperscript{206} but the same treatment should be given \textit{a fortiori} to issues raised by the pleadings and tried by the parties. The plaintiff asserted liability on the theory that the truck which caused the damage was being driven by a servant of the defendant at the time of the accident. The defendant contended that the evidence was insufficient to establish the master-servant relationship. The appellate court agreed, but affirmed the judgment on the theory that the defendant was liable even as an employer of an independent contractor on other facts in the case as to which there was no dispute. Perhaps this was the approach being followed by the West Virginia court when it searched for a theory on which the facts proved might justify recovery even though it rejected the attractive nuisance doctrine, the theory on which the case had been tried in the lower court.\textsuperscript{207}

In another West Virginia case\textsuperscript{208} the court expressed a rather liberal view concerning the theory of the case. In that case the plaintiff had sued husband and wife for wrongful death caused by the negligent operation of the husband's automobile by the

\textsuperscript{204} Cochran v. Craig, 88 W. Va. 281, 802, 106 S.E. 633, 641 (1921). Even though the opinion of a circuit court is made a part of the record by court order, a correct decision is not affected by the reasons prompting it. Robertson v. Vandergrift, 119 W. Va. 219, 193 S.E. 62 (1937).

\textsuperscript{205} Venuto v. Robinson, 118 F.2d 679 (3d Cir. 1941).


\textsuperscript{207} See note 160 supra and the text which accompanies and follows it.

\textsuperscript{208} Creasy v. Thomas, 106 W. Va. 24, 144 S.E. 563 (1928).
wife, apparently asserting liability against the husband on the family car doctrine. The plaintiff was permitted to amend his declaration to allege that the automobile was owned by a third person since it involved no change in the cause of action, the decision being based upon the fact that “... The plaintiff would have been entitled to recover under the original declaration, on the ground that the husband was responsible for the wife's tort, whether he or another was the owner of the automobile.”

Although the husband's liability for his wife's torts has been modified by statute, this reasoning would indicate that the new theory might have been the basis of recovery without any amendment of the declaration.

However, the writer believes that both of these West Virginia cases may illustrate nothing more than a liberal application of the principle that surplusage in a pleading may be disregarded and the true theory of the pleading be determined from the other allegations therein. This approach has been discussed herein, and it offers no relief from the doctrine unless the court strains the principle in order to justify recovery. The only safe remedy available to the pleader at the present involves the insertion of separate counts to cover all possible theories of recovery. Even with the prolixity of pleading and possible confusion involved in this method, the limitations on its effectiveness have been shown. The adoption of rules comparable to those herein discussed would eliminate any danger that the theory of the pleading doctrine could continue to operate to delay or deny the relief to which the facts pleaded and proved show the claimant is entitled.

E. Summary

The adoption of one form of action may be accomplished without denial of any substantive rights of the parties. The manner in which the change may be effected has been described herein. The points discussed in detail may be summarized by Professor Moore's approach to the combined procedure. He states that the real problems now are:

209 Id. at 26, 144 S.E. at 564.
210 "... At common law the form of action is not settled by the name given to it by the pleader, but by asking what form is indicated by the count as a whole, the substantial allegations being given chief consideration. A similar rule prevails in determining the theory of a pleading. ... A name given to a pleading does not determine its theory..." Whittier, supra note 158, at 596.
211 See text at notes 182-185 supra, especially notes 184-185 supra.
212 See text at notes 164-181 supra.
"(1) What interests will the law protect?
"(2) What type of protection should, as a matter of substance be given—e.g., damages or specific performance; damages or injunctive relief? In answering this, factors of merit, not procedural forms, should be and are weighed.
"(3) Are the parties entitled to a jury trial, and have they waived that right? Rule 38 preserves the right to jury trial of legal issues when a litigant actually wants such trial and demands it; but the litigant is not encouraged, as he has been in New York, to sit by until the case has been decided on the merits and then for the first time advance the claim that he was entitled to a jury trial."213

Such other problems relating to substantive rights as may arise from the union of law and equity may be approached in the same manner as the right to trial by jury. If substantive rights can be protected without the retention of two systems of courts, the existing distinctions amount to little more than saying that a judge has "power to decide the dispute when he crosses his left leg over his right, and no power at all when his right leg is on top."214

V. GENERAL RULES OF PLEADING

In this part of the paper rules of pleading which control the manner in which a claim must be alleged will be discussed. The precision required by some of these rules may delay a hearing of the claim on its merits even though there is no uncertainty as to the nature of the claim from the allegations used by the pleader.

The writer has no intention of discussing all the rules which regulate the manner in which pleadings shall be drafted. A few of them will be criticized as illustrative of rules which are unnecessary for an understanding of the issues to be tried. As rules of pleading they were designed to prevent uncertainty generally; but when applied without considering the facts in the particular case, they often do not serve this purpose and become merely technicalities which may be used to delay the trial. Some of these rules of pleading may even require another action to obtain relief. For the sake of brevity, the discussion will be limited largely to rules for pleading causes of action, excluding most rules as to pleading defenses.

213 2 Moore, Federal Practice 357.
214 Chafee, Some Problems in Equity 339 (1950).
A. Different Approaches

Two common law rules, if properly stressed and liberally applied, might have made many others unnecessary, namely, a pleading is not ambiguous if it be clear according to a reasonable construction, and all pleadings ought to be true. In effect, the substance of the federal rules on pleading a claim is composed of these two rules, many others having been eliminated. In West Virginia steps have been taken to eliminate technicalities, but many remain. The principal difference seems to be that the Federal Rules use a positive approach to the problem, whereas the West Virginia approach has been negative in nature.

For example, Federal Rule 8 provides that a pleading which sets forth a claim for relief shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief", and that a party shall state "in short and plain terms his defenses to each claim asserted." The rule also contains the following specific directives:

"(e) Pleading To Be Concise and Direct; Consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11.


216 "At common law, while it is a principle that pleadings ought to be true, yet there are no means of enforcing the rule. Thus the common-law pleadings fail to uncover the real issues in dispute. . . ." Shipman, Common-Law Pleading § 326. See Stephen, Pleading § 258. Consider this principle as to the pleader's doubt concerning the facts provable or the law applicable. This is developed in the text which follows.

"(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice." 218

In contrast an example of the West Virginia approach is contained in this statute:

"On a demurrer (unless it be to a plea in abatement), the court shall not regard any defect or imperfection in the declaration or other pleading, whether it has heretofore been deemed mispleading or insufficient pleading or not, unless there be omitted something so essential to the action or defense that judgment, according to law and the very right of the cause, cannot be given. . . ." 219

As construed by the court, this statute, which has been in effect since the formation of the state, simply abolished special demurrers, which went to matters of form, and any demurrer for a matter of substances continues to be sustained. 220 Thus, where precedents exist, the court uses them to determine whether the defect in the pleading is one of substance. 221

The approach in West Virginia results in cases being decided on rules of antiquity rather than rules of reason. As a specific illustration consider the rule that pleadings must not be by way of recital, but must be positive in their form. 222 Our court is firmly bound to hold that a declaration in tort is fatally bad on demurrer if the facts necessary to constitute the cause of action are stated under a quod cum or after a whereas, 223 even though

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218 Ibid. Rule 11 reads: "... The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. . . ." The other parts of Rule 8 form the basis of the text which follows.

219 W. Va. Code c. 56, art. 4, § 37 (Michie, 1949). An equally good illustration is the statute which provides that no action shall abate for want of form where the declaration sets forth sufficient matter of substance for the court to proceed upon the merits of the case. Id. at c. 56, art. 4, § 12.

220 This section and the other cited in note 219 supra are usually read together in reaching this conclusion. E.g., Spiker v. Bohrer, 37 W. Va. 258, 16 S.E. 575 (1892); Hays v. Heatherly, 36 W. Va. 613, 15 S.E. 223 (1892). Relying upon this section alone, see Coyle v. Baltimore & Ohio R.R., 11 W. Va. 94 (1877).

221 E.g., Reynolds v. Hurst, 18 W. Va. 648 (1881). The court recognized the need for precedents to determine such questions for "it is not always easy to determine, what is matter of form, and what is matter of substance." Id. at 651.

222 Stephen, Pleading § 237; Shipman, Common-Law Pleading § 294.

223 Gould v. Coal & Coke Ry., 74 W. Va. 8, 81 S.E. 529 (1914); Spiker v. Bohrer, 37 W. Va. 258, 16 S.E. 575 (1892).
the claim made is perfectly clear to the court and opposing counsel.224 Perhaps the same is true of contract counts—except the common counts in assumpsit.225 This result was reached because the early Virginia cases held that the defect was one of substance and could be reached by general demurrer, although Chitty took the position that it could be attacked only by a special demurrer.226 The court has been able to find some cases in which the ancient rule did not apply and has been pleased to recognize the exceptions,227 stating that the rule is centuries old, technical, a stigma upon the common law,228 and an odious blot on the law of pleading.229

224 Note, for example, the allegations in the one-count declaration in Spiker v. Bohrer, 37 W. Va. 258, 259, 16 S.E. 575, 576 (1892).

225 The common counts in an action of assumpsit are good on demurrer even though both the consideration and promise are stated after a whereas. Sheppard v. Peabody Insurance Co., 21 W. Va. 368 (1883); Burton & Co. v. Hansford, 10 W. Va. 470 (1877). This conclusion was reached because the English judges had prescribed this manner of allegation in the common counts and because the Virginia court had never held such counts defective on demurrer. The court realized that the allegations which followed the whereas in these counts constituted the very gist of the action. However, no West Virginia case has been found in which this manner of pleading was held good in other contract counts, and the court in the latter case recognized that the Virginia law, which was being followed, might be otherwise as to contract counts other than the common counts although some attempt was made to indicate that most of the Virginia cases involved actions in tort. Chitty took the position that this manner of pleading in contract counts might be good on general demurrer and perhaps even on special demurrer. 1 CHITTY, PLEADING *309 (16th Am. ed. 1879). However, the West Virginia court has followed the Virginia court in preference to Chitty. See text which follows.

226 "... The injury in trespass should be stated directly and positively, and not by way of recital; and therefore a declaration charging 'for that whereas', or 'wherefore,' the defendant committed the trespass, is bad on special demurrer...." 1 CHITTY, PLEADING *402. Note that this applied only to a declaration in trespass, according to Chitty. To the same effect, see STEPHEN, PLEADING § 237; SHIPMAN, COMMON-LAW PLEADING § 294. This is of special interest in West Virginia since the action of trespass has been abolished. However, the West Virginia court pointed out specifically that the Virginia court applied the rule to both actions of trespass and trespass on the case. Burton & Co. v. Hansford, 10 W. Va. 470, 476 (1877). See note 225 supra as to this manner of pleading in contract counts, noting especially Chitty's view.

227 In addition to the cases cited in note 225 supra, which permit this manner of pleading in the common counts in assumpsit, see Rogers v. Coal River Boom & Driving Co., 41 W. Va. 593, 23 S.E. 919 (1896) (held that the "whereas" was used only as to inducement); Battrell v. Ohio River Ry., 34 W. Va. 232, 12 S.E. 699 (1890) (the participial form of a verb used in stating the facts—decision weakened by the court's finding that these facts might be regarded as surplusage). Note also Jenkins v. Montgomery, 69 W. Va. 795, 72 S.E. 1087 (1911) (recital as to amount of damages claimed—not a fact essential to the cause of action).


Although the difference in result may not be entirely attributable to the language variation in the rules, the declared purpose of such statutes to eliminate only some technical rules leaves the court bound by other ancient rules and precedents based thereon. Instead of a new approach to determine whether the court, jury and opposing party have fair notice of the particular claim asserted, definite formulae must be satisfied. A few of these will be examined more in detail to illustrate more clearly what is meant.

B. The Pleader's Dilemma

The pleader in West Virginia is confronted with this dilemma in drafting his pleadings: he must plead ultimate facts but not conclusions of law. If he can find precedents to follow, he is reasonably safe; but if he reasons by analogy from precedents or simply drafts the pleading in such manner that no doubt exists concerning the basis of his claim, he may find that his pleadings are demurrable. One court frankly admitted that there is no guide except precedents, in these words:

"... It may not be possible to formulate a definition that will always describe what is a mere conclusion of law, so as to distinguish it from a pleadable, ultimate fact, or that will define how great an infusion of conclusions of law will be allowed to enter into the composition of a pleadable fact. Precedent and analogy are our only guides. And it is un-

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270 For example, in Battrell v. Ohio River Ry., 34 W. Va. 232, 12 S.E. 699 (1890), Judge Brannon felt constrained to follow the precedents which were available, but he says that the language in the statute quoted in the text above if properly construed would cure the defect of recital pleading. Id. at 234, 12 S.E. at 700.

271 SHIPMAN, COMMON-LAW PLEADING §§ 295, 296. A mere reading of these two sections will demonstrate that the rules mean nothing except that precedents based upon the rules must be used to determine what degree of particularity is required in alleging particular matters. What allegations are deemed to make the issue clear vary, not on the basis of the declared objective of clarity but based on considerations of policy and convenience.

272 One rule of pleading is thus stated in SHIPMAN, COMMON-LAW PLEADING § 327: "Pleadings should observe the known and ancient expressions as contained in approved precedents." But, he hastens to add: "The rule stated is of rather uncertain application, for it must be often doubtful whether a given form of expression has been so fixed by the course of precedent as to admit of no variation." Note what has happened in the West Virginia cases where precedents were the basis on which the pleader acted. See text which follows.

273 In addition to the text which follows, compare the preceding text as to recital pleading. Judge Green said of this matter: "... it may be difficult to assign any good reason for a difference, yet a distinction has been taken between declarations in tort and those based on contracts." Burton & Co. v. Hansford, 10 W. Va. 470, 476 (1877).
doubtedly true that there will be found a want of entire judicial harmony in the adjudicated cases as to what are statements of fact, and what are mere conclusions of law. And in holding one class of inferences as facts to be pleaded, and another as conclusions of law to be avoided, courts may have been often governed more by precedent than by a substantial difference in principle..."

Can a pleader rely on precedents by analogy? Normally that is all that can be done, but it offers little assurance of a concession that a claim has been well pleaded. To illustrate this point the writer has chosen a factual situation as to which the average practitioner believes the existing precedents are clear. It can probably be said that the West Virginia law is better settled here than in most pleading problems which involve the dilemma of ultimate facts versus conclusions of law. In other jurisdictions there is a conflict of authority as to "whether it is proper to plead generally that the defendant 'negligently' collided with the plaintiff, or whether the special circumstances from which the negligence might be inferred should be set out concretely and in detail." It is said to be a well settled rule in West Virginia that in a declaration alleging negligence it is not necessary to state the particular acts which constitute the negligence. The court adopted this approach soon after the formation of the state.

Yet cases continue to come before the court for a determination of whether the plaintiff has alleged simply that the act on which he bases his cause was done "negligently". In a case decided a year ago the court cites over twenty cases which have involved this issue and others might have been added. Although the court refers to declarations which are held to satisfy the rule as fully informing the defendant of the negligent act with which he is charged, this means merely the "primary act of negligence", and it is clear that the defendant may obtain no information from

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235 Shipman, Common-Law Pleading 496.
237 Blaine v. Chesapeake & Ohio R.R., 9 W. Va. 252 (1876), wherein the court relied upon Chitty's form and the West Virginia statute abolishing special demurrers. In reaching the same conclusion in Baylor v. Baltimore & Ohio R.R., 9 W. Va. 270 (1876), the court relied merely upon the statute. In Hawker v. Baltimore & Ohio R.R., 15 W. Va. 628 (1879), the court seems to have regarded the rule as settled in this jurisdiction and merely relied upon the two cases above as precedents.
238 Gasber v. Coast Construction Corp., 60 S.E.2d 193 (W. Va. 1950). Some of the other cases which might have been added are being used in the text which follows.
the pleading concerning the facts which the evidence will show amounted to negligence.\textsuperscript{239} The information which he receives concerning the claim may be no greater than that which a defendant receives from a complaint couched in the language of the official form used in federal courts.\textsuperscript{240} There is no reason that he should, but that form may be used with greater assurance that the hearing of the claim on its merits and recovery of judgment will not be delayed by a contention that a violation of the well settled rule as to how negligence shall be alleged has occurred.

A brief review of a few of the cases may indicate why counsel continue to have some difficulty in knowing whether sufficient facts have been pleaded to show a cause based on negligence.

In Robbins v. Baltimore & Ohio R.R.,\textsuperscript{241} the West Virginia court held a distinct allegation that the defendant by its servants and agents in its behalf "carelessly and negligently" ran its locomotive and cars upon and against the horse of the plaintiff and thereby killed the horse was an allegation of an act of negligence and not simply a conclusion of the pleader. The declaration was held sufficient since it showed how the horse was killed by the defendant, was in conformity with a form set forth by a well-known writer on West Virginia procedure, gave the defendant notice of the claim for damages, and was good under the statute which

\textsuperscript{239} \textit{E.g.}, "... Here the defendant is fully informed from the allegations that it is charged with the negligent construction of the steps. True, the declaration does not say just what step was negligently or defectively constructed, or what nail was improperly placed, or what board or material used was defective, or how much any step sloped, or what step was constructed of thin boards. ..." Gasber v. Coast Construction Co., 60 S.E.2d 195, 197 (W. Va. 1950). This declaration was held sufficient. Many other West Virginia cases might be cited in which declarations were held adequate although the declaration merely alleged as to the negligence that the defendant did a certain act "negligently, carelessly and wrongfully". These words or the equivalent were held sufficient in the earliest cases. See cases cited in note 237 \textit{supra}. In Louis v. Smith-McCormick-Construction Co., 80 W. Va. 159, 165, 92 S.E. 249, 251 (1917), the court said it suffices to set forth the primary act causing the injury and say it was done negligently. See Bralley v. Norfolk & W. Ry., 66 W. Va. 462, 464, 66 S.E. 653, 654 (1909) (to show what instrumentality inflicted the injury and say it was negligently done).

\textsuperscript{240} Federal Form 9 contains only this allegation as to the negligence: "On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway." Fed. Rules Civ. Proc., 28 U.S.C.A. (1950). Compare the allegations held sufficient in the West Virginia cases mentioned in note 239 \textit{supra}. But, contrast the detailed allegations as to negligence in the declarations usually found in West Virginia cases; detailed allegations to comply with common law forms but containing no greater information than in the federal form.

\textsuperscript{241} 62 W. Va. 595, 59 S.E. 512 (1907).
abolished special demurrers. The earlier West Virginia precedents had held comparable allegations of negligence sufficient. However, in *Wilson v. Guyandotte Timber Co.*, a later case, the plaintiff alleged that

"... the said defendant ... so carelessly, negligently, improperly, and unlawfully constructed, managed, and operated the boom ... , by its servants and agents; that by and through the negligence and improper conduct of the defendants by its said servants and agents in that behalf, the said boom entirely stopped up ... the river, ... whereby an immense number of logs accumulated behind said boom ... to such an enormous extent that the said boom broke, carrying along with it ... a great volume and mass of water, so that in its course ... it ... swept away all of the timber and logs, etc., that were owned by said plaintiff ... ."244

The court held that there was no averment of facts which constituted a use of the river in disregard of the rights of the plaintiff. Here was the reasoning:

"... The charge that the boom broke by the defendant stopping up the river entirely and catching a great accumulation of logs is not enough. Such breaking may have been without blame on defendant's part. Nor will it do merely to say that these acts were negligently and unlawfully done without showing wherein the negligence and unlawfulness lay; for it is not always a negligent or unlawful act for a boom company to stop up a river and catch a great number of logs. The act must be shown to be negligence; not merely stated to be ... ."245

The same might be said of the operation of a locomotive which strikes the plaintiff's horse, as in the *Robbins* case. The plaintiff in the *Wilson* case had relied upon the *Robbins* case, but the court summarily disposed of it by saying:

"... The case is different from that of running a locomotive onto a horse. *Robbins v. Railroad Co.*, 62 W. Va. 555. That case, relied on by plaintiff, is not in point here. Facts must be averred to take the act out of its ordinary harmless phase. ... ."246

One would have thought that plaintiff's counsel had used greater care in drafting his pleading in the *Wilson* case, having alleged

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242 See note 237 *supra*; note the basis for this conclusion in the earlier cases.

243 70 W. Va. 602, 74 S.E. 870 (1912).

244 This is quoted from the second count of the declaration as found in the record. Italics supplied.

245 70 W. Va. at 604, 74 S.E. at 871.

more "facts" than the Robbins case seemed to require. The defendant certainly had fairer notice of the claim asserted than in the Robbins case.

The reasoning in the Wilson case stands in contrast with later cases permitting more general allegations of negligence. Compare this:

"... Neither the running of an engine nor the killing of a person in so doing is necessarily negligence . . ." 247

"... The averment is that the defendant negligently ran its train over and upon him. Under any conceivable state of circumstances, this would be a wrong, if it happened . . ." 248

Or this:

"... An allegation that an act which may have been done either with or without negligence, according to the circumstances to be revealed by the evidence, was done negligently, is an allegation of fact . . . " 249

Although the Wilson case has been discredited by these two later cases, though not mentioned therein, it does show how the rule may unnecessarily delay a hearing on the merits. Further, it may be assumed that the court has not heard the last of the Wilson case. In the most recent case involving the sufficiency of an allegation as to negligence, the defendant relied upon that case. The court did not disapprove of the manner in which the rule had been applied in the case; it was merely stated to be "a case where 'that which is averred therein as negligence is not negligence' and not a case where an allegation of primary negligence was held insufficient." 250

In this recent case the court applied the "well settled rule", the application of which appears not always certain, 251 and concluded that the primary act of negligence had been ascertained by the pleader and that the declaration was sufficient since that act was alleged to have been negligently done. 252 After reviewing the earlier cases and pointing out that declarations in some of

248 Id. at 466, 66 S.E. at 655.
250 Gasber v. Coast Construction Co., 60 S.E.2d 193, 198 (W. Va. 1950). The quotation within the quotation is taken from the Wilson case.
251 Even in this latest case the court said that this was one of the more difficult questions in the case. Note that the court examined more than twenty cases in reaching its decision.
252 The declaration alleged that the defendant "negligently, carelessly and unlawfully" constructed certain wooden steps. Id. at 195.
them were sustained even though "there was no specific act of negligence alleged", the court says:

"... We do not intend to be understood as saying that a general allegation of negligence will be sufficient in any case. A defendant must be informed from the allegations of the pleadings 'that he negligently did a specific act doing harm. In other words, you may say that the defendant negligently did or did not do so and so, without detail as to the mere negligence, but you must state the acts that are the basis of liability. If the negligence cannot be otherwise charged, detail must be given.' "

As stated in the syllabus by the court, an allegation that the primary or basic act was done negligently will be sufficient unless an allegation of the particular or specific act constituting negligence is necessary to inform the defendant of the charge.

Whether the decision in this case has clarified the law may be doubted. The holding appears consistent with the great majority of the earlier cases in finding the allegations here sufficient, but may the court have indicated that greater detail may be required in the future where it is felt that the defendant should be better informed? The form of allegation held sufficient in this case and most of the West Virginia cases is no different basically from that used in the official form prescribed for use in federal courts. There is no danger that that form will be held insufficient and little likelihood that an objection will be made as to its sufficiency as a delaying tactic. The possibility that there may arise a case in which the defendant should be given additional information concerning the claim, although he concededly gets little from most of the declarations which have been sustained in the past, can be met by other means to be discussed herein and without holding out hope to the defendant that he may use this argument as to sufficiency of the pleadings to delay a hearing on the merits.

251 Id. at 198.
254 See notes 239, 240, and 252 supra and the text at notes 241-249 supra.
255 See note 261 infra.
256 See note 239 supra. See also Bralley v. Norfolk & W. Ry., 66 W. Va. 462, 465, 66 S.E. 653, 654 (1909), and Carlin, The Common Law Declaration in West Virginia, 35 W. VA. L.Q. 1, 6 (1928), for a discussion of the advantages in not requiring detailed pleadings. In Gorsuch v. F.W. Woolworth & Co., 104 W. Va. 98, 139 S.E. 472 (1927) and 107 W. Va. 552, 149 S.E. 610 (1929) are two declarations in the same case, both with detailed allegations, neither of which gives the defendant any more information as to the claim than the other. Yet the first was held inadequate but the second sufficient. Had the plaintiff waited long enough for justice?
The problem here as to precedents in determining what is an ultimate fact or a legal conclusion has been limited to a field in which the law is said to be well settled in this jurisdiction. Numerous other words and phrases used in pleading might be discussed in relation to this problem, but as to many of these the law is less well settled and the dangers inherent in choosing the proper phraseology are greater. Much space would be required to develop adequately as to these other words the same factors as stressed herein and the point urged would not be made any clearer thereby. Let this one question suffice: has the use of precedents either established a safer basis on which a pleader may proceed in alleging his cause or defense or resulted in giving the opposing party any fairer notice of the claim or defense asserted than might be secured under a rule which provides that earlier precedents shall be ignored and that the pleading shall be held adequate "unless there be omitted something so essential to the action or defense that judgment, according to law and the very right of the cause, cannot be given"? Since this quoted part of the statute has not been construed to eliminate precedents based on matters of "substance", the common law rules of pleading which were regarded as more than "formal" many years ago continue to consume much time of the court and lawyers—and law students—and this not for the purpose of ascertaining either the law applicable or the facts on which the cause of action will be based, but merely to comply with rules for the sake of rules. This time-consuming game of mental gymnastics may be interesting, but how long will the public, which does not understand how fascinating the game can be, continue to pay the expenses of the participants?

Rather than accept as controlling the technical rules of common law pleading, along with the confusing precedents, many of which continue to be applied in states having code pleading, the Federal Rules stress the requirement that the pleader set forth a short and plain statement of the claim showing that he is en-

257 Many of these words and the variety of approaches as to their sufficiency or insufficiency in pleading are discussed in Wheaton, Manner of Stating Cause of Action, 20 Cornell L.Q. 185 (1935).
259 In some respects code pleading became even more technical since some courts emphasized that this was to be fact-pleading and required extensive detail in cases where the common law permitted general allegations. See Clark, Code Pleading §§ 39, 45 et seq.
titled to relief, and as an extra precaution prescribe certain forms which not only illustrate the simplicity goal but are adequate to cover the great majority of litigated cases. The federal courts are no longer "hampered by the morass of decisions as to whether a particular allegation is one of fact, evidence, or law." The West Virginia court has indicated that it would welcome an opportunity to be free of some of the fetters imposed by such common law precedents and to decide cases without sacrificing substantial rights to mere technicality and form. In the following sections the resulting simplicity of pleading under the Federal Rules is shown, noting also that pleading according to the legal effect, another common law requirement, is not needed. In effect, pleading under the Federal Rules is equivalent to notice pleading in West Virginia.

C. Pleading Legal Effect

The official forms in the appendix to the Federal Rules indicate that the rule requiring one to plead according to the legal effect has been abolished and that those rules require no verbalism to state a claim. Although other forms may better illustrate the permissible brevity of pleading under these rules, the form of the common counts best reflects the absence of pleading by legal effect. For example, Form 5, the complaint for goods sold and delivered, reads (omitting the allegation to show jurisdiction):

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230 Rule 8, Fed. Rules Civ. Proc., 28 U.S.C.A. (1950). Note that there is no requirement that the pleading set forth "facts", "ultimate facts", "facts stating a cause of action", or "facts according to their legal effect", nor is there any prohibition against pleading "legal conclusions" or "evidence", except as the latter may be discouraged by the emphasis on a short pleading.

261 "The forms contained in the Appendix of Forms are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate." Rule 84, Fed. Rules Civ. Proc., 28 U.S.C.A. (1950). The amendment of this rule in 1946 made it clear that the Official Forms are sufficient to withstand attack. See comment on this rule in Moore, Federal Rules and Official Forms (1949).

262 2 Moore, Federal Practice 1647.

297 See notes 228 and 299 supra and the accompanying text. See also this complaint: "The use of exhibits to pleadings in common law actions is barred under the strict and stereotyped rules of the common law." Mountain State Water Co. v. Kingwood, 121 W. Va. 66, 69, 1 S.E.2d 395, 397 (1939).

294 "... The courts have recognized that the function of pleadings under the Federal Rules is to give fair notice of the claim asserted so as to enable the adverse party to answer and prepare for trial, to allow for the application of the doctrine of res judicata, and to show the type of case brought, so that it may be assigned to the proper form of trial. ... " 2 Moore, Federal Practice 1649.


296 Forms 5, 6, 7, and 8. Ibid.
252  COMMON LAW PLEADING

"I. . .
"2. Defendant owes plaintiff ten thousand dollars for goods sold and delivered by plaintiff to defendant between June 1, 1936 and December 1, 1936.
"Wherefore plaintiff demands judgment against defendant for the sum of ten thousand dollars, interest, and costs."

Where is the promise to pay?

In *Waid v. Dixon*, the West Virginia court meticulously examined a declaration, set forth in full and covering four pages of the opinion, to find that it would have been a good pleading except that the plaintiff had not averred a promise on the defendant's part, even though it was immaterial whether the defendant ever made a promise or whether the plaintiff had to prove it. The court held that the statute eliminating special demurrers had not rendered the "promise" allegation unnecessary, and apologized for reversing the judgment in *haec verba*:

"... This seems a technical matter on which to reverse the case, but according to long established principles of law calculated to promote justice, and a fair trial between litigants and precedents firmly established, the Court cannot do otherwise."268

When dealing with the implied promise in the common counts, the court is permitting the pleading of what is as much a legal conclusion as other allegations which are held not sufficient for this reason.269 Yet not only is it permitted, it is *required*, in either general or special assumpsit,270 and in the latter action even though it may serve no greater purpose than it does in the former. Here is an illustration: The plaintiff sues for rent relying upon the written contract of lease and charges in a special count indebtedness of $500.00 "for money due for rent of a certain store room * * * rented by the plaintiff to the said defendant, * * * amount due and unpaid prior to the beginning of this suit, at the rate of $75.00 per month, payable monthly in advance."271 This the court says would be bad on demurrer for there is no

267 55 W. Va. 191, 46 S.E. 918 (1904).
268  Id. at 197, 46 S.E. at 920.
269  "... Therefore, the court first says, 'State not law;' then it orders, 'State it.' What admirable consistency! . . ." Wheaton, *supra* note 257, at 207.
express allegation of the promise to pay the rent, and if there was a promise it was not well pleaded, although the court concedes that

"... This apprised the defendant of the nature of the demand, and also of reliance upon an express contract of rental, carrying an implication of a promise or agreement to pay the rent sued for. ... The subject matter of a cause of action is here plainly indicated. Enough is stated to show what the plaintiff seeks and upon what theory or claim he sues for it. Nothing is omitted which could have misled or injured the defendant. Only a technical allegation is lacking. What should have been stated in express terms has been put in by way of implication or intendment. ..."\textsuperscript{272}

Contrast the requirement that a promise must be alleged in all actions in assumpsit with the rule that an allegation of any duty on the defendant’s part in an action for negligence may be considered as surplusage. An allegation of duty is only a conclusion of law and is unnecessary where the facts alleged show the duty and are stated with sufficient clarity to prevent surprise.\textsuperscript{273} The legal liability results from the \textit{facts} whether the action is trespass on the case for negligence or general assumpsit on an implied promise. Clearly the difference in pleading is required only by the technicality which was used many centuries ago to develop the common counts.\textsuperscript{274} The allegation of a fictitious promise was created to promote justice; requiring the allegation today where the claim is clearly stated only delays justice.

In a very recent case\textsuperscript{275} an excellent example of justice delayed resulted from what may be termed a requirement that the pleader allege legal effect. Some may believe that it is a better illustration of the ultimate fact versus legal conclusion problem. In either event, existing rules of pleading as there applied delayed a hearing on the merits without any known benefit to either party unless delay alone is beneficial. This may often be true as to defendants, but seldom as to plaintiffs.\textsuperscript{276}

\textsuperscript{272} \textit{Id.} at 97, 70 S.E. at 1099. It was held that the defect was cured after verdict by a statute.

\textsuperscript{273} The duty implied by law from the facts alleged need not be averred. Curry v. New Castle Auto Express, 112 W. Va. 268, 164 S.E. 147 (1932); Gorsuch v. F.W. Woolworth & Co., 104 W. Va. 98, 139 S.E. 472 (1927). Many earlier West Virginia cases in support are cited in the latter case.

\textsuperscript{274} For a history of this development, see \textit{AMES, LECTURES ON LEGAL HISTORY} 145-152 (1913).


\textsuperscript{276} Compare the statement by the West Virginia court quoted in the text at note 341 \textit{infra}. 
The state tax commissioner instituted an action to recover money illegally expended and received by a commissioner of a county court. The majority of the court were of the opinion that only one statute gave the tax commissioner that right. The statute provided that the defendant would be personally liable if he “wilfully” participated in the expenditure involved.\(^{277}\) The declaration alleged that the defendant “failed and neglected to pay and receive to himself only such monthly salary as was provided by law”, that the amount paid by him to himself as an individual over and above his salary was $1,100, that the same was paid and received by forty-three separate orders, each order being specifically described and numbered in the declaration, and that such payments were “illegal, unlawful and improper”.\(^{278}\) A demurrer to the declaration was sustained in the trial court but not for the reason given by the appellate court. Although the court said that the ground so assigned by the trial court, reasons which went to the merits of the case, were improper, discussion of those grounds was postponed until the fatal defect in the declaration, first noticed by the appellate court, was corrected. Apparently relying upon the very general ground of demurrer assigned by counsel, namely, “no cause of action is stated”,\(^{279}\) the majority of the court held that no cause of action was alleged because the word “wilfully” was omitted before the word “received”. The court deemed this to be a “grave question”, and says that it is not sufficient for the wilfulness of the conduct to appear in the declaration by inference or by implication. Reliance was placed upon this statement from a digest: “Whatever facts are necessary to constitute the cause of action should be directly and distinctly stated in the declaration, and such facts should not be left to be inferred from other facts distinctly

\(^{277}\) “A person who in his official capacity wilfully participates in an illegal expenditure may be proceeded against for the recovery of the amount illegally expended. . . .” W. VA. Code c. 11, art. 8, § 30 (Michie, 1949). Italics supplied.

\(^{278}\) From the dissenting opinion. 62 S.E.2d at 553-554. To the same effect, see the majority opinion at 561.

\(^{279}\) “. . . All demurrers in civil cases shall be in writing and shall state specifically the grounds of demurrer relied on, and no grounds shall be considered other than those so stated, except by the court of its own accord. . . .” W. VA. Code c. 56, art. 4, § 36 (Michie, 1949). Will this general assignment serve as the basis for challenging the sufficiency of a pleading on any matter of substance; may a demurrer special in form be thus converted to one general in form; or was the court considering this ground of its own accord? See Carlin, Functions of a Demurrer under the Revised Code, 41 W. VA. L.Q. 313 (1955).
alleged in the declaration, and arguments, inferences and matters of law should be excluded."

Would the allegation of "wilfully" be a statement of fact? or law? or legal effect? The dissenting judge believed that the declaration alleged "facts which clearly established that the sums sued for were received wilfully by the defendant." He says further: "... Assuming the allegations to be true, as we must on demurrer, the actions of defendant could not have been otherwise than wilful." Be it fact, law, or legal effect, who would be misled by the omission of the word? Would the facts alleged or the statements made in the declaration lead the jury to believe that the defendant was charged with doing the acts there alleged in any manner other than wilfully? Was the defendant in doubt as to the charge? Apparently not; this basis was not even assigned as a ground of the demurrer.

This case offers a sharp contrast with what would be required under notice pleading. If all parties concerned have fair notice of the claim which is being made, what more should be required or expected of pleading? Requiring more seems difficult to justify.

**D. Notice Pleading**

Unjustifiable delays are equally apparent where code pleading requires a pleader to state "facts", the distinction between facts, evidence, and law being as nebulous as that between ultimate facts, evidentiary matters, and conclusions of law. The same precedents are usable. What was needed was a new approach, at least a different approach or objective. If there were fair notice of the claim asserted, that would suffice. This is the objective under the Federal Rules, and the West Virginia practitioner

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280 62 S.E.2d at 552. S MICHE, DIGEST OF VIRGINIA & WEST VIRGINIA REPORTS, Pleading, § 52. Italics supplied. The only West Virginia case cited in support of this proposition is Burton v. Hansford, 10 W. Va. 470 (1877). This is the case which held that recital pleading was proper in the common counts in assumpsit (see note 225 supra), the exception as to this type of pleading in West Virginia. This statement quoted from that case was used there as introductory matter. The only other West Virginia case cited to support the holding in the instant case involved a declaration in which sufficient facts were not alleged to show that the defendant owed a duty to the plaintiff—the quotation taken from that case was there adopted from the Burton case.

281 62 S.E.2d at 553.

282 Id. at 554.

283 See note 259 supra.

284 See note 264 supra.
has long been familiar with it, even though only in a limited field.

"It is the purpose of a notice, on which to base a motion for judgment, to acquaint the defendant with the grounds on which he is to be proceeded against; and if it be so plain that the defendant cannot mistake its object, it is sufficient, however wanting it may be in form and technical accuracy. . . . Such notice will be treated with great indulgence by the court. . . ."

That is the West Virginia court dealing with the sufficiency of a notice of motion for judgment, but it might as easily have been a federal court applying the new rules. For example:

". . . to avoid dismissal for failure to state a claim upon which relief may be had, it is necessary only to allege sufficient facts to apprize the opposing party of the nature of the claim which will be proved. Technicalities in pleading are no longer observed. . . ."

The only difference to be noticed is that the West Virginia court went further to state that the pleading would be treated with great indulgence, which is also the way in which pleadings are to be construed under the Federal Rules.

A comparison of the official forms in the appendix to the Federal Rules with notices held sufficient by the West Virginia court also illustrates the same liberal treatment of pleadings. One notice held sufficient recited simply that the plaintiff would move the circuit court "to render judgment against you, and in our favor, for the sum of $389.40, with interest thereon from the due date of said account. Said money is due and owing to us by you, as per itemized statements rendered to you for sand heretofore sold

\[285\] Notice of motion for judgment proceedings have been used from the time the state was formed. VA. CODE c. 167, § 5 (1849).

\[286\] The limitations are discussed in the text which follows.

\[287\] Hall v. Harrisville Southern R.R., 103 W. Va. 287, 289, 137 S.E. 226 (1927). From an historical viewpoint it is of interest that originally it seems that the notice though not in writing was adequate and that where in writing it was often drawn, not by a lawyer, but by the party plaintiff himself. 4 Minor's Institutes, 1318 (3d ed. 1893). It is also of interest that recent statements by the court as to the manner in which the sufficiency of a notice is determined, such as that quoted in the text above, are almost verbatim with those made by Professor Minor in the reference, omitting only the two observations made in this note. As to the possibility of litigants' drafting their own pleadings under the Federal Rules and the dangers inherent in such action, see Dioguardi v. Durning, 139 F.2d 774 (2d Cir. 1944).

\[288\] W. VA. CODE c. 56, art. 2, § 6 (Michie, 1949).


and delivered to you from time to time.\textsuperscript{291} In another case\textsuperscript{292} the motion held sufficient stated that the plaintiff would move for a judgment for \$1,000.00, being the amount owing to the plaintiff for a carload of lumber which was \textit{sold} to the defendants on a specified date. The court held that it was unnecessary to state that the defendants had contracted with the plaintiff and had \textit{promised} to pay him for the car of lumber because the law \textit{implies} that from an allegation of sale,\textsuperscript{293} and further that the details as to quantity and price per thousand need not be alleged.

As an example of similar treatment of pleadings under the Federal Rules, one of the official forms, omitting the allegation as to jurisdiction, reads:

"1. . . .

"2. Defendant owes plaintiff ten thousand dollars for goods sold and delivered by plaintiff to defendant between June 1, 1936, and December 1, 1936.

"Wherefore plaintiff demands judgment against defendant for the sum of ten thousand dollars, interest, and costs."\textsuperscript{294}

Although the West Virginia court states the rule to be that the pleader must allege in the notice the \textit{facts} necessary to show a right to recover from the defendant,\textsuperscript{295} the distinctions drawn at common law and under code pleading between facts, evidence, and law, have not been used to hold notices insufficient as long as the defendant is given reasonable notice of the claim asserted.\textsuperscript{296}

Those who think an extension of these principles to pleadings in common law actions is objectionable may attempt to justify the liberality here on the basis that notices of motion for judgment

\textsuperscript{291} Elkhorn Sand & Supply Co. v. Algonquin Coal Co., 103 W. Va. 110, 111, 136 S.E. 783 (1927). This quotation is from the unofficial report. In the official report the words "as per itemized statements rendered to you" are omitted. The record in the case confirms the correctness of the unofficial report.

\textsuperscript{292} Tuggle v. Belcher, 104 W. Va. 178, 139 S.E. 653 (1927).

\textsuperscript{293} See the text above as to the essentiality of the allegation of a promise in the action of assumpsit, whether general or special assumpsit. Why the difference when it may be the same cause of action being used as the basis of a notice of motion for judgment? And why is implication sufficient here but not in a common law action? The questions are further discussed in the text which follows.


are now limited to actions in which the amount to be recovered is "liquidated".

The statute provides that this procedure may be used "to recover money by action on any contract." Even though the court has restricted the application of the statute, the procedure may be used where the issue even as to "damages" is not free of doubt.

In White v. Conley, the court held that the quoted statutory phrase does not permit this simplified procedure where the plaintiff merely seeks damages for the breach of a contract. The plaintiff had sued upon the official bond of a justice for his alleged failure to issue an execution. The decision contained this reasoning:

"... Upon a bond with a collateral condition, or an official bond, there may properly be a proceeding by motion for judgment for a claim which is definite, certain and fixed in amount, ...; but if the claim sought to be collected under the bond is not definite and certain but depends upon proof as to the amount which the claimant may be entitled to recover, then a proceeding upon notice of motion for judgment is not proper. ..."

An earlier case in which the plaintiff had proceeded by motion for judgment on an oral contract for a sum uncertain, though capable of being made certain, was not mentioned by the court. Later cases recognized that a notice of motion for judgment would be entertained for the recovery of money on contract, including contracts implied in law and fact, and they did not seem to require that the sum demanded be either certain or liquidated as

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298 "... This language, ambiguously, is sufficiently broad to cover all claims that might be litigated in a common-law contract action, but it has not been so construed..." Carlin, supra note 296, at 162.
300 Id. at 662, 152 S.E. at 529.
302 Mountain State Water Co. v. Kingwood, 121 W. Va. 66, 1 S.E.2d 395 (1939) (contract implied in fact); Grimrod Process Corp. v. Rothwell, 117 W. Va. 709, 189 S.E. 100 (1936) (judgment of sister state); Lawhead v. Garlow, 114 W. Va. 175, 171 S.E. 250 (1932) (liability imposed by statute on stockholders of banks); State ex. rel. Bush v. Carden, 111 W. Va. 691, 163 S.E. 54 (1932) (contract implied in law where action for damages on injunction bond required by statute); Lambert v. Morton, 111 W. Va. 25, 160 S.E. 223 (1911) (quasi-contractual obligation; money received for another). See also the cases in note 303 infra which are not cited here.
long as there was a promise to pay money.\textsuperscript{303} One of these cases, \textit{State ex rel. Bush v. Carden},\textsuperscript{304} since discredited as will be noted, permitted the proceeding on an injunction bond to recover damages sustained by the plaintiff by reason of the granting of the injunction. The issues for trial in cases of this nature were often complex,\textsuperscript{305} but these cases indicate that, as long as the claim asserted is made reasonably clear by the pleading, the technicalities which would have been required in common law actions can be eliminated without prejudice to the substantive rights of the parties.

One might have thought that the apparent extension of the field in which notices of motion for judgment might be used was

\textsuperscript{303} In \textit{Houston v. Lawhead}, 116 W. Va. 652, 182 S.E. 780 (1935) (notice of motion for judgment to recover the purchase price of a note under a warranty imposed by law), the court used reasoning which would even permit this procedure in an action for damages for breach of contract, namely: "... The test of this provision is the right to recover money by an action on a contract. In other words, if a person is entitled to recover money on a contract in an existing law action, he is, by this provision, also entitled to recover on motion. The statute simply provides an alternative remedy. Therefore, the designation of assumpsit as a proper remedy necessarily makes its statutory alternative also a proper one." \textit{Id.} at 655, 182 S.E. at 782. Italics by the court.

Concededly this went further than the court had previously gone. [The soundness of this approach was questioned in \textit{Moundsville v. Brown}, 125 W. Va. 779, 25 S.E.2d 900 (1943).] However, it had been thought that the \textit{White} case merely confined the remedy to \textit{promises to pay money}, express or implied, and if such a promise existed, then the sum due need not be so certain or liquidated that evidence in the nature of an inquiry of damages would be unnecessary. Carlin, \textit{supra} note 296, at 162. The case which best illustrated this view was \textit{State ex rel. Bush v. Garden}, 111 W. Va. 631, 163 S.E. 54 (1932), wherein the motion procedure was held proper to recover damages on an injunction bond by this reasoning:

",... The injunction bond given by defendants was required by statute ..., thereby establishing an obligation to pay for any damages ensuing as a result of the injunction order. ... Recovery is thus predicated on money due under the contract implied in law and a proper remedy therefore is under the statute providing for motions for judgments in actions on contract."

\textit{Id.} at 633, 163 S.E. at 55. Italics supplied. This approach permitted the court to reach a conclusion different from that in the \textit{White} case although both cases were based on \textit{Stuart v. Carter}, 79 W. Va. 92, 90 S.E. 537 (1916). The \textit{White} case was not mentioned in the \textit{Garden} case. The cases cited in note 302 \textit{supra} also demonstrate this approach. In addition to these cases, see \textit{Skidmore v. Star Insurance Co.}, 126 W. Va. 307, 27 S.E.2d 845 (1943) and \textit{Morgan v. American Central Insurance Co.}, 80 W. Va. 1, 92 S.E. 84 (1917), both of which permit the motion procedure to be used for recovery on fire insurance policies. In the latter case, the court said: "... A policy of fire insurance is a contract on which the insured is entitled to recover money, after a loss by fire has occurred. ..." \textit{Id.} at 2, 92 S.E. at 85.

\textsuperscript{304} 111 W. Va. 631, 163 S.E. 54 (1932).

\textsuperscript{305} Note the variety of fact situations in which the procedure has been used. See cases in notes 302 and 303 \textit{supra}.
some evidence of the court’s reluctance to allow technical rules to delay a hearing on the merits. However, in State, for Use of Stout, v. Rogers, a very recent case, the court has indicated that the use of the notice procedure with its concomitant liberal rules of pleading may be further restricted. For all practical purposes the Carden case was overruled, and perhaps an extended application of the principles relied upon in the Conley case is to be expected.

It was held in the Rogers case that a notice of motion for judgment will not lie on an injunction bond for damages which are “unliquidated”. The court seems to have reached this conclusion by emphasis on this being an action for unliquidated damages for breach of contract and that the proceeding is not proper for unliquidated amounts, whereas the court in the Carden case seems to have relied upon the idea that the contract sued upon created an obligation to pay damages or money and thus whether liquidated or unliquidated the recovery was predicated on “money due under the contract”.

Aside from the holding, further doubt is cast upon earlier precedents. In clarifying the meaning of previous statements by the court that damages for breach of contract may be recovered in a notice proceeding, the court concludes:

“... What we think the courts have meant to hold is that the notices of motion procedure may not be used to recover what is termed unliquidated damages, that is damages which can only be determined in the trial of a case where evidence in some form other than the terms of the contract is required to ascertain the amount of the damages sustained. Notices of motion were designed to recover liquidated demands, or demands which could be definitely ascertained from the contract sued on, on the theory that that is certain which can be made certain....”

It is hoped that the court had in mind only actions on express contracts, where the rule here expressed has been used to determine whether damages for a breach thereof are liquidated, and that these statements will not be applied to prevent the use of notice procedure where the action is based on an implied con-

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306 52 S.E.2d 678 (W. Va. 1949).
307 See the quotation from the White case in the text above.
308 See also note 303 supra.
309 52 S.E.2d at 684.
310 Hooper-Makin Fuel Co. v. Shrewsbury Coal Co., 94 W. Va. 442, 119 S.E. 176 (1923); American Sugar Refining Co. v. Martin-Nelly Grocery Co., 90 W. Va. 730, 111 S.E. 759 (1922); Cook Pottery Co. v. Parker, 86 W. Va. 580, 104 S.E. 51 (1920). Although not so stated, the court may have had in mind the analogy of claims deemed liquidated for the purpose of set-off. For that pur-
tract. Even if this is what the court meant, this will in effect amount to a discrediting of other earlier cases in which the proceeding had been based on express contracts.

In any event, from the viewpoint of the proper function of pleadings, why should the defendant receive less notice of the claim, or the plaintiff be permitted to use less specific language in describing his claim, because the amount claimed is liquidated? Perhaps this feature may indicate that it would normally require less to notify the defendant concerning the amount of the claim, but how could this justify a lesser degree of particularity in alleging the basis of the claim? Furthermore, application of more liberal rules to notice pleading is not justified on the basis of the amount involved in the action. Even though liberal rules of pleading apply to notice procedure, the pleader has always been required to allege sufficient therein to state a cause of action. If it be conceded that this requirement can be enforced under liberal rules as to notice pleading, and there is no contention that it has not been, why cannot those same rules be applied to any cause of action whether stated in a pleading called a notice, a declaration at law, a bill in equity, or a complaint in a unified procedure? The reason is merely historical.

E. Pleading Technique

The question may arise whether the pleader would be required to develop a new technique in drafting his pleadings if
simplified pleading were extended to all actions. The answer is that he need not, but he probably will. What now is sufficient under existing rules of pleading will continue to be sufficient, but failure to observe existing technical rules will no longer be bad pleading. Under the Federal Rules the function of the pleadings is to give fair notice of the claim asserted so that the opposing party may answer and prepare for trial, so that the doctrine of res adjudicata may be applied, and so that the proper form of trial may be assigned. As long as fair notice of the cause of action is given, it is immaterial whether legal conclusions, ultimate facts or evidentiary facts are alleged. If the pleading does not show that the litigant is entitled to relief on the facts that might be proved under its allegations, although it need not be the same relief as demanded, the pleading will be insufficient without amendment whether the deficiency is the result of too few or too many allegations.

F. Determining the Issues

Under the simplified pleading in notices of motion for judgment in West Virginia no difficulty seems to have arisen in determining the issues for trial or in the defendant's being aware of the evidence which would be needed. However, if the scope of this type of pleading is broadened to cover the assertion of any claim, these problems may need some consideration. This is especially true if a freer joinder of parties and claims, including legal and equitable claims, is permitted. The West Virginia court seems to have recognized that these problems may arise even in the limited field in which notice pleading may now be used if the claim is very tersely stated, but the court shows no great concern

315 Or, as stated by Professor Moore: "What constituted good craftsmanship before the Rules continues to constitute good craftsmanship. . . ." 2 Moore, Federal Practice 1654. Judge Clark, in speaking of what should be considered proper pleading in code jurisdictions, states this: "... It would seem, therefore, that the common-law rules as to particularity of allegation, since they have become familiar to pleaders, should be considered at least in point under code pleading and, subject to the more flexible nature of code pleading which puts less of a premium on formalism, should furnish satisfactory precedents. Beyond this it might well be held that any form of pleading which through long usage under the common law or elsewhere has been held to give sufficient notice should be considered to be sufficient under code-pleading rules . . . ." Clark, Code Pleading 249.

316 See note 264 supra.
318 See text which accompanies notes 149-155 supra.
319 2 Moore, Federal Practice 1653, 1657-1658. See also quotation from this treatise in the text at note 155 supra.
for the defendant unless he has made a demand for a bill of particulars.\footnote{220} This suggests that there are ways to meet these problems without unduly cluttering the pleadings.

Although it may not be within the scope of this paper to discuss the methods aside from the pleadings which may be used for the purpose of formulating issues and advising the opposing party of the facts involved, such methods can be and have been devised. Professor Moore writes:

"... Under the old practice the pleadings not only served the function of giving notice of the claim asserted, but they also carried the burden of formulating the issues and to a large extent of advising the adverse party of the facts involved. Now the pre-trial conference under Rule 16 and the deposition and discovery procedure under Rules 26-37 afford a much more efficient method of getting at the facts than pleadings ever offered, and they also bear much of the burden of making up the issues. ..."\footnote{221}

Federal Rule 12 (e) is also designed to assist an opposing party \textit{at the pleading stage} if the pleading to which he is permitted to respond is so vague or ambiguous that he cannot reasonably be required to frame a responsive pleading. This rule permits him to move for a more definite statement before interposing his responsive pleading.\footnote{222} The amendment to this rule in 1946 eliminated any reference to this motion as one for "a bill of particulars" or...
that such motions could be used "to prepare for trial". Many federal courts had entertained a motion under this section where the pleading satisfied the requirement of Rule 8, that is, it contained a short and plain statement of the claim, where the opposing party sought detailed information concerning the cause of action or defense or desired to limit the issues to be tried. The elimination of this practice was designed to force a use of the more expeditious methods provided by the pre-trial conference and the deposition and discovery procedure. Rule 12(e) can no longer be used as a discovery method or as a means to narrow the issues, nor as a device to delay trial of the case.

More rules of this nature might be needed or be helpful in expediting litigation if simplified pleadings were adopted more generally in West Virginia, but existing devices would be sufficient to permit greater liberality in pleading without any fear that uncertainty would result. Since June 1, 1945, trial courts have had the option of using pre-trial conferences. The rule establishing this procedure is the same in substance as the federal rule, the only change therein being the substitution of terminology to indicate that the procedure applies whether the proceeding is "at law" or "in equity". This procedure can be used to simplify and clarify the issues and reduce or eliminate surprise at the trial, and as indicated, these objectives can be accomplished much more effectively by this method than by any pleading device. In addition, the other matters which may be considered at the pre-trial conference may greatly lessen the time to be consumed in the trial of the case or perhaps avoid the necessity of a trial. For these reasons,

323 The rule formerly read in part as follows: "... 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.... A bill of particulars becomes part of the pleading which it supplements." 2 Moore, FEDERAL PRACTICE 2215. Italics supplied.

324 An excellent discussion of the reasons for abolishing the bill of particulars, containing an elaboration of the points above in the text, appears in 2 Moore, FEDERAL PRACTICE § 12.17.

325 The rule appears in volume 127 West Virginia Reports. Compare Rule 16, Fed. Rules Civ. Proc., 28 U.S.C.A. (1950). The rules are identical except that (1) the words "action" and "suit" are used in lieu of "action" which could be used alone in the federal rule since there is only one form of action in that system, and (2) in the first line of the rule the word "civil" has been inserted before the word "action".

326 Note the number and variety of matters which the rule stipulates may be considered in the pre-trial conference. Much that might be accomplished in such conferences may not have been realized in West Virginia to date because of lack of interest in the procedure. Those who have had little ex-
it might be hoped that simplified pleadings would make it nece-
sary or expedient for this procedure to be used more frequently
by trial courts. The rule provides that pre-trial conferences may
be used in all cases or in such cases as the trial court deems it
necessary or expedient.

In addition to the pre-trial conference, bills of particulars as
to the claim or defense are now available to obtain a more partic-
ular statement of the nature of the claim or defense or the facts
expected to be proved by the pleader at the trial. The state-
ment does not become part of the pleading which it supple-
ments being simply an evidentiary device which limits what
may be proved at the trial. That a bill of particulars is not as
effective as pre-trial conference or the federal deposition and dis-
covery procedure in narrowing the issues or preventing surprise
may be judged from the test to be applied in determining its
sufficiency. The statute provides: "... But no statement which,
in the particulars required... to be stated or referred to therein,
is sufficient to notify the adverse party, in effect, shall be adjudged
the claim or defense to be set up against him, shall be adjudged
insufficient." This test would be applied under the Federal Rules
in determining whether the pleading is sufficient. It is intended
that the motion for a bill of particulars be used in West Virginia
where the statement of the claim or defense is adequate as a pleading
but is so indefinite that the basis of the claim or defense cannot be
ascertained therefrom. The typical cases in which it is neces-

erience with pre-trial conference will find the following of interest: Nims,
PRE-TRIAL (1950); Shafroth, PRE-TRIAL Techniques of Federal Judges, 28 J.
AM. JUD. SOC'Y 39 (1944); Sunderland, Procedure for Pretrial Conferences in the
Federal Courts, id. at 46. See also 3 MOORE, FEDERAL PRACTICE 1101-1109.
Mr. Nims includes in his book not only all of the decisions of courts of last
resort on pre-trial matters but also a lengthy appendix containing pre-trial
rules of various courts and administrative bodies, transcripts of minutes of
pre-trial hearings and specimens of forms and orders. In a review of this
book, Judge Jayne quoted this pertinent statement. "... Experience has
shown that, while pre-trial procedure generally proves popular with attorneys
after they have once become familiar with it, it needs a strong push from the
judge to get over the initial hump caused by our acquired habits of thinking
of the law as a sort of a game in which each party holds his cards under the

327 W. VA. CODE c. 56, art. 4, §§ 19, 20 (Michie, 1949). See also id. at §§
18, 21-23.

328 E.g., Baker v. Letzkus, 113 W. Va. 533, 168 S.E. 806 (1933). Compare
the former rule in federal courts. See note 323 supra.

329 W. VA. CODE c. 56, art. 4, § 23 (Michie, 1949).


331 "If the pleadings of either party already sufficiently set forth the
grounds of action or defense, no bill of particulars is necessary." Burks, Plead-
ing & Practice 573.
sary are those in which the plaintiff has used the common counts in assumpsit or the defendant has used one of the general issues under which a great number of different defenses may be shown.\textsuperscript{332} It may be used in other cases where the pleadings leave the nature of the claim or defense uncertain, for example, where the pleading is duplicitous.\textsuperscript{333} If a short and plain statement of the claim or defense were required, one which gave the opposing party fair notice thereof, not even a bill of particulars would be required.\textsuperscript{334} It is clear that it is not an efficient method of obtaining accurate pre-trial information, for in supplying the bill a pleader may prepare a lengthy statement which really gives little or no knowledge as to the real claim or defense and the issues for trial will remain uncertain.\textsuperscript{335}

Therefore, since the deposition and discovery procedure established for federal courts does not exist in West Virginia, the trial court under existing procedure would need to rely largely on pre-trial conferences to limit the issues and prevent surprise at the trial, but to no greater extent than may be necessary now under proper pleadings and bills of particulars if the true issues are to be learned in advance of trial. In many cases simplified pleading would give the court and opposing counsel as much, if not more, notice of the claim or defense from the pleadings as do the present pleadings even aided by bills of particulars. Here it is reemphasized that Federal Rule 8 requires as to both a claim and a defense that the statement thereof be short and plain and composed of

\textsuperscript{332} E.g., a plea of \textit{nil debet} gives the plaintiff no notice of what the actual defense is for numerous matters may be introduced thereunder. \textit{Id.} at 158.
\textsuperscript{333} \textit{Grass v. Big Creek Development Co.}, 75 W.Va. 719, 84 S.E. 750 (1915).
\textsuperscript{334} See note 331 \textit{supra}.
\textsuperscript{335} It is not necessary to support a verdict that all of the matters set forth in the statement be proved; only so much thereof as is necessary to sustain the essential averments of the pleading need be proved. \textit{Deitz v. Providence Washington Insurance Co.}, 33 W. Va. 526, 11 S.E. 50 (1890). Since the statement is not a part of the pleading, it seems that evidence as well as ultimate facts may be averred. In speaking of a statement of the grounds of defense to accompany a plea of \textit{nil debet}: "... the defendant may allege in such statement as many different grounds of defense as his imagination may suggest, and, if he includes among such grounds his actual defense, he is safe. So, even with the aid of § 6091 the plaintiff may still be left to conjecture in determining what the real defense is." \textit{Burks, Pleading \\& Practice} 159. See also \textit{id.} at 572 n. 24. Only this limit is imposed by the statutes: the statement must be under the oath of the party plaintiff or defendant, or some other credible person, to the effect that the affiant believes the same will be supported by evidence at the trial. See note 327 \textit{supra}. Not being a part of the pleading, the statement is not subject to demurrer even though the grounds stated are an inadequate basis for a claim or defense. See note 328 \textit{supra} and the accompanying text.
simple, concise and direct averments, and further that general
denials are permitted only where the pleader intends in good faith
to controvert all of the averments of the preceding pleading, with
the added condition that matter constituting an avoidance or
affirmative defense must be pleaded specially.338 If compliance
with these requirements does not give as much notice of the issues
for trial from the pleadings as existing pleadings and bills of par-
ticulars, the court may resort to pre-trial conferences on its own
motion or on motion of one of the parties.337 The real issues for trial
might also be developed under the deposition and discovery pro-
cedure set forth in Federal Rules 26-37, and this without the court's
participation;338 but even without the adoption of similar rules,
simplified pleadings may be used without losing any of the benefits
which are historically assigned as reasons for the technical re-
quirements observed in common law pleading.

G. Alternative Pleading

Before concluding these comments on the rules which govern
how a claim must or must not be pleaded or stated, one other
limitation will be examined. This restriction in West Virginia
results from other basic differences between the procedure in this
state and that under the Federal Rules. Differences which have
already been discussed in this paper. Being of more fundamental
importance, it was thought advisable to treat this matter after
discussing the differences as to the degree of particularity required
in stating a claim. Alternative pleading here to be discussed may
be permitted regardless of the certainty required as to the state-
ment of any one theory of recovery or defense.

The adoption of simplified pleading may avoid delays in
hearing cases on the merits, but an even more important consid-
eration is involved in the provisions of Federal Rule 8 (e) (2) which
permit alternative pleading.339 Permitting a pleader to set forth
two or more statements of a claim or defense alternatively and
regardless of their consistency may prevent the necessity of two
actions and the possibility of a party's being defeated in his recov-
er by the necessity of presenting "his case" piecemeal. Likewise,
recovery may be permitted unjustifiably unless the defendant is

336 These requirements are expressly set forth in the rule. Rule 8, Fed.
337 See notes 325-326 supra.
338 See note 321 supra.
339 This part of the rule is quoted in text at note 218 supra.
permitted to set forth any defenses which he has regardless of their consistency. That these principles should apply whether the claim or defense be legal or equitable has already been developed herein. The real danger is that alternative or inconsistent pleadings may be inserted merely for the purpose of delay and without any grounds to support them. This possibility was considered when the Federal Rules were drafted, and the requirement that all statements in the pleadings shall be made subject to the obligations set forth in Rule 11 was designed to prevent any abuse of the liberal rule.340

Merely to be permitted to set forth alternative statements of a claim might not suffice to prevent the hardships suggested if the plaintiff were limited, regardless of his proof, to recovery on only one claim and one type of relief and against only one person. Other provisions of the rules permit the plaintiff to meet these alternatives. Rule 18(a) permits him to join, either as alternative or independent claims, as many claims as he may have against the opposing party, Rule 8(a) permits him to demand relief in the alternative or of several different types, and Rule 20(a) provides that defendants may be joined in the alternative if there is asserted against them any right to relief in respect of the same transaction and if any question of law or fact common to them will arise in the action. Some of the broader applications of these rules have already been discussed herein. They are noted here as to the situation in which the plaintiff may in good faith not know which person is responsible, the basis on which he is responsible, or the relief which should be granted. Shall he be required to bring a series of actions to determine these matters "without any corresponding advantage to the defendant[s], other than the disadvantage thrown in the way of the plaintiff"?341 To a limited extent the West Virginia court has recognized that these matters can be decided in one action.

340 Rule 11 is quoted in note 218 supra. Only if the pleader is honestly in doubt as to the theory of recovery or the facts provable should he use a variety of statements of the claim or defense. Compare the situation under common law pleading. See notes 169 and 216 supra. For a discussion of application of Rule 11 in the federal courts, see 2 Moore, Federal Practice § 11.02.

341 Per Judge Poffenbarger, in Bralley v. Norfolk & W. Ry., 66 W. Va. 462, 465, 66 S.E. 653, 654 (1909). This was stated as to other matters, but it is equally appropriate here.
The West Virginia court has taken the position that a pleading must not be inconsistent with itself, or repugnant; but aided by the statute abolishing special demurrers, the rule has been liberally applied so long as the declaration does not involve what the court terms a “misjoinder of inconsistent causes of action,” which seems to mean a joinder not permitted by existing rules as to parties or forms of action. Where such misjoinder is not involved, the rule preventing inconsistent pleading does not forbid pleading merely because it is in the alternative, whether in one count or separate counts. The pleader may allege many acts of negligence, or different theories of negligence, or that the acts complained of have been done “wrongfully, negligently, unlawfully, injuriously, wilfully, maliciously, and violently” or that they were done negligently or wilfully. Dicta in the case in which the last proposition was decided, which would permit the defendant to force an election as to the theory on which the plaintiff will proceed at the trial, has been criticized herein. The undesirability of that result becomes even more obvious in considering the present problem. No contention is made that a pleading should be held sufficient if the allegations thereof are wholly repugnant, inconsistent, and destructive of one another.

342 Collins v. Dravo Contracting Co., 114 W. Va. 229, 171 S.E. 757 (1933); Stephenson, Pleading § 229.
343 In text at note 219 supra.
345 This is discussed in detail in note 170 supra.
346 Where the alternatives are alleged in one count, the pleading may be duplicitous but this will not render the declaration demurrable unless in combining the alternatives the pleader has committed some other fatal error, such as misjoining causes of action or jumbling the allegations so that no cause of action is clearly stated. See Carlin, supra note 170.
351 See text which accompanies notes 175-179 supra. On the same point, see discussion of the Wellman case in the text at note 180 supra. Note that Federal Rule 8(e)(2), quoted in the text at note 218 supra, expressly permits two or more statements of a claim or defense to be alleged alternatively either in one count or defense or in separate counts or defenses. Further, the courts have held that the party will not be required to elect upon which theory he will proceed, “since this would defeat the whole purpose of allowing inconsistent pleading.” 2 Moore, Federal Practice 1708.
352 As stated by the West Virginia court: “... our inquiry here is... whether the matters alleged in the declaration are so fundamentally inconsistent as to destroy each other and thus constitute a fatal repugnancy.” Collins v. Dravo Contracting Co., 114 W. Va. 229, 233, 171 S.E. 757, 758 (1933).
To avoid this possibility separate counts may often be advisable.\textsuperscript{353} But, the pleader should be permitted to observe the other ancient rule of pleading, namely, all pleadings ought to be true,\textsuperscript{354} by using allegations in the alternative when he is not certain as to the basis of his recovery.\textsuperscript{355} Properly applied this principle stated by the West Virginia court might be used as a guide: "To vitiate a pleading, on the ground of repugnancy, the conflict or inconsistency must be irreconcilable. If the intent is clear, nice exceptions are ignored."\textsuperscript{356}

Further, if the theory advanced in one of the alternatives is deemed insufficient, the pleading ought not to be regarded as inadequate, as some courts hold, merely because one or more of the alternatives is bad.\textsuperscript{357} The federal rule expressly so provides,\textsuperscript{358} and the West Virginia cases seem to support this result. The court holds that if a declaration states a good cause of action, its sufficiency cannot be tested by a demurrer.\textsuperscript{359} Also, the reasoning in

The same is true under the Federal Rules. Pleadings thereunder have been condemned where alternative allegations have been so intermingled that the pleader's position was not clear. 2 Moore, Federal Practice § 8.33. Judge Clark suggests that the tests of a pleader's truthfully stating his position and of fair notice under-all the circumstances be applied to alternative pleadings to determine whether they are proper. Clark, Code Pleading 258. As to the requirement in some code states that to be joinable causes of action must be consistent, he believes that this should be applied only to the facts alleged and not to legal claims—it then would be a requirement of truth in the pleadings and the specific requirement of consistency would become unnecessary under the general requirement that all pleadings must be true. This approach might be used: "where it appears that proof of all the facts alleged means perjury by somebody, the pleadings are objectionable." Id. at 449.

\textsuperscript{353} Because of the West Virginia dicta, discussed above, that an election may be required where the theories are combined in one count, another reason for using separate counts appears. "... Where a resort is had to multiple counts, of course an election between the counts is not required. Such a requirement would wholly defeat the object of the right to resort to multiple counts. ..." Carlin, supra note 170, at 244. See note 351 supra.

\textsuperscript{354} Stephen, Pleading § 258.

\textsuperscript{355} "... This is somewhat shocking to the common-law pleader [permitting alternative pleading]. As a matter of fact an alternative. ... position is often the true one, but the rule of common-law pleadings compelled the pleader to pretend the contrary." Sunderland, The New Federal Rules, 45 W. Va. L.Q. 5, 12 (1938).

\textsuperscript{356} Town of Cameron v. Hicks, 65 W. Va. 484, 64 S.E. 882 (1909), point 2 of the syllabus by the court.

\textsuperscript{357} Clark, Code Pleading 256 n. 142; 2 Moore, Federal Practice 1706.

\textsuperscript{358} Rule 8 (e) (2), quoted in the text at note 218 supra.

\textsuperscript{359} The statement usually quoted by the West Virginia court to support this proposition appears in point 1 of the syllabus to Grass v. Big Creek Development Co., 75 W. Va. 719, 84 S.E. 750 (1915): "A declaration, though indefinite and uncertain, is not demurrable, if with reasonable certainty it states one or more good and not inconsistent causes of action...." Quoted, for example, in State ex rel. Stout v. Rogers, 52 S.E.2d 678 (W. Va. 1949); Jones v. Berry,
Union Stopper Co. v. McGara\textsuperscript{360} seems to support this conclusion. In each count of the declaration the plaintiff sought to recover on the theory that the defendant owed him a debt. The court held that there was no justification for this theory but overruled the demurrer since sufficient had been alleged to show that the plaintiff was entitled to recover damages for breach of the defendant's agreement. Said the court:

"... The averments of an indebtedness and all matter thereto related, must be excluded as insufficient and as constituting mere surplusage. With the surplusage excluded, a cause of action is shown. ... If a count alleges sufficient matter of fact to warrant a recovery, all immaterial allegations may be disregarded as surplusage. Injury from immaterial matters in a declaration may be prevented by objection to evidence and by application for proper instructions. ..."

The real problem arises in West Virginia from the limitation that pleading in the alternative is not permissible if it will result in the "misjoiner of inconsistent causes of action". Although the court has not so stated the rule, the effect thereof is that the pleader is again confronted by the rules regulating the joinder of parties and forms of action.\textsuperscript{362} The often unnecessary multiplicity of actions flowing therefrom has been discussed herein in its broader aspects; here the rules prevent a doubtful case from being fairly stated.\textsuperscript{363} As will be shown, the rule against inconsistency produces inconsistencies.

The cases above in which pleading in the alternative was allowed were those in which the allegations might have been stated in several counts and joined in the same form of action.\textsuperscript{364} Another example, involving joinder of counts in assumpsit, may be used to illustrate the inconsistence resulting from this limitation. In Cochran v. Craig,\textsuperscript{365} the plaintiff may have been uncertain

\textsuperscript{360} 66 W. Va. 403, 66 S.E. 698 (1909); accord, Union Stopper Co. v. Wood, 66 W. Va. 461, 66 S.E. 720 (1909).
\textsuperscript{361} 66 W. Va. at 409, 66 S.E. at 701.
\textsuperscript{362} See note 170 supra.
\textsuperscript{363} "Now the difficulty is [may be] that the pleader cannot know, and cannot reasonably be expected to know, which of two or more alternatives is the correct one. ... To enforce the rule as harshly as at common law is unfairly to trap the pleader beyond any requirement of fair notice to the defendant. ..." \textsc{Clark}, \textit{Code Pleading} 255.
\textsuperscript{364} The limitations on joinder imposed by the forms of action and the liberalization thereof in West Virginia were discussed in detail in an earlier part of this paper. Lugar, supra note 39, at 167.
\textsuperscript{365} 88 W. Va. 261, 106 S.E. 633 (1921).
whether the facts would indicate that the person with whom he bargained had actual or apparent authority to act for the defendant; and if not, whether the evidence would show that the defendant ratified the alleged contract; and if neither of these theories could be supported by the evidence, perhaps he could show that he was entitled to recover additional money expended in complying with what he considered an alteration in the contract. The same problems may arise from uncertainty concerning the law which will be applied to the facts proved. The court held that recovery could be sustained on the pleadings on any of these theories since the plaintiff had combined the common counts with his special count (covering the first two alternatives). The approach in this case received favorable comment. However, if the plaintiff has relied upon the representation of the defendant that he had authority to sell property for another and has paid part of the purchase price to the defendant, in seeking relief he cannot properly combine the common counts with counts for fraud and deceit. He may doubt whether the facts or the law will support an action for fraud and deceit, the remedy he prefers, and be certain or uncertain that he is entitled to a return of the money paid. Two actions may be needed, if the defendant objects to the joinder by demurrer, when one should have been sufficient and would have been sufficient if the same form of action could

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366 This was called "the more liberal and the more just rule, assuming that the court's purpose is to settle the dispute between the parties rather than to award a prize for good pleading." Hankin, Alternative and Hypothetical Pleadings, 33 Yale L.J. 365, 375 (1924). See also 2 Moore, Federal Practice 1705 n. 11. The theory being approved was that the law does not require a pleader to select at his peril between alternative claims—he may assert and prosecute both claims in the same action, "leaving it to the court and jury to determine to which claim, if either, he is entitled, and proof of one constitutes no abandonment of the other." See quotation from the case in note 168 supra.

367 Shafer v. Security Trust Co., 82 W. Va. 618, 97 S.E. 290 (1918). Said the court: "Clearly this summarization indicates an inconsistency between the general and special counts of the declaration. The first is proper only in actions of debt or assumpsit, never in an action on the case, of the nature of which the two special counts clearly partake. . . ." Id. at 620, 97 S.E. at 291. Another good illustration appears in Wells v. Kanawha & M. Ry., 78 W. Va. 762, 90 S.E. 337 (1916). See also Lugar, supra note 39, at 175 n. 193.

368 See statement in note 363 supra.

have been used for both counts. The forms of action being different, requiring different pleas and judgments, historical reasons, but only historical, can be assigned for requiring separate actions and refusing the privilege of using these counts in the alternative. The right to amend and drop some of the counts to cure the defect is no solution to the problem.372

Another inconsistency is produced by adherence to the forms of action as limitations on alternative pleading. No limitation of this nature has ever been applied in West Virginia to the defendant. The statute provides that "The defendant in any action or suit may plead as many several matters, whether of law or fact, as he shall think necessary, except that if he plead the plea of non est factum he shall not, without leave of the court, be permitted to plead an inconsistent cause of action unless the facts constituting those causes are, in whole or in part, the same; and where they are the same, he shall state the nature thereof in the pleadings." The right to make such amendments was established in Knotts v. McGregor, 47 W. Va. 506, 55 S.E. 899 (1909). This was true in Virginia even before West Virginia was created. "The defendant in any action may plead as many several matters, whether of law or fact, as he shall think necessary," VA. CODE c. 171, § 23 (1849). In Nadenbousch v. Sharer, 2 W. Va. 285, 294 (1867), the court said that the statute applied however inconsistent the defenses might be with each other. Note that the Virginia statute did not even contain the present condition as to a plea of non est factum.
to plead any other plea inconsistent therewith. ...”374 The defendant may therefore plead any number of defenses, however inconsistent they may be with each other,375 the only exception being that he must obtain leave of the court if he pleads *non est factum* and desires to file a plea inconsistent therewith.376 The defendant may plead matters in the alternative as defenses, and the facts stated in one plea cannot be used as evidence or admission to disprove anything contained in the other pleas nor to sustain the plaintiff's declaration.377 The following inconsistent and contradictory defenses were permitted in *Levy v. Scottish Union & National Ins. Co.*:378 (1) the general issue, (2) a submission to an appraisement and award between the plaintiff and the defendant along with another company and a tender of the defendant's proportionate part of the award, (3) a plea similar to the second plea except that it alleged the agreement of submission and award had been between the plaintiff and the defendant alone, (4) tender of the amount for which the defendant was liable under the policy, (5) failure of the plaintiff to furnish proof of loss as provided in the policy, (6) plaintiff's failure to submit to examination as required by the policy, and (7) failure of the plaintiff to submit the loss to appraisement as provided in the policy.379

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374 W. Va. Code c. 56, art. 4, § 89 (Michie, 1949). It may be of interest to note that the part of the statute not quoted above permits the plaintiff to demur and also plead as many special replications, as he may deem necessary, to any special plea pleaded by the defendant.

375 See the West Virginia case cited in note 373 *supra*.

376 The exception is clearly expressed in the statute, but what pleas are inconsistent with *non est factum* may raise some difficult questions. Some aid may be obtained from the precedents in code states which enforce a rule of consistency among defenses. The earlier decisions held that there was an inconsistency “whenever the defenses could not all be good at the same time either in fact or in law.” But, the trend is to hold defenses improper for this reason “only where they are inconsistent in point of fact,” and inconsistency of legal theory is not objectionable. CLARK, CODE PLEADING § 99. Judge Clark suggests that the alternative defenses ought not be held improper as long as the pleader has been as truthful as his knowledge of the case will permit. Note that he took the same position as to what should be deemed inconsistent causes of action. See note 392 *supra*. Will the West Virginia court take a similar position in determining whether leave of court is necessary where a plea of *non est factum* is filed? Of course, the safer procedure would be to obtain leave of court which ought readily be granted if the test here is applied.

377 Nadenbousch v. Sharer, 2 W. Va. 285 (1867). This is true under the Federal Rules. 2 MOORE, FEDERAL PRACTICE 1706.

378 58 W. Va. 546, 52 S.E. 449 (1905).

379 Many code states would not permit such inconsistent defenses. CLARK, CODE PLEADING § 99. They would be permitted under the Federal Rules. 2 MOORE, FEDERAL PRACTICE 1708-1709. Rule 8(e) (2) expressly provides that two or more statements of a defense may be set forth alternatively either in one defense or in separate defenses. Quoted in the text at note 218 *supra*. 
addition, the statute abolishing special demurrers\textsuperscript{380} permits the defendant to set up distinct and different defenses alternatively in the same plea.\textsuperscript{381}

It may be said that these statutes merely removed technical rules and that the defendant ought to be permitted to assert any defense that he may have. But, only technical rules prevent the plaintiff from pleading in the alternative in all cases in West Virginia, and the possibility of two actions seems no more necessary in the cases where alternative pleading is not permitted than in the instances where it is permitted.\textsuperscript{382} The basic reason for permitting the alternative statement of the case is the same in both classes of cases, and that is the reason given at common law for allowing many counts although only one cause of action was being asserted. Stephen stated that the pleader should use this device when, after setting forth his case in one view, he "... feels doubtful whether as so stated it may not be insufficient in point of law, or incapable of proof in point of fact, and at the same time perceives another mode of statement by which the apprehended difficulty may probably be avoided..."\textsuperscript{383} The law set no limit on the number of counts which might be used for this purpose, if the pleader's discretion was "fairly and rationally exercised".\textsuperscript{384} This is all that is being suggested here, except that there be ignored the technicality of what forms of action may be joined.\textsuperscript{385}

The bona fide doubt that a pleader may have in deciding whether the facts as they may develop in the proof or the law held applicable thereto will entitle his client to legal or equitable relief is another reason that either or both types of relief ought to be obtainable in the same action. If this is possible, the pleader being permitted to set up his case in the alternative, the second proceeding necessitating substantially the same proof would be unnecessary where the pleader originally thought relief was obtainable on

\textsuperscript{380} Quoted in the text at note 219 \textit{supra}.
\textsuperscript{381} This would have been duplicity at common law, a formal defect which can no longer be reached by special demurrer. Hunt v. DiBacco, 69 W. Va. 449, 71 S.E. 584 (1910); Poling v. Maddox, 41 W. Va. 779, 24 S.E. 999 (1896). Both cases also indicate that no other method, such as objecting to the filing of such pleas, can be used to prevent the alternative statements in one plea. This is true under the Federal Rules. See note 379 \textit{supra}.
\textsuperscript{382} See note 370 \textit{supra}.
\textsuperscript{383} \textsc{Stephen}, \textit{Pleading} 361.
\textsuperscript{384} See note 169 \textit{supra}.
\textsuperscript{385} See Judge Clark’s statement in note 363 \textit{supra}.
the wrong side of the court. The situation existing in United States Stamping Co. v. Gall could be avoided. An executory agreement existed under which the plaintiff was to receive specific notes as collateral security for the payment of an obligation, and the bank which agreed to make the delivery became insolvent. The plaintiff first instituted an action of detinue against the receiver of the bank to secure possession of the notes. This action was prosecuted to trial, judgment being entered for the defendant, presumably on the basis that legal title had not passed to the plaintiff. The plaintiff then sued in equity for specific enforcement of the agreement to deliver the notes, joining the bank and the receiver as defendants. The defendants assigned these grounds, inter alia, for a demurrer to the bill: (1) an adequate remedy exists at law, and (2) the judgment in the detinue action is res adjudicata. The vicious circle was broken by an overruling of the demurrer by the appellate court. Perhaps in this case the pleader should have known that the legal title had not passed, in itself a question often subject to doubt on the facts yet to be proved and the law to be applied, but even so the court's time need not have been consumed by a second action and the litigant's recovery delayed if the pleader had been allowed to plead his case in the alternative and to obtain the relief to which he was entitled on the proper alternative. This he would be permitted to do under the Federal Rules.

This case also serves to introduce another type of alternative pleading which should be permitted. Suppose that it were uncertain whether the plaintiff was entitled to recover from one person or from another, for example, the bank or its receiver in the case mentioned. Could he honestly set this forth in his pleadings, the delay incident even to a transfer of the case to the other side of the court can be contrasted with the manner in which the hearing might be expedited under a merged system. As to hearing a case in which both legal and equitable issues are present, see text accompanying notes 121-128 supra. Here even if a jury were demanded, the entire case could be heard by the court and jury in the same manner as a case in which both legal and equitable issues are involved. Contrast the transfer procedure. See notes 37 and 42 supra.

121 W. Va. 190, 2 S.E.2d 269 (1939).

As an example, see Form 12 in the appendix to the rules and the note thereto. Fed. Rules Civ. Proc., 28 U.S.C.A. (1950). The merged system not only permits this procedure; it compels the pleader to seek all the relief to which he may be entitled in one action. Contrast Perdue v. Ward, 88 W. Va. 371, 106 S.E. 874 (1921), which permitted the plaintiff to bring a second action for damages even though the damages could have been obtained in a prior injunction suit.
or is he required to make his guess and hope that a second action will not be needed? The same question arises where the uncertainty exists as to whether one person or another is entitled to the recovery. Both of these questions must be answered with the statement that two actions will be necessary if either the law or the facts disclose that the pleader was wrong as to his best judgment in the first case. Alternative pleading of this nature would not be proper in West Virginia since the allegations would not show any right to joint recovery or joint liability.389 The plaintiff must elect to proceed against one of them, if the allegations show that the defendants are not jointly liable, and dismiss his action as to the others.390 If the plaintiff alleges a joint liability, he may introduce his proof before being required to elect when the lack of joint liability appears;391 but, not only is this less honest pleading, it also fails to leave the question open for decision in the case.392 The same situation exists where the plaintiffs allege a joint right.

Within limits the hardship caused by the refusal to allow pleading as to parties (or causes) in the alternative has been removed by the Federal Rules and by statutes or rules in some states.393 Rule 20 (a), mentioned above, provides that either plaintiffs or defendants may be joined in the alternative if the rights asserted by the plaintiffs or against the defendants arise out of the same transaction or occurrence and if any question of law or fact common to the parties will arise in the action.394 If both of those requirements are met, it is immaterial that the various parties plaintiff or defendant have no interest in each other's cause of action.395 A joint right as to plaintiffs or a joint duty as to defendants need not be alleged or proved, and the causes joined remain as separate in substance as if separate actions at common law had been brought.

389 See the first part of this paper dealing with joinder of parties and causes of action. "... There can be no question that distinct causes of action cannot be joined in the same suit against different parties. ..." Draper v. Crozier, 104 W. Va. 156, 161, 139 S.E. 648, 650 (1927).
392 Bennett, Alternative Parties and the Common Law Hangover, 32 Mich. L. Rev. 36 (1933). For a good example of how the statutes which change the consequences where parties are misjoined has encouraged joinder of all parties possibly interested, see Sutton v. Walton, 122 W. Va. 424, 10 S.E.2d 573 (1940), and Lugar, supra note 39, at 190.
393 The states are listed in CLARK, CODE PLEADING 394.
395 This point was developed in the first part of this paper under the caption, "Joinder of Parties under Code Pleading and the Federal Rules". See 3 MOORE, FEDERAL PRACTICE §§ 20.05-20.06.
Typical instances in which the pleader might use this privilege have been shown in decided cases. The plaintiff is injured in a collision between two motor vehicles and is in doubt as to which of the drivers was negligent; or the plaintiff is injured by the negligent operation of an automobile and is in doubt as to which of two persons was driving at the time of the accident and no relationship between the persons creating joint liability can be shown; or the plaintiff contracts with one person who purports to be the agent of another who later denies his authority, and the plaintiff is in doubt as to whether the authority existed. Other hypothetical or actual cases could be used, but these will suffice to show that under the federal rule the pleader is permitted to protect himself where he is in doubt as to which person should sue or be sued in the same manner that he is now permitted in West Virginia to protect himself in some cases by joining different counts to set forth possible variances as to the facts to be proved or the law which will be held applicable. The present limitations have been discussed. Should the pleader be required to state his case with certainty, even though he has no way of removing a doubt prior to trial, and another action be required if his choice was unfortunate? Should he be required to take the chance that he will lose both cases because of the facts proved in the different trials or the reaction of different juries to the evidence introduced?

396 Jacobs v. Barron, 214 N.Y. Supp. 261 (1st Dep't 1926). Compare the recent West Virginia case in which the defendant contended that the trial court had properly set aside the jury verdict in the plaintiff's favor because "the proximate cause of the plaintiff's injuries was the negligence of the driver of an automobile approaching the bus company's [defendant's] bus in an opposite direction, . . . causing it [the bus] to come in contact with a pole of the power company negligently installed inside the curb of the western pavement of the street. . . ." Laphew v. Consolidated Bus Lines, 55 S.E.2d 881, 883 (W. Va. 1949).

397 Fowler v. Baker, 32 F. Supp. 783 (M.D. Pa. 1940). Compare Official Form 10 used in federal courts, quoted in part in the text which follows, Compare the recent West Virginia case in which father and son were joined as defendants in a negligence case, the joinder being on the basis of the family car doctrine. Evidence introduced by the defendants indicated that a guest passenger in the automobile may have been driving at the time of the accident. It was held that an amendment should have been permitted to allege that the car was being operated by the guest passenger under the direction and supervision of the son and thus show a basis of recovery against the defendants. Buffa v. Baumgartner, 58 S.E.2d 270 (W. Va. 1950). But, suppose this relationship cannot be shown? Shall another action be required?


399 CLARK, CODE PLEADING § 62; 3 MOORE, FEDERAL PRACTICE §§ 20.05-20.06.
Official Form No. 10, in the appendix to the Federal Rules, is an epitome of alternate pleading. The illustrative part reads:

"...defendant C.D. or defendant E.F., or both defendants C.D. and E.F. wilfully or recklessly or negligently drove or caused to be driven a motor vehicle against plaintiff....

"Wherefore plaintiff demands judgment against C.D. or against E.F. or against both in the sum of ten thousand dollars and costs." 400

The pleader may thus state his case honestly,401 and the defendants receive fair notice that liability is being asserted against them either jointly or in the alternative for an injury arising from a factual situation in which they both participated and that either or both of them may be liable depending upon a common question of law or fact which will be more fully developed at the trial or prior to that time in a pre-trial conference. The deposition and discovery procedure established by the Federal Rules, if made available, would also be useful in narrowing the issues.

Most of the other alternative allegations in this official form have been discussed. The alternative prayer should be noted briefly again. An alternative statement of the facts may not result in any difference in the relief being sought. Where such allegations are permitted in West Virginia that condition exists.402 However, where greater liberality is allowed in stating the facts in the alternative, the result may be that the relief will vary403 and also the person who recovers or against whom recovery is obtained will vary,404 depending upon the facts proved and the law applied thereto. If the principle that the prayer for relief is not binding is accepted,405 the possible differences in the relief to be obtained need not be stressed at the pleading stage.406 The prayer would not be controlling in any event if the facts proved show that the pleader


401 Alternative pleadings are subject to the requirements of Federal Rule 11 as to honesty in pleading. See note 218 supra. Unless the pleader has a bona fide doubt as to the law or facts, pleadings are not to be in the alternative.

402 This result follows from the limitations as to the forms of action which are joinable and the two court systems.

403 For example, the pleader may be entitled to legal or equitable relief.

404 See the discussion above in the text as to joinder of parties plaintiff or defendant in the alternative.

405 See text which accompanies notes 149-155 supra. See also note 188 supra.

406 "The demand for judgment is simply the pleader's suggestion to the court." Clark, Code Pleading 274.
is entitled to another alternative relief.\textsuperscript{407} However, if judgment is taken by default, the prayer is important as to the relief obtainable;\textsuperscript{408} and in any event the pleader should set forth the theory of his case including alternative prayers where the facts have been pleaded in the alternative for that purpose.\textsuperscript{409} Accordingly, Rule 8 (a) permits the pleader to demand relief in the alternative or of several different types.\textsuperscript{410} In order to avoid any question concerning the right to alternative relief because of the absence of a prayer therefor, the careful pleader would make the demand in the alternative and it is usually so done.\textsuperscript{411} The West Virginia practitioner would have no difficulty in framing such prayers for he is accustomed to doing this in bills in equity.\textsuperscript{412}

A summary at this point of the thoughts expressed as to each subject discussed in this paper seems inappropriate, especially since each topic has been separated as much as possible from the others. This was done to demonstrate in some detail what might be accomplished by the adoption of rules comparable to the Federal Rules to replace certain existing rules in West Virginia. The rules chosen seemed to illustrate best the existence of limitations which unnecessarily may delay or defeat determination of claims on their merits.

As indicated at the beginning of this paper, no attempt has been made herein to examine or appraise all of the differences between the West Virginia rules of practice and procedure and the Federal Rules. It was believed that a detailed comparison of some segments of the differences between the two systems might be more likely to stimulate or encourage members of the bench and bar to consider these and other differences than would a more generalized treatment of a greater number of variances between the two systems.

\textsuperscript{407} See text accompanying notes 151-155 supra.

\textsuperscript{408} See text which accompanies notes 149-150 supra.

\textsuperscript{409} This may be necessary for a clear statement of the cause or causes of action involved.


\textsuperscript{411} For example, the prayer to be used with Official Form 10, noted above in the text, reads as follows: "Wherefore plaintiff demands judgment against C.D. or against E.F. or against both in the sum of ten thousand dollars and costs." See also the prayer in Official Form 12, Appendix of Forms, Fed. Rules Civ. Proc., 28 U.S.C.A. (1950).

\textsuperscript{412} E.g., Lockhart v. Hoke, 85 W. Va. 382, 101 S.E. 730 (1920).