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THE COMMON LAW DECLARATION IN WEST VIRGINIA

LEO CARLIN*

The ideal system of pleading, in whatever forum, would be one so simple in its mechanism and so flexible in its operation that it would eliminate all technical problems of pleading and permit the pleader to give his undivided attention to problems of the substantive law. Such has been the commendable, though so far unattained, goal of those who have constructed statutory systems for the regulation of pleading and practice. Particularly in the common law field have pleaders been inclined to feel that they are confronted with too many difficulties not directly and essentially concerned with a simple and logical statement of the operative facts of the case. Many of the features of common law pleading which make it relatively formal and complicated and draw to it the criticism of being technical have largely evolved from two peculiar requirements to which common law pleadings have found it necessary to conform: first, the necessity for simple and clearly defined issues to serve the purposes of trial by jury; and second, the necessity of conforming to a formulary system. The second requirement, especially, to a greater or less extent, prevents the pleader from resorting to allegations designed solely for the purpose of presenting the literal and specific facts of a case as they occurred, and compels him to plead in the peculiar language of some particular form of action. Hence perhaps the primary impulse of those who would escape

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from what they consider the rigors of common law pleading is to seek a method by which pleadings at common law could be drafted, like pleadings in equity, by simply stating the essential facts, adopting a literary style and form of narration as suggested by the facts of the particular case and disregarding all matters of form. One frequently hears the wish expressed that declarations in actions at law might be drafted like bills in equity, where, of course, there are no forms of action and, ordinarily, no trials by jury. It has been suggested to the writer that the local statutes should be comprehensively revised so as to permit such a method of pleading.

As every practitioner in this state knows, the local statutes have already gone a long way in the abolishment of formal requirements in pleading both at law and in equity. However, in spite of the many liberties which the statutes would allow, pleaders have usually found it convenient, and presumably expedient, to avail themselves of the standard, established forms of the law, and they have done so to such an extent that it is believed that they have largely lost sight of the liberty which is theirs if they cared to take the risk of cutting loose from the guidance of established precedents and of trusting to their originality. On the other hand, only brief deliberation is necessary to arrive at the conclusion that, owing to the very nature of common law rights and of the manner in which they have become classified and defined, there would be difficulties, varying with the nature of the right invaded, even under the local statutes, in undertaking to draft a common law declaration, like a bill in equity, relying upon a simple statement of the specific facts of the case and with a total disregard for form. Since in these days the processes of the law, and especially the procedural mechanism of the courts, are subject to so much criticism, it is believed that it will not be entirely without interest to examine briefly into some of the phases of the local law in order to determine to what extent, in drafting a declaration, the initial and most important pleading of the series, we are still bound by the formal requirements of the common law, and what obstacles may be in the way of a more radical liberalization of the pleading processes. Particularly, in drafting
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a common law declaration, what matters of form may be disregarded? And to what extent may a simple statement of the operative facts of a case be substituted for a translation of those facts into generalizations which stand for the elements of a form of action?

The declaration at common law and the bill in chancery are both, of course, products of gradual processes of evolution. Each became standardized, so far as standardization was practicable, with reference to the particular function which it was to perform as a convenient receptacle for statements of facts which, in the light of the substantive law, would show a cause of action. That this standardization took place along different lines in the two different forums is largely explainable as a result of the formulary system which prevails at law but which is unknown in equity.

From the very beginning, an original writ, issuing under authority from the king, was necessary in order to maintain an action in a common law court; and it was necessary, of course, that the allegations of the declaration in any particular case conform to the statements in the writ which authorized the action. In fact, the substance of the declaration was little more than a repetition of the body of the writ. But in the beginning, all actions at law were actions "on the case", in the sense that each writ and the declaration drafted in pursuance of it merely undertook to embody the litigable facts which the chancellor issuing the writ considered sufficient to entitle the plaintiff to relief, without reference to any class of remedies. The great variety of writs which accumulated in the course of years of litigation naturally and automatically tended to fall into classes, because the relationships between men are such that human rights and wrongs necessarily fall into classes. Hence, as a matter of convenience, if for no other reason, it was natural that the clerks of the chancery who issued the writs would be tempted to adopt a form of writ which would serve for a whole class of cases, rather than to undertake to labor with the specific and detailed facts of each case as it was presented. As a result, by processes of generalization and elimination of details, standardized forms of writs, general in their purport and elastic in their application,
were evolved. Consequently, we have forms of action, or classes of remedies. As the original writ thereafter had to conform to some particular form of action, so the declaration, still under the necessity of conforming to the writ, had to conform to the same form of action.

From what has been said, it will be apparent that the common law declaration, in the process of standardization, would tend to adapt itself to the requirements of a form of action rather than to the function of stating the peculiar facts of any particular case. The effect of this standardization upon the specific allegations of the declaration is easy to surmise. The allegations would tend to become general and elastic in their purport and effect, so as to be adapted, to a greater or less extent, to any specific case ultimately shown by the evidence to come within the scope of the particular form of action with reference to which the declaration was drafted. As a result, the efforts of the pleader, in drafting a declaration, are largely directed toward satisfaction of the requirements of a form of action, rather than toward the selection of the peculiar facts of the specific case which might, without more, show a cause of action.

What has been said, of course, applies strictly only to declarations in the true forms of action. Through the impetus of the statute of Westminster the Second, there continues to be a broad and indefinite field of remedial law, comprising those instances in which relief is given in actions designated as trespass on the case, or simply case, where a remedy is sought without reference to any form of action. Trespass on the case, although usually classified as one of the forms of action, is more appropriately called the "formless action", and is resorted to in those instances where the substantive law demands a remedy but the facts of the case cannot be made to fit any form of action. In actions on the case, as originally in all common law actions, and as still in chancery, so far as a statement of the cause of action is concerned, the pleader must ordinarily rely upon the peculiar facts of each specific case for the purpose of framing his pleading.\(^1\)

\(^1\) It is not intended to say, of course, that all declarations in case are free from manifestations of form, even in stating the cause of action. It is not easy to find in declarations in the regular forms of action anything rivaling the niceties involved in the proper formal use of the inducement, colloquium and innuendo in actions for libel and slander.
As a result of the general allegations which the requirements of the forms of action have established as sufficient to show a cause of action, it will readily be seen that the ultimate question whether the peculiar and detailed facts of a case are sufficient in law for a recovery must ordinarily be determined on the introduction of the evidence, rather than on a demurrer to the pleading. As has been indicated, the task of the pleader has practically been accomplished when he has succeeded in making the declaration conform to the requirements of the form of action which he has selected. Whether the plaintiff finally shall be allowed to recover, as a matter of law as well as a matter of fact, will depend upon whether he can produce evidentiary facts, which may be infinite in variety depending upon the nature of the case, to support and vitalize the general allegations of his declaration.

Whether such a result is desirable is a debatable question, to be answered intelligently only in the light of the general procedural effects. From the viewpoint of pleading alone, it would seem that the standardized general forms of declarations developed through the forms of action have made the drafting of a declaration much easier and safer than if the pleader were compelled to rely upon the peculiar and detailed facts of each particular case. The fact that the form has become standardized permits him to rely upon it as a true criterion of legal sufficiency and has led to the establishment of many reliable precedents which he may follow. If he correctly diagnoses his form of action, the standardized form of pleading will carry him safely through, and he cannot fail in the evidence except for lack of proof. On the other hand, to the extent that he should rely on detailed and specific allegations adapted to the circumstances of each specific case, he would in the first instance, owing to a lack of precise precedents, certainly be faced with a much greater possibility of having to convince the court that he had stated a cause of action, and finally with a much greater risk of having a variance between his allegations and his proof.  

2 Considerations such as these are said to have been cogent and practical reasons why the common counts in assumpsit were developed as rivals of the action of debt. See Ames, Lectures on Legal History, 153; 3 Street, Foundations of Legal Liability, 188; Moses v. McFerlan, 2 Burrow 1005 (1760).
There is something to be said in favor of requiring a more detailed method of allegation adapted to the facts of the particular case in order that there may be a greater possibility of determining the existence of a cause of action and the final merits of the case on a demurrer to the declaration. But there is also something to be said to the contrary. Every practitioner knows that a plaintiff is often honestly mistaken as to what he is able to prove until the actual introduction of the evidence. He may be able to prove a case which fits general allegations, but not one which fits allegations more detailed and specific. It is true that the court may permit him to amend his declaration so as to fit the proof, so long as he does not change his cause of action. But if the defendant has shaped his proof to the detailed and specific allegations, as apparently he would be encouraged to do by such a method of pleading, might not the surprise of an amendment lead to more confusion and delay than if he had prepared himself to meet a more general situation?

It may be urged that general allegations do not give the defendant sufficient notice for purposes of pleading his defenses and of preparing for a trial of the case. Theoretically, this objection might seem to have much weight; but actually, when a defendant is sued in a certain form of action, it is surmised that he generally knows fairly well in detail what the controversy involves and goes about preparing his pleas and his proof on knowledge extrinsic to the declaration. Moreover, if it should happen that he is truly in need of further information, he can demand a bill of particulars, which will give details in as reliable a form as if they were alleged in the declaration, and yet through an expedient which is not subject to the same objections and technicalities with reference to form and proof as the allegations in a declaration. And even when a bill of particulars is demanded, one is tempted to inquire whether, in the average case, it is demanded primarily because of any legitimate lack of knowledge or in pursuance of a desire to hamper and arbitrarily limit the plaintiff in the presentation of his proof. Obviously, the more a pleader goes into details involving the peculiar facts of his case, the more he calls into action the pleading mechanism and pleading
functions of the law. If it is a virtue in pleading to dispense with pleading as far as possible, it may be urged that this end will be served by initiating the pleading processes in the declaration with the maximum permissible generality of statement, as measured by the requirements of the average case, leaving it to a bill of particulars to take care of exceptional cases when they shall be presented.

In equity pleading, there being no forms of action, there was no possibility of bills becoming standardized into classes differentiated upon the basis of standard forms of allegations. The standardization which monstrously resulted in establishment of the nine formal parts of the bill is one which pertains to all bills and has nothing to do with differentiation of causes of action as depending upon the form of the bill. The statement of the cause of action is confined to a single one of those parts, the premises, or stating part. It is true, of course, that original bills praying relief, which correspond to declarations at common law, are differentiated into various classes, but this differentiation is on the basis of the subject matter and not on the basis of any particular allegations or theory of pleading. The stating part, or premises, is the one part of the bill which corresponds to the statement of the cause of action in a declaration, the part of the bill in which the equitable cause of action is stated, and in framing this part of the bill the pleader is expected to resort largely to his own ideas of literary style, sequence and narrative skill. He must rely fundamentally upon his knowledge of the substantive law as dictating the substance of his allegations and upon his literary skill as dictating their form, without any standardized allegations to which he may resort as carrying both form and substance.

Thus it is seen why the elements in a common law declaration must ordinarily be measured by different standards of sufficiency than those by which allegations in a bill in equity are measured. In the one instance, the pleader, having decided that the peculiar facts of his case entitle him to relief in a certain form of action, largely directs his pleading efforts to drafting a declaration that will satisfy the requirements of that particular form of action, being concerned otherwise only that such literal facts as it is
necessary to state at all be stated so as to conform to his
proof. In the other instance, not being concerned with any
form as a channel through which he must seek relief, he
shapes his allegations of facts primarily and directly on
the basis of the substantive law which he conceives entitles
him to relief.

Bearing in mind these fundamental distinctions, it will
be apparent that, when we speak of "form", or of "formal
allegations", in a common law declaration, and consider the
possibility of the elimination thereof, or of the substitution
of equivalent facts or forms of expression, it is necessary
to distinguish between two different classes, or phases, of
form. First, there are matters of form, or formal parts,
which are generic in nature and apply indiscriminately to
all declarations; and second, there are peculiar matters of
form imposed by the form of action in which the declaration
is drafted. Examples of the first are the statement of the
venue in the margin and the entitling of the declaration;
and examples of the second are allegation of the conversion
in trover and of the promise in assumpsit. Again, it will be
expedient to bear in mind that a matter may be considered
as "formal" in the sense that it contains no essential sub-
stance and may be totally disregarded; while another mat-
ter may be looked upon as "formal" only in the manner of
expression, and carries with it substance that cannot be
wholly dispensed with. For example, the entitling of the
declaration may be entirely eliminated as mere matter of
form; but on the other hand, in an action of assumpsit,
while it may not be necessary to allege a promise in literal
words, as is done in the standard forms, still it will be
necessary at the least to allege it in equivalent words, or to
allege facts showing that there was in legal effect a promise.

A declaration drafted in pursuance of the standard forms
has a formal commencement and a formal conclusion. The
conventional practice in the local courts, in accord with the
general common law practice, is first to state the venue of
the action in the margin and then to entitle the declaration
as of the court in which the action is pending. In some of
the prescribed forms, but not in all, the declaration is en-
titled as of the rules at which it is filed. All these matters,
to a certain degree useful, although perhaps entirely dis-
pensable, expressed in the same form in the different forms of action, are so easy to observe in their proper form that perhaps no pleader should object to their presence in a declaration or seek the liberty of varying their form of expression. However, it has recently been decided by the Supreme Court of Appeals that it is entirely unnecessary to entitle the declaration as of the court in which it is filed. In its opinion in this case, the court says that the summons will inform the defendant of the court in which the action is pending and where, of course, the declaration should be filed, and that the fact that it is so filed will indicate that it belongs there. The court refers to the entitling as a mere matter of form and cites the local statute dispensing with matters of form as authorizing its omission. For like reasons, the same case, of course, would be authority, if authority other than recognized practice were necessary, to the effect that the entitling as to rules may be omitted.

The writer is not aware of any local case in which the appellate court has decided the effect of failure to state the venue in the margin. Courts in other jurisdictions have decided that it is not necessary to state the venue in the margin when it is properly stated in the body of the declaration. In order to speculate as to what application these cases might have as authority in the local jurisdiction, it will be pertinent to distinguish briefly the function of the venue stated in the margin and the function of the venue of the facts alleged in the body of the declaration.

The function of the venue in the margin, of course, is primarily to indicate the place where the action is brought, and not to fix the place of facts with which the cause of action is concerned. The venue, or place, of the facts, whether for purposes of venue under the old law or as a mere descriptive quality of the facts under the later law, is alleged in the body of the declaration. In this state, it is said, it is not necessary to allege the venue, or place, of transitory facts at all, although it is usual and convenient

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3 Fleming v. Hartrick, 100 W. Va. 714, 131 S. E. 558 (1926).
5 County Commissioners v. Wise, 71 Md. 43, 18 Atl. 31 (1889); Dwight v. Wing and Miller, 8 Fed. Cas. No. 4219, 2 McLean 580 (1841).
to do so regardless of the fact that the proof does not need to conform to the place alleged. On the other hand, if the venue, or place, of a local fact is not alleged in the body of the declaration (and it must be alleged somewhere), it would seem that the statement of the venue in the margin, unless there should be some express reference to it from the body of the declaration, would not help the situation. And even where there is such a reference, it would of course be of no avail as supplying the place of the local fact unless the fact were of such a nature (and it usually would not be) that it might be described as having occurred generally within the county, without greater particularity as to place. Consequently, it would seem that the venue in the margin will not serve as a substitute for allegations of place, when necessary, in the body of the declaration, and that its function is simply to indicate the county in which the action is brought. If so, then it would seem that the reasoning of the case which says that the entitling of the declaration as to the court may be omitted would apply equally to omission of the venue in the margin. The summons will show in what county the action has been brought, and a comparison of the summons with the declaration, together with the fact that the declaration is filed in the case to which the summons pertains, will indicate that the declaration has been filed in a court within the proper venue of the action. In fact, under the modern and local law of venue, questions relating to the venue in the margin are essentially procedural questions preceding and leading up to the institution of the action by the issuance of process, rather than questions concerning the essentials of the declaration after the action has been instituted.

In many of the standard forms, after the statement of the venue in the margin and the entitling, the body of the declaration begins with a statement of the manner in which the defendant has been brought into court; for instance, whether he has been constructively brought in by service

9 As in Hunt v. Di Bacco, supra, note 6.
10 For an example, see the case cited in note 8, supra.
of a mere summons, or whether he has been bodily brought in by arrest under a capias. Linked with this allegation, is a brief statement of the nature of the action which the defendant is required to defend. These statements were substituted early in the English practice for a recital of the entire original writ.

"Anciently it was the practice in all actions to repeat the whole original writ in the declaration; and if a material variance appeared between the writ and the declaration, the defendant might take advantage of it, either by motion in arrest of judgment, writ of error, plea in abatement, or demurrer. Cro. Eliz. 829; Norton v. Palmer; Ibid. 185; Edwards v. Watkin; Ibid. 198; Berkenhead v. Nuthall; Ibid. 330; Haselop v. Chaplin; 2 Lectw. 1181; Gins v. Dams. But this practice was altered by a rule of the court of C. B. A. D. 1654, by which it was ordered, that in future 'declarations, in actions upon the case, and general statutes, other than debt, should not repeat the original writ, but only the nature of the action; as that the defendant was attached to answer the plaintiff in a plea of trespass on the case, or in a plea of trespass and contempt against the form of the statute.' And it would seem, that even in trespass *vi et armis* in the common pleas, or commenced by original in the king's bench, it would now be deemed sufficient to state in the declaration, that the defendant was attached to answer the plaintiff in a *plea of trespass*, without setting forth the writ; at least this has been held sufficient on a general demurrer as far back as 2nd of William and Mary, Carth. 108, Lambert v. Thurston, and I should think would at this day be held good on a special demurrer. For this short recital is intended only as an intimation to the court of the nature of the action."11

Under the original English practice, it was important to know in what manner the defendant had been brought into court, because the nature and effect of the subsequent procedure depended in certain respects upon the nature of the process. Since under the local practice, where an action is started by process at all, the summons is used exclusive-

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11 Sergeant Williams' note to Redman v. Edolph, 1 Saund. 318, quoted in Sunderland's Cases on Common Law Pleading, 255.
ly for the purpose of instituting the action and the capias has been abolished for such purpose, and there is only one way in which a defendant is brought into court to answer a declaration, a recital in the declaration of the nature of the process would seem to be superfluous in all cases.

It would still be important, however, to inform both the court and the defendant of the nature of the action in some part of the declaration, since the nature of the action, in the absence of a plea in abatement alleging a variance between the writ and the declaration, and even in the presence of such a plea when the plaintiff avails himself of the privileges of amendment permitted by statute, might not depend upon the form of the writ. If the statement of the cause of action itself should be framed in such allegations as to show the nature of the action, the possibility of which will be hereafter considered, then it would seem that an express statement of the nature of the action might be wholly omitted. But if it should be deemed advisable or necessary to insert an express statement of the nature of the cause of action, no reason is perceived why it would be necessary to do so in the language of the standard forms, involving, as it does, a statement of the nature of the process. No reason appears why, varying the name of the form of action to suit the occasion, any declaration might not begin an introduction of the statement of the cause of action in the following, or equivalent, language:

“John Doe complains of Richard Roe in an action of trespass on the case, for this: that * * *,”

proceeding with a statement of the cause of action.

So far as a declaration has any standard conclusion, with the exception of the allusion to production of the secta hereinafter noticed, it is concerned with a statement of the amount of the damages suffered by the plaintiff. The amount of the damages is usually, and preferably, stated in a formal allegation called the “ad damnum clause”, but it has been decided\(^\text{12}\) that a formal allegation for this purpose is wholly unnecessary, provided the defendant has been notified, however informally, in any part of the declaration (in the case cited, at the beginning of the declara-

\(^{12}\) Jenkins v. Montgomery, 69 W. Va. 795, 72 S. E. 1087 (1911).
tion where the nature of the action was stated), of the amount of the damages which the plaintiff claims; and of course, the information may be imparted in any intelligible language which the plaintiff may care to adopt. But the amount of the damages, when the action sounds in damages, must be stated in some form, and it has been held that a declaration which fails to do so is demurrable.  

In many of the standard forms, declarations conclude finally with the words, "and therefore he brings his suit". This clause corresponds to the Latin, "inde producit sectam", meaning that the plaintiff proffers his secta, or preliminary proof witnesses. Some of the forms attempt to use what are evidently supposed to be equivalent expressions, such as "and therefore he brings this suit", "and therefore he sues", "and therefore he brings his action", "and therefore he brings this action". Such substitutions of language, of course, though entirely harmless, show a misapprehension as to the purport and object of the proper allegation. Since a plaintiff in this state is neither required nor permitted to produce a secta, any allegation referring to a secta should be wholly superfluous, and the ad damnnum clause, where it is necessary, should be permitted to stand alone as a sufficient conclusion.

There remains for consideration that part of the declaration which states the cause of action. Here, it will be noted, the pleader must take into consideration two classes of requirements: first, requirements demanding that the declaration, although apparently sufficient on its face, must conform to other matters of procedure; and second, requirements intrinsic to the declaration itself, the absence of which will make it demurrable without reference to other matters of procedure.

It may be said that the pleader, in order to make his declaration conform to other elements of the action, must look both backward and forward—backward in order to conform to the writ, and forward in order to conform to the proof. However, the consequences of failure to observe proper precautions in this respect have been radically modified by statute in favor of the pleader.

14 ANDREWS, STEPHEN'S PLEADING, 573.
At the common law, a misnomer of a party to the action was pleadable in abatement, and hence would abate the action. Under the local statute,\(^\text{15}\) there is no such consequence.

"No plea in abatement for a misnomer shall be allowed in any action; but in a case wherein, but for this section, a misnomer would have been pleadable in abatement, the declaration and summons may, on the motion of either party, and on the affidavit of the right name, be amended by inserting the same therein."

It will be noted that the statute gives either party the right to make the motion to correct the misnomer. But if a party should be sued under a wrong name, and so served with process, but should make no motion to correct the misnomer, a judgment taken against him in the wrong name would necessarily be valid.\(^\text{16}\)

It should be noted, however, that this statute affects only a misnomer of a party to the action. At the common law, a misnomer in the subject matter of the action constitutes a variance between the declaration and the proof and is objectionable under a plea in bar. It is still objectionable for this reason, regardless of the statute, and is ground for a motion to reject evidence involving it, unless the declaration be amended in pursuance of the statute hereinafter discussed.\(^\text{17}\)

At the common law, a variance between the declaration and the writ made the declaration demurrable.\(^\text{18}\) By virtue of a section of the Code immediately following the one quoted,\(^\text{19}\) when the defendant appears to have been served with process, such a variance is only pleadable in abatement, and even then may be cured by amendment.

"In other cases, the defendant on whom the process summoning him to answer, appears to have been served, shall not take advantage of any defect in the writ or

\(^{15}\) W. VA. CODE, c. 125, §14.


\(^{17}\) Tuivl v. Aynsworth, 2 Lord Raymond 1515, Sunderland's Cases on Common Law Pleading, 276 (1727); 4 MINOR, INSTITUTES, 906.

\(^{18}\) 4 MINOR, INSTITUTES, 609-610.

\(^{19}\) W. VA. CODE, c. 125, §15.
return, or any variance in the writ from the declaration, unless the same be pleaded in abatement. And in every such case the court may permit the plaintiff to amend the writ or declaration so as to correct the variance, and permit the return to be amended, upon such terms as to it shall seem just."

This statute has apparently been so construed as to require a plea in abatement in lieu of a demurrer only when the defendant appears to have been served with process which is not void, and to permit an amendment so as to cure the variance only when the defendant has pleaded in abatement.20 However, its curative effect, even as so circumscribed, is important. Under it, writs have been amended so as to conform to the declaration, even to the extent of changing the form of action in the writ.21

As to a variance between the declaration and the proof, another section of the Code22 provides as follows:

“If at the trial of any action there appear to be a variance between the evidence and allegations or recitals, the court may, if in its opinion substantial justice will be promoted thereby, allow the pleadings to be amended, and if it be made to appear that a continuance of the cause is hereby rendered necessary, such continuance shall be granted at the costs of the party making the amendment.”

It would seem that the only limitation upon the discretion of the court in permitting such an amendment is that an amendment cannot be made which would change the cause of action.23

Turning now to the intrinsic essentials of the declaration, it will first be noted that we have a statute24 which entirely dispenses with the allegation of any fictitious venue in the body of the declaration. The old practice required that the venue of every traversable fact be alleged and that

20 For a more detailed discussion of the effect of this section, see 29 W. Va. L. QUAR., 229, et seq.
22 W. Va. Code, c. 131, §§.
the allegation of the venue of the fact conform to the venue of the action stated in the margin. There was no difficulty about this requirement in the beginning, when the jury had to be summoned from the vicinage and all facts were local. But later, when a distinction between local facts and transitory facts became recognized, and actions were differentiated into local actions and transitory actions, it frequently happened that a transitory action involving a local fact was instituted in a county in which the local fact did not occur. Since the place of transitory facts was immaterial, the venue of such facts could be stated unqualifiedly as that of the venue of the action. But the place of local facts had to be proved as alleged, and hence had to be truly stated. The difficulty was solved by resorting to a fiction. The place of the local fact was first alleged truly as it occurred, and then, under *a videlicet*, was alleged a fictitious place conforming to the venue of the action. The local statute dispensing with allegation of this fictitious venue reads as follows:

“It shall not be necessary in any declaration or other pleading to set forth the place in which any contract was made, or act done, unless when, from the nature of the case, the place is material or traversable, and then the allegation may be so as to a deed, note or other writing bearing date at any place, that it was made at such place, or as to any other act, according to the fact, without averring or suggesting that it was at or in the county in which the action is brought, unless it was in fact therein.”

It will be noted that this statute not only dispenses with the necessity of alleging a fictitious venue, which perhaps was its primary purpose, but also dispenses with the necessity of alleging place at all except where it is material or traversable.

Another fiction which has been expressly abolished by statute is the famous one which prevailed in ejectment. In this state, the few essential elements of the declaration in ejectment, but not the form in which they must be alleged, are wholly prescribed by statute.26

26 W. Va. Code, c. 90.
In addition to these statutes expressly abolishing or dispensing with fictions in specific instances, there is a general provision\(^{26}\) which is understood as dispensing with the necessity of fictitious allegations as a means of conforming to the standards of any form of action.

“All allegations which are not traversable, and which the party could not be required to prove, may be omitted, unless they are required for the right understanding of allegations that are material.”

Fictions, of course, do not have to be proved, their artificial existence depending on that very fact; nor, by the same token, can they be traversed. Nor can it be conceived that they may be “required for the right understanding of allegations that are material”, but rather to the contrary.

The effect of this sweeping provision is not to be understood as confined to fictions alone. It also applies to all allegations of facts which are \textit{immaterial}, though not fictitious. It is said to have abolished the necessity of alleging time or place with reference to any fact, except where the time or place is material, and the same may be said as to quantity or value. In general, place is material when it describes a local fact, or is otherwise essentially descriptive of the fact alleged. Time, quantity and value are material only when they essentially describe the fact alleged, as when time is involved in alleging the date of a writing. Quality is said always to be essentially descriptive in character.\(^{27}\)

At the common law, when an action is based on a deed, the declaration must make profert of the deed. Profert of the deed, it is said, was for the same purpose (preliminary proof) as that for which the secta was brought before the court in actions based on matters in pais. Profert is also required of letters testamentary and letters of administration. In the early law, but not now, profert was made of a record when it was the basis of an action.\(^{28}\) At the common law, if profert was omitted from the declaration when it should have been made, the declaration was subject to

\(^{26}\) \textit{W. Va. Code}, c. 125, §34.

\(^{27}\) See \textit{A Minor, Institutes}, 960-965.

Such is not the consequence under the local law.

"It shall not be necessary in any action to aver that the cause of action arose or that the matter is within the jurisdiction of the court, or to make profert of any deed, letters testamentary, or commission of administration; but a defendant may have oyer in like manner as if profert were made."

Even at the common law, it has been decided that in the action of trespass allegations that the acts were committed "with force and arms" (vi et armis), and "against the peace" (contra pacem), may be eliminated, and that the pleader may rely upon allegations of the specific facts as showing a cause of action. In West Virginia, a statute dispenses with these formal allegations.

"In actions of trespass, general averments that the defendant committed other wrongs, and that the acts charged were done with force and arms and against the peace, may be omitted; and the plaintiff may prove all that he could have done if such averments had been inserted in the declaration."

It will be noted that this statute dispenses also with the necessity of alleging that the defendant "committed other wrongs" (alia enormia), an allegation which was inserted in the common law form of declaration for the purpose of permitting the plaintiff to prove matters in aggravation; and that the plaintiff, by virtue of the statute, without this allegation may prove all matters in aggravation which the allegation at common law would permit him to prove.

With these formal allegations in trespass omitted, especially in West Virginia, where one may sue in trespass on the case in any instance where at the common law he may sue in trespass, it might be difficult to determine whether the count were intended to be framed in trespass or in case,

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29 Andrews, Stephen's Pleading, 205.
30 W. Va. Code, c. 125, §33.
31 Griffin v. Gilbert, 28 Conn. 493, Sunderland's Cases on Common Law Pleading, 381 (1859). It has been said that the allegations of "vi et armis" and "contra pacem" were originally incorporated in the declaration only to give the king's court jurisdiction. Holmes, The Common Law, 84.
except by reference to other formal allegations (the commencement, for instance, where the nature of the action is stated), or by reference to the writ. Indeed, under the West Virginia statute, it would seem rather immaterial to require such a determination, if there were nothing in the declaration but allegations of essential facts upon which to arrive at a conclusion, and those facts were sufficient to support an action of trespass. At the common law, if the writ were in case and the facts alleged showed a trespass, there would be a variance between the writ and the declaration. Such would not be true under the West Virginia statute, since a writ in case would be supported by allegations of facts showing a common law trespass. Under the statute, if any variance between the writ and the declaration as to the form of the action arises, when the writ is in case, it must arise on the basis of formal allegations and not on the basis of allegations of facts constituting the cause of action.

It would seem that the combined specific and general effect of the statutes reviewed above is to dispense with the necessity of any allegations in a declaration except such as are necessary to state the essential substance of the cause of action. But all the essential substance, of course, must be stated, and it remains to inquire as to the necessities of form as applying merely to the manner of statement. That allegations dealing with the substance of the cause have become formally standardized in the various forms of action, all practitioners are aware. Hence the question is to what extent there may be a substitution of substantial equivalents, whether the proposed substitute involve merely a variant form of expression of the same fact, such as the substitution of “agreed” for “promised” in assumpsit, or a substitution of equivalent facts, such as a statement of collective facts, showing that in legal effect there was a promise in lieu of the more general fact involved in the word “promised”. This question will be at least partly answered by the following statutes.

“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.”

33 Idem, §9.
"On a demurrer (unless it be to a plea in abatement) the court shall not regard any defect or imperfection in the declaration or pleadings, whether it has heretofore been deemed mispleading or insufficient pleading or not, unless there be omitted something so essential to the action or defence that judgment according to law and the very right of the cause can not be given. 34

The familiar statement of the general effect of these statutes is that they have abolished objections to formal defects in all pleadings except pleas in abatement, but perhaps few have undertaken to determine precisely and specifically what is meant by such a statement. It undoubtedly means that there may be a variation in the mode of expressing any given fact so long as the variation does not result in a form of allegation giving the fact a different operative effect—one which, for instance, would not conform to the theory of relief on the basis of which the form of action was selected. Thus, "agreed" might be substituted for "promised" in a declaration in assumpsit.35 In other words, the pleader, having determined in the first instance what ultimate facts must be alleged in order to satisfy the requirements of the form of action which he has selected, should have entire liberty as to the form, or language, in which those facts are to be expressed, at the least so long as the facts are so expressed as to give them the operative effect demanded by the form of action. But could he, as in a bill in equity, forget about forms of action, and allege the bare facts which he expects to prove, leaving it to the court to decide whether the nature of the facts so alleged, rather than the application which is made of them through the medium of any formal mode of allegation, satisfies the requirements of the form of action?

This question might not be difficult to answer if every combination of litigable facts entitled the plaintiff to only one form and one measure of relief. Thus, it may be entirely practicable to allege a combination of facts showing an express promise which will support an action in special assumpsit, in lieu of merely alleging that the defendant

34 Idem, §29.
“promised”.$^{36}$ This is true because if, in legal effect, there was an express promise, special assumpsit may, depending upon the particular facts of the case, be the only remedy available. The same would be true, at the common law, as to the allegation of any combination of facts showing a direct and forcible injury to the person, since trespass would be the only remedy in such a situation. But in other instances, there would be greater variety to the uncontrolled operative effect of the facts. For instance, in some cases, the same combination of facts might serve as the basis of an express promise, the breach of which would be remediable in special assumpsit, might create a debt for the recovery of which an action of debt or general assumpsit would be proper, or might give rise to a legal duty the breach of which would be actionable in case. Again, if a trespasser should forcibly take possession of land, a collective statement of the bare facts might warrant a recovery of damages for invasion of the possession or a recovery of the possession. Additional illustrations will be found in the introductory text to “THE THEORY OF THE CASE” in Keigwin’s Cases in Common Law Pleading.$^{37}$ In this work Mr. Keigwin, in a very able manner, develops the following ideas:

(1) There is nothing accidental or artificial in the differentiation of forms of action. These differences are in reality differences of subject matter. Therefore, as Mr. Keigwin says:

“To ascribe the differences in the characteristic phrases which distinguish the actions to a mere pedantic fondness for technical refinement, or to refer them to historical accidents, is to ignore intrinsic differentiations which are enduring and inescapable.”$^{38}$

(2) An even more fundamental differentiation of the forms, according to Mr. Keigwin, is contained in the fact that they express the plaintiff’s conception of his cause and the specific ground or theory of legal liability he invokes. The common law forms of action therefore, may

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$^{36}$ Union Stopper Co. v. McGara, 66 W. Va. 403, 66 S. E. 698 (1909).

$^{37}$ Pp. 275-280.
be characterized as "categories of legal liability". These categories are essential to avoid confusion. A single state of facts embodies so many wrongs with so many different remedies that if the facts alone are pleaded, neither the judge nor the defendant can tell exactly what the plaintiff wants. Mr. Keigwin gives an example of a man breaking into your stable, leading away your horse, and detaining it against your demand. In such a case, neither the court nor the defendant can tell from the facts whether you want your horse, or merely its value, or damages for trespass on your real property. It is, therefore, convenient and conducive to a certainty of justice that the plaintiff by using a different form of action shall inform the court and the defendant exactly what he wants.

As is suggested by Professor Keigwin, grievances essentially different, "as a matter of literary craftsmanship", cannot be stated in "the same words or even on the same scheme of compositional structure". In fact, so far as such a unity in form of expression is practicable, it would seem that the forms of action are responsible for it. Within the confines of each particular form of action, it will be observed that the same scheme of compositional structure does largely permeate the allegations of any declaration coming within its peculiar category. Those who complain of formal requirements seemingly should not be understood as desiring to amalgamate all forms of action into a single form of action. If such a process of coalescence were possible—and Professor Keigwin seems to have demonstrated clearly that it would not be—the pleader would still be under the necessity of satisfying the requirements of form. The pleader seeking liberty of expression would rather contemplate the abolishment of all form, in order to expand, not to limit, the variety of statement which Professor Keigwin says is even now necessary to differentiate the remedies. In other words, what he seeks is not some scheme by which he may state all grievances in the same form, but the liberty to state any grievance without regard to form.

It will be noted that Professor Keigwin objects to an informal narration of the facts relied upon as constituting a cause of action, not because the facts alone would fail to show a cause of action, but rather because, if they were

38 Ballantine, Shipman's Common Law Pleading (3d ed.), 55.
not alleged in such a form as to control their operative effect, they might show too many causes of action. If such is the only obstacle to the abandonment of form imposed upon the allegations by requirements of the forms of action, or the theory of the case operating through the forms of action, then may it not be possible, whether or not expedient, to indicate to the defendant and to the court the operative effect of the facts upon which the plaintiff relies otherwise than through the form of allegation? In equity, this is done through the prayer of the bill, precisely for the reason that bills in equity are not drafted with reference to any form of action which would control the operative effect of the facts. And the same device has been incorporated into the complaint or other pleading which takes the place of the declaration in the code states. Would it be rash to say that, under the liberal provisions of the local statutes, this device might not be used for the same purpose in a common law declaration, thus permitting the plaintiff to indicate the theory of his case in the form of an express demand for the relief which he seeks, rather than to indicate it through the symbolism of form? Would it be rash to say that it might not be indicated through even a simpler device than a prayer for relief? Why would not all purposes in this respect be served by a simple statement in the declaration—at the commencement, for instance—of the form of action which the plaintiff relies upon as giving operative effect to the facts which he has stated, always assuming that facts have been alleged, whatever their variety and the language in which they have been stated, which will sustain the form of action relied upon? After all, the painting of the facts in the colors of a particular form of action is only a symbolic method of indicating the use which the plaintiff expects to make of the facts. If he names the form of action upon which he relies, why should not this carry with it all the symbolic effect that would come indirectly from the color of formal allegations? The court is finally called upon, when the evidence is introduced, to determine whether the informal facts of the case are sufficient for a recovery, a part of that task always being to decide whether they satisfy the form of action which they are offered to support. Why could the court not do so when the facts (ultimate facts, of course, and not
evidentiary facts) are informally stated in the declaration, accompanied with a statement of the form of action within the bounds of which the facts are expected to operate?

The writer, of course, is merely undertaking to suggest what might be possible, not what is advisable, in the way of abandoning formal allegations in the common law declaration and approximating the methods of equity pleading. Something has already been said for the purpose of indicating that such an attempt, although conceivably possible under the local statutes, might well be undertaken with some hesitation.

Finally, it may be inquired what more may be done by way of statutory enactment for the purpose of liberalizing the pleading processes by way of dispensing with form in the declaration. Seemingly, considering the comprehensive effect of the statutes already enacted, little more can be done merely in the way of dispensing with form so long as it is necessary to seek relief through the channel of some form of action. Then naturally the question occurs, What might be accomplished by abolishment of the forms of action, as has been done in England and in the code states? Let this question be answered by Professor Keigwin:

"As the differences between causes of action, which are signified by the forms, are intrinsic and necessary, the actual diversity cannot be escaped by simply ignoring it. The fact cannot be abrogated by obliterating the forms any more than the law of gravitation can be repealed by simply stepping from a second-story window. In the Codes adopted by many of the States, however, as in the English Judicature Act of 1873, are provisions abolishing all forms of action, and prescribing that all causes of action, legal and equitable, shall be stated in the same style of composition; identical or similar provisions occur in the Practice Acts of some States.

"Whatever may be the merits of this experiment and of some others made by the Codes, the proposed emancipation from form has been found in practice necessarily subject to some limitations. In the first place, the abolition of distinctions in the manner of stating the various causes of action does not at all dispense with stating all the matter previously requisite to make a good declaration. If, for example, the pleader is di-
declaring for a trespass, he must include in his complaint an allegation of every fact which must be alleged in a common law declaration for an action of Trespass; so if the suit is for a conversion or a breach of contract, the plaintiff must show every circumstance which, by the substantive law applicable to such a case, is requisite to a recovery. The only practical relief afforded by the abolition of the actions seems to be that the pleader may exercise some liberty in his choice of literary style, and may, if he likes, put his statement into the aspect of an informal letter to the court.

"Again, the necessity of stating the facts required by the substantive law to warrant a recovery in the particular case implies the necessity of framing the case in conformity to some particular principle of that law. If, to this requirement be added the rule that the plaintiff must recover, if at all, in virtue of the legal proposition whereon he grounds his right—that is, according to his own theory of right as expressed in the structure of his case, and signified by the facts selected to compose his statement—the result is not far remote from the common law rule that the recovery had must be that warranted by the form of action chosen. Very likely, there was underlying the legislation of the Codes a purpose to abrogate this rule, and the intention or the hope that a man who shows a good ground of recovery should get a judgment without regard to his erroneous conception of the law or to other grounds of recovery with which he may have mixed his good ground in a confused narrative of his grievance; and some of the courts in the Code States occasionally use language which seems to bear that meaning. Indeed, from some of such expressions it might be inferred that a man may frame a case going on the law of contract and recover for a tort alleged as an incident of the transaction; and such may be the rule in certain jurisdictions.

"However, in most of the Code States, and in the more important ones, it has been found necessary to hold that a plaintiff must ground his right upon some certain principle of substantive law and recover by proving a case conforming to that principle, or not recover at all. In other words, the complaint must embody some definite theory of the plaintiff's right, and the evidence must establish his right in accordance with that theory. Thus, in a leading Code State, it has been
held that, if a trespass upon the plaintiff's land is alleged, and the cutting and conversion of timber laid by way of aggravation, he cannot recover upon proof that the timber was found elsewhere and there converted. So in New York, in a case where the plaintiff's goods had been wrongfully taken by several persons acting jointly, and he sued some of them ex contractu as upon an implied contract of sale, he was not permitted to maintain against another of them a subsequent action for conversion.

"In other jurisdictions where the forms of action are abolished the same principles appear to prevail. The adoption of the doctrine that there must be a theory of the case, definitely developed and consistently adhered to, both by the plaintiff in his proof and by the court in its adjudication, looks very like a revival of the formulary system: to say that a party must frame his case and choose his remedy with reference to one legal principle, and cannot recover upon another, is manifestly but a thinly disguised version of the common law rule that the correct form of action must be adopted. At any rate, the attempt to abolish distinctions between the actions has demonstrated that the forms are neither arbitrary, artificial nor accidental, but in the nature of things necessary and enduring." 39

The last paragraph is concluded with a quotation from MAITLAND, FORMS OF ACTION, 296, evidently referring to the results of the English legislation, as follows:

"The forms of action we have buried, but they still rule us from their graves."

39 CASES IN COMMON LAW PLEADING, 281-4. Instructive footnotes, citing authorities, have been omitted.