1-1-1962

Pleading #2

Maynard Jackson

#2

PLEADING

MAYNARD H. JACKSON, JR.

55¢

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Lapse of time is not a cond. precedent normally. (e.g., "w/in 30 days.")

G.S. 1-155 (re pleading in K actions) does not apply to happening-of-event type of cond., so P must allege and prove the facts of same and P's performance.

N.C. Rule — See 226 N.C. 667 - P must generally plead performance, and may plead the facts showing the performance.

The C.L. rule requires P to plead the FACTS showing performance and absent statute, C.L. prevails.

Fed. Rule 9(c) allows P to merely plead performance generally.

139 N.C. 457 - on D has prevented P from performance, cases have not considered it material variance on P pleads performance and proves prevention by D, but it is safer for P to plead prevention. 208 N.C. 49; 207 N.C. 300.

226 N.C. 303 - on paymt. is to be made out of a special fund, P must plead specifically. See this.

G.S. 1-155 - applies only to conds in K actions, not conds in tort or other actions.

(2.) CONDITIONS SUBSEQUENT - any cond. which could extinguish a duty of D to pay the P. Its failure of performance extinguishes liability of D to perform.

Rule of Construction ⊛ Gen. tendency of courts is to construe conds. as subsequent unless clearly shown otherwise.

Loss and filing of proofs of loss = conds. precedent to liability of ins. companies; but bringing suit w/in the time specified by the ins. K = a cond. subsequent.

Conds. subsequent are matters of defense to be pleaded and proved by D, and P need not anticipate defenses nor negative them by alleging performance.

Conds. precedent must be pleaded and proved by the P.

See 105 N.C. 175 - leading case.

(3.) Conds. Concurrent - on y are reciprocal performances in a bilateral K, they are in law conds. concurrent.

Either party may put the other in default by tender (offer) of performance, not necessarily perf. per se. So, tender of perform. is a cond. precedent wh must be pleaded and proved by P, and P, alleging

tender, must also allege that he was ready, willing and able to perform and still is at time of trial — and P must prove those factors. This is true in K cases. To merely make tender w/o ability to perform renders tender null and void.

Title Guaranty and Surety Co. v. Nichols (p. 263)
Employer had to inspect the books of the employee and that was a cond. subsequent.

Sustaining loss is always a cond. precedent to liability of an insurer.

Held, "if the K sued upon is subject to a cond. subsequent, ∴ is no occasion for any averment in respect to the cond. It is a matter of defense, which must come from (the D)."

Insurance Ks

In insurance Ks, P must allege performance of all conds. precedent, but D must plead nonperformance of specific conds. if he wishes, and then P must prove performance if he wishes to recover

✱ "The designation of the cond. as a cond. precedent does not necessarily vary the ct. procedure or the rules of evid. which places the burden of proving an affirmative defense upon the party making it, especially on the cond. relates to the conduct of the insured, subsequent to the accident maturing the liability. The rule applies to that which is affirmative

in substance and not necessarily in form.

Harty v. Eagle Indemnity Co. (p. 265)

P suing D - insurer on the judgment recovered against the insured.

Held, "one instituting an action upon an insurance policy is only obliged to allege in his complaint, in general terms, that the various conds. precedent stated in the policy have been fulfilled; that it is still incumbent upon D by way of SPECIAL DEFENSE to set up such failures to comply w/ such conds. as it proposes to claim; that the burden rests upon the P to prove compliance w/ the conds. so put in issue; but that, as to other conds. precedent, compliance is presumed w/o offer of proof by the P."

The universal rule, except in Louisiana, is that you must get an unsatisfied judgment v. the insured before you can sue the insurer on the judgment.

In the case here, the P was not obliged to offer proof of a compliance w/ the conds precedent in the absence of a special defense alleging a failure to do so.

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Ins. policy provides that if representations are false (229/305), then the whole policy shall be void, the D must plead the misrepresentations.

Conds. precedent ~~are~~ are not favored in the law; as the trend is to favor construction of conds. as subsequent.

In ins. actions under life ins., burden is on P to prove the death was accidental on the policy promises to pay for "accidental death." This specific cond. will be construed to be cond. precedent because it is narrow.

On the broad promise in life ins. policy is such as to pay "in case of death" (w/ certain exceptions), this will be construed as a cond. subsequent to be pleaded and proved by D - ins. co.

Conds. precedent to be pleaded by P:
(1.) Pymt. of prems.

226/1119

(2) Occurrence of loss.
(3) Due filing of proofs of loss.

See 212/638; 212/354; ⊛226/1119; ⊛212/516 (life ans.)

Conds. subseq. in Form and Precedent in Operation —

Gen. rule of procedure = P must allege D's promise specially and w/ particularity.

On action for br/narrow promise, add a part and parcel of D's promise appears to be subsequent in form but is, in reality, essentially precedent, the P must allege w/ particularity this cond.

Whether a cond. is pre. or subseq. = question of law in most cases.

Provisos — D has burden of proving existence of facts falling w/in proviso modifying D's promise (in ins. policy, e.g.). ⊛See 2 F. Supp. 222; 186 P. 2d 673. True altho' proviso is normally subsequent in form but precedent in operation.

But, gen., on the cond. is subseq. in form and pre. in operation, P must allege the facts and negative the operation of the exception in the policy.

See 97 N.C. 116; 132/760 = exception v. proviso.

Exception must be pleaded and negatived by P. Proviso is on D to plead and prove.

See Mac Intosh, p. 987 in vol. I re proviso v. exceptions.

A gen. denial is insuff to raise an issue in respect to conds. pre., since Rule 9(c) F.R.C.P. requires that a denial of performance of conds. precedent shall be made specifically and w/ particularity. Reynolds - Fitzgerald Inc. case (p. 267).

Reichold Chemicals Inc. v. Wells, (p. 267)

If the cond. is to be performed by a third party and not the P, or a party whom it represents, the complaint must state the facts = performance, as at C.L. This is per N.Y. (and N.C.) statute. These statutes are in derogation of the C.L. and, thus, strictly construed.

SEC. 3 THE DETAIL REQUIRED IN PLEADING

(A.) PURPOSES OF PLEADING

Humphreys v. Bethly (p. 269)

At C.L., this was a question of DUPLICITY, a defect of form. Could have been attacked at C.L. only by a special demurrer particularly alleging the specific duplicity.

Generally, if defects of form are not raised at outset, they are deemed waived.

at C.L., to file a general demurrer = waiver of defects of form.

Penal bill is for pymt. of forfeiture damages upon failure to make one installment (at C.L.).

P should have alleged failure of D to make a specific pymt.

* A demurrer will search the record, and tests sufi of all prior pleadings, and the party at the first defect in substance will cause that party to suffer the demurrer (at C.L.).

On this rule has not been changed by stat., it still stands today. But, as a practical matter today, there is not much chance to apply this rule because of few pleadings in most cases. However, still is a live question w/o statute (as in N.C.)

There was also question of "aider by answer."

ASSIGNMENT: See Macintosh re pleadings of answer, and what the compl. must contain.

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Aider by answer - the answer of D may cure a defect in (65/430) pleading in the complaint. This doctrine is universally recognized. Applies only to a defective stmt. of a good c/a or defense. See 82 Eng. Rep. 1046 - sued in tres. for taking a hook out & failed to allege that it was in the poss. of P when taken by D. D then justified taking the hook "out of the hands of the P." This cured the defect.

This doctrine extends beyond the stmt. of express admissions to include on the responding pleading recognizes the (179/301) merits

and responds to the merits and treats the defective pleading as if there were no omission.

Read v. Dawson (p. 270)

Repleader = granting (174 So. 731 at 735) new trial w/ leave to amend under modern pleading. Granted on the defect in form of pleading is so great that the issue cannot be ascertained or an issue is joined on an immaterial issue. Requires the parties to begin pleading at the stage of the defective pleading. See 185 N.Y. Supp. 945, 201 N.Y. Supp. 2d 201. The parties plead de novo. Granted on no valid judgment can be granted on the extant pleadings. 32 N.C. 543 - not granted on judgment has been passed on the merits or on the jury has passed on the immaterial issue. Not granted on the defect cannot be cured by amendment. See also

135 F. 2d 835

135 F. 2d 835.

Q. What is the consequence of mis-pleading? = Rarely fatal today.

Gen. defects of form ≠ ground for gen. demurrer or its equivalent (motion to dismiss).

If the pleading is somewhat too general as to be poor in form, but not poor or bad (G.S. 1-153) in substance, a motion would lie by the opposing party for a motion to make more definite and certain (universal).

Defects of Substance - in Code states, a demurrer must specify the ground upon which he relies. G.S. 1-127 - sets out the allowable grounds of demurrer. Most states (code) have specific grounds for demurrer and the one relied on by a demurring party must be specified.

Defect of substance may be cured by "aider by answer" or "aider by verdict" (I plead general answer and verdict supplies the defect; then I cannot take exception later on).

At C.L., it was no way to attack the pleadings at trial.

Today, a party may test the suff. of the pleadings even at trial by certain methods, eg. motion for judg. on the pleadings.

* On the compl. is so defective that it states no c/a, that pleading cannot be aided by verdict, and D can take advantage of this defect at any time, even upon appeal.

(B.) PURPOSES APPLIED: NEGLIGENCE AND SOME COMPARISONS
(1.) UNDER FACT PLEADING

Facts pleaded always presuppose the operation of some rule of law arising from those facts and the pleader is always alleging that the rule of law operates in his ~~pleader~~ favor.

Code pleading = fact pleading.

In every pleading is some underlying rule of law implied from the

facts.

A good pleading always contains the elements of a good syllogism: major premise (legal principle), minor premise (the operative facts), and the conclusion (the legal inference to be drawn from the legal principle as it related to the facts). A good pleading does not state, however, the legal principle as it is assumed the court knows the law.

If D can deny or refute any one of the essentials of P's pleading, P will fail on the whole. If the major premise is denied, a question of law is raised (by demurrer). Or, the D can deny the minor premise (the facts) and raise a fact. However, or both premises are admitted, the conclusion must inevitably follow UNLESS new matter or distinct collateral facts can be brought in. e.g., Affirmative defenses. Then, P could avoid (at C.L.) the affirm. defense. (Today,

the pleadings stop after the answer.

On both premises are not denied, the conclusion must follow unless I can show justification, excuse or mitigation.

Only material ultimate facts should be pleaded and not conclusions of law. See Clark on Code Pleading for distinction.

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Complaint:

(1.) The compl. must have a caption consisting of title to the action, county + state in which action is, names of parties, name of court. It is identified as a complaint.

(2.) Body - stmt. of the material ultimate facts upon which P bases his claim for relief. G.S. 1-122.

(3.) Prayer - if not appearing, how -

ever, the compl. would not be automatically defective.

4. Verification - in some cases. It is a stmt. under oath that the allegations in the pleading are true. This is different from the C. L. D's verification set out w/ new matter in D's plea.

Verification is sometimes required. Field Code required verification in all cases. But after 1859, the P was given the option of verifying the complaint subject to the D's demand for verification. This is the maj. rule in Code States today.

Three views:

1. Ver. required only in special pleadings. Ariz., Ind., Conn., Fed. Rule 11 [and 23(b), and 27(a)(b) [depositions], 65 and 66].

2. Ver. required in all pleadings except for a few specified instances set out by statute. Ky., old N.Y., Va.

3. [Ver. optional w/ pleader, and if any pleading is verified all others must be. Majority rule. G.S. 1-144 to -149. N.Y., N.C., S.C.

G.S. 1-144 to 1-149

(5) Subscription - every pleading must be signed (subscribed) by the party or his atty.

In Divorce actions, verification is always required and is a matter of substance wh goes to the juris of the court or absent.

Substantial compliance w/ verification stat is all that's required.

If not verified, any subsequent pleading need not be verified, and the judge cannot refuse to accept a non-verified pleading coming after a non-verified complaint.

In a proceeding (98-14 G.S.) to restore a lost instrument, and actions v. counties or municipalities (G.S. 153-64), ~~require~~ verification is required. See 229 N.C. 117.

G.S. 153-64
229/117

Re form of verification, see G.S. 1-145.

Ver. can be waived by failure to object timely.

or any time before filing a responsive pleading to the unverified pleading.

Party can swear to the best of his belief and knowledge.

Two cases or atty. can verify [redacted]:

(1.) Action is on an instrument and same is in personal poss. of the atty., or

(2.) On the material facts are w/in the personal knowledge of the atty.

Any officer, notary, etc., can take the verification.

Body of Complaint —

Every code state requires a plain and concise stmt. of the material facts = c/a excluding conclusions of law & stmts. of evidence.

Type of action and availability of facts to the pleader and other factors involved are factors wh make the above general rule of "plain and concise stmt. of facts etc." flexible.

A compl. wh states only conclusions of law & evid. stmts. ~~[illegible]~~ is defective

+ demurrable. But on P has pleaded the material facts and conclusions + evid. stmts. the latter two maybe disregarded and the compl. will still be good.

P should not plead rebuttals to anticipated defenses nor matters subject to judicial notice.

hypo: P alleges D violated sec. 20-138 of the driving code. — This would be a conclusion.

hypo: P alleges D was drunk and driving on wrong side of street when he struck P. — Material, ultimate facts.

hypo: P alleges that D drove his car after drinking 1 gal. of liquor at D.B.C. Inn. — That is evidentiary of drunkenness, but not the material fact of drunkenness.

Whether something is a material, ultimate fact or a conclusion of law depends on the

nature of the action. e.g., whether A & B are H + W can be a conclusion of law in a case on the issue is one of marriage, but same could be a material ultimate fact in a negl. action.

The distinction is one of degree, and the real question in these cases is how specific must the pleader be.

Clark puts the emphasis on fair notice and whether same is given by the pleader to the other party.

In negligence actions, there is a diff. of opinion re the amt. of specificity required.

* Negl. Actions: How much particularity is required? = N.C. requires high degree of particularity, and the specific facts are essential in the allegations.

Orig. view under Codes, fairly general statement of facts was allowed. Same at ~~only~~ C.L.

Fed. Rules don't require details.

Majority view says that P must state the conduct of D explicitly, and may state

231/71

impressions.

Re N.C. view, see (required reading) 231 N.C. 71 re Amt. of particularity.

Some states don't require as much specificity in wrongful death actions as in other negl. actions.

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Under the majority view, P must allege the specific facts of negligence but is also allowed to characterize the acts as negligent.

(p. 279) Kramer v. K.C. Power & Light Co.

Extremely strict view held that this was a defect that could not be corrected by a more definite and certain stmt. under Mo. stat., and was subject to collateral attack at any time even up thru appeal.

P was required to allege and prove that D was negligent in failing to drive the

steel step far enough into the utility pole. Failure to meet this by respect to the specific act of driving the step far enough into the pole = fatal defect. Ct said it, as alleged, was a legal conclusion and stated NO issue of fact.

G.S. 1-122(2) = "plain and concise statt. of the facts = a c/a."

Clark says "... a defectively alleged c/a can be cured by ader, but not the statt. of a defective c/a." Sometimes (when an essential element of a c/a is left out (e.g., breach of duty), Cts will deem that a statt. of a defective c/a. Or is a defective statt. of a good c/a, failure to ~~demur or~~ raise motion for a more definite and certain statt. ~~will~~ before answer will be deemed waived and defects will be cured. Here, most courts will refuse demurrers and motions to dismiss, but will grant timely motions to make more definite and certain.

Gabel v. Frantz (p. 282)

Judgment creditor assigned the note to P and had himself made administrator of the judgment debtor. Then the assignee sued his assignor as admr. of the estate. Here, now, one Pauline L. Frantz filed a petition to intervene, alleging that she was a C.L. wife of decedent and that she is a creditor of the estate. P alleges these pmts. were mere conclusions of law and not pmts. of fact. So, ct. found that tho' these were pmts. of conclusions of law, they were also pmts. of fact.

Q. In a K action, is the allegation that the K was made "for a valuable consideration" a mere conclusion of law? = (Note, on consid. is presumed, no need to allege it e.g., Action on a negotiable instrument. And, in N.Y. and Calif., on the K is written, no need to allege

q.s. 25-29 - U.N.I.A. (except. instances)

45/199

226/258
204/537 } Ks under seal = no consid. required

189/610

176/622*

consid.) The general rule (N.Y. and N.C. included) is that (176/622) a gen. allegation of consid. is okay. See note (B), p. 284 (T.I.). Read that case.

188/716 - on the motion. is made a part of the compl., need only say that "the K was made for a valuable consid." But see 176 N.C. 622.

Note D, (p. 284) - the rule appears to be well settled that, if P's ownership of the prop. is properly alleged, and ny is an averment that the D converted the same, a c/a is sufi stated. See 165/180; 190 N.C. 485; 171/1 (measure of damages).

Two Kinds of material facts:

(1.) Ultimate - should be pleaded

(2.) Probative - should NOT be pleaded, but should be brought out at trial to establish the ultimate facts.

Thomas v. Hunt Bros. (p. 285)

205/329

Allegation that P was involved in interstate commerce was held insufi. "Averments as to the exact nature of his employment

are, therefore, material since only from them can be drawn from the conclusion that he was or was not engaged in interstate commerce and, if, whether or not he can bring himself w/in the provisions of the Fair Labor Standards Act...."

Driefer v. Hershey Estates, Inc. (p. 288)
Represents the majority views. You must have some specificity.
N.C. requires much particularity.
P here failed to set out w/ sufficient particularity the nature of the negl. complained of and the injuries suffered.

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In a tort action, facts must be alleged w/ show the existence of a right - duty relationship, inter alia. A duty may arise out of C.L., K or statute.
N.C. - see 22 F. Supp. 518.
Tendency of fed. courts is to follow the procedure of the forum State re particularity. Also 249 N.C. 706 - motion

Robertson v. Nat Kaiser Sav. Co. (p. 291)
82 Ga. App. 416, 61 S.E. 2d 298 (1950)
Action by P v. D et al for injuries sustained by pedestrian when she tripped on iron grating in sidewalk on w/h realty owned by named D and leased to another abutted.
Superior Ct. sustained named D's demurrer to petition and upon P's refusal to amend, dismissed the

action + P brought error. On Appeal, Ct. of Appeals held that the petition did not state c/a, since in merely alleged that grating was constructed "for benefit of" D owner after term of tenancy began + did not allege that D owner had actual notice or knowledge of defective construction.

Pleadings in the disjunctive and alternative are construed most strongly against the pleader.

Church v. Adler, (1953) (p. 213) 350 Ill. App. 471, 113 N.E. 2d 327.

A pleading must contain allegations of fact sufficient to state a c/a. Verbosity and looseness of form are to be discouraged and in some cases may render the pleading fatally defective.

The stmt. of facts must NOT be so general as to admit of almost any proof to sustain it, but it is also a "familiar rule of pleading that forbids alleging the evidence." The two rules should be harmonized, and the two extremes which they respectively define should be avoided.

However the words "negligently and carelessly" may be classified when standing alone and out of context, they are not mere legal conclusions when

232/457

for injury to a drug store customer whose foot was caught in a scale. Complaint was generally worded: "dangerous and hazardous cond." So, the compl. was demurrable as being defective fatally. If some facts were alleged, but not too clearly, the compl. would not be demurrable but subject only to a motion to make more definite. Test: whether the complaint is sufficient to allow D to formulate an answer; fair notice.

N.C. has held that an answer by D waives all defects except fatal ones.

In a wrongful death action in N.C., more generality is allowed than in ord. negl. actions. And see also 232 N.C. 457.

Some types of actions permit general allegations depending on the theory of the action:

(1) Res ipsa loquitur actions - see note (c), p. 291. See 171/722 - N.C. says that it follows view #2. 222 N.C. 367, aff'd. 320 U.S. 476; 129 N.Y. Supp. 2d 719 in accord. On view #4, see 253 S.W. 2d 97 (Mo.). Re view #1 (the better but minority view) 175 A. 679 → Conn.; 193 S.W. 1053 (Tenn.): better view because R.I.L. is a rule of evidence, not of pleading.

N.C. does not follow its view in exploding bottle cases and

properly employed in context w/ allegations stating circumstances which they characterize.

A pleading is not argumentative simply because it makes allegations which the opposing party presumably intends to dispute. An allegation is objectionable in the pleading sense as "argumentative" or it does not state its "positions of fact in an absolute form but leaves them to be collected from inference and argument only."...

Sparks v. Chi. & E.I.R. Co. (1942), 42 F. Supp. 1019 (E.D. Ill.) (p. 300)

Passenger's (P) complaint alleging that common carrier (D) undertook to carry passenger safely and securely to her destination but failed to do so, and that the carrier so negligently and unskillfully conducted itself in managing its train w/in wh D was carried that the train collided violently w/ a truck at a street crossing causing serious injury to passenger, failed to state c/a, since the measure of responsibility imposed upon the carrier by the ~~contract~~ complaint was that of an insurer. A common carrier is not an "insurer" of the safety of its passengers. But, this cases on deleterious substances are found in bottled beverages. The view is applied in medical malpractice cases (219 N.C. 178) and "electric eye" door cases (21 N.C.L.R. 376). (Note 222 N.C. 616 — auto cases + res ipsa loquitur.) (Mrs. Dolman seems to stress this question of R.I.L. in pleading. Watch it!)

R.I.L. usually ltd. to cases of machines or apparatus under the control or right of control of the D.

* Robertson v. Nat. Kaiser Ins. Co. (p. 291) C.L. rule: construe the pleadings most strongly against the pleader. G.S. 1-151 — specifically provides that pleadings will be construed liberally against the pleader. This stat. changes the C.L. rule in N.C.

* Church v. Adler (p. 293) Ct. found this complaint did state a c/a.

* Read 38 Amer. B.A. Journal 123 in connection w/ Diogiardi v. Durning — a veiled attack on Clark.

alone would not justify dismissal: amendment would be appropriate but for the failure of P to allege freedom from contrib. negl.; a substantive requirement in Pa. Thus, for the latter reason, motion to dismiss granted. Porter v. Shoemaker, 6 F.R.D. 438 (M.D. Pa. 1947): Price Admin's complaint seeking treble damages for violation by D of price regs. by allegedly having sold and delivered w/in a specified period a specified no. of lbs. of turkey at overceiling prices alleged suff ultimate facts to enable D to make a denial of the charge or to admit it w/o necessity for a more definite complaint.

Complaint should set forth ultimate facts, but ordinary evidentiary facts which tend to prove ultimate facts have no place therein.

(A Bill of Particulars should be denied on information sought is peculiarly w/in the knowledge of the moving party.)

Under the Fed. Rules, the purpose of pleading is to give notice of what an adverse party may expect to meet and the broadening of the discovery rules and other pretrial procedure is designed to define the issues + obtain the facts. (p. 303)

* Pleadings under Fed. Rules: *

(1.) Complaint
(2.) Answer – and see 8(d).
(3.) Reply – by P only, and only on D counterclaims or on the ct. so orders. Otherwise, reply is subject to motion to strike.
(4.) Motions – applications to ct for orders. In writing, and (7(b)) must state w/ particularity the grounds and the relief sought + the order requested.
(a.) Motion to dismiss
(b.) Motion for judg. on pleadings (Rule 12(c))
(c.) J. N.o.v.
(d.) for D.V.
(e.) for more definite stmt.

Complaint – Fed. Rules use "claim" rather than c/a. Each claim for relief set forth in the complaint must have:
1. Short and plain stmt. of the grounds upon wh the ct's juris depends.
2. A short + plain stmt. of the claim showing that the pleader is entitled to relief.
3. Demand for judgment.
(Same requirements held for any claim (except #1), like

counterclaim, cross-claim, etc.

Relief can be prayed in the alternative or for several types of relief.

No Amt. of Ct's. juris. grounds need be made in any claim after the complaint except a permissive counterclaim.

In fed. cts. it has been held that a claim showing that P is entitled to relief" is not the same as the Code requirement of a plain and short stat. constituting a c/a.

Test: no justification for dismissal except on it appears to a certainty that under no state of facts which the scope of the pleading would the pleader be entitled to relief. See 108 F. 2d 302 at 306.

Test of failure to State a Claim for Relief.

108 F.2d 302 at 306

All fed. juris. is statutory.

Caveat: the approved forms of the Fed. Rules in the back of the pamphlet may not be adequate in some cases not precisely

c/in the facts of the given pleading. Moore, scholar on fed. cts., says that craftsmanship as it existed before the Fed. Rules will still be good after the adoption of the Rules.

See Rule 8(A, b, c, d., e, etc.) Deals w/ the complaint.

Claims should be separated, however, or same would facilitate a clear presentation. Same for defenses. Rule 10(b).

See 141 F.2d 226 at 228; 79 F. Supp. 1013 (1947)

If pleading is unverified, it is unnecessary to make allegations as to info. + belief because of the effect of the signing atty's. signature under the Fed. Rules.

Judgment shall be given (except default judg.) as justice requires even though such relief has not been pleaded.

Bill of Particulars has been abolished by the 1948 Amend. of the Fed. Rules, but it is available under most code.

Object of a Bill of Particulars:

(1.) Amplify pleadings.
(2.) To limit proof.
(3.) To prevent surprise.

The one seek a Bill/Par-
ticulars must set out
the necessity for one,
and if granted, it becomes
a part of the complaint
like an amendment.
See G.S. 1-150 for N.C.
The power of the ct. to
grant the motion for the
Bill/Par. is found in the
cts inherent power to
regulate trial.
The Bill/Par. becomes a
part of the compl. in
most states (N.C.), but
the compl. must state
a c/a nevertheless, and
matters of evid should not
be set out in the Bill/
Par.
See 56 S.E. 748 (Ga.) -
re use of Bill/Par.
Some cases say there is no
necessity for Bill/Par on
the facts are known or
are reas means of find-
ing out. But, most states
don't agree.
Bill/Par allowed freely.
See 101/661.
Failure to comply w/
ct. order to submit Bill/Par
= inability of such re-
fuser to give any proof on

any matter wh would have been in the Bill/Par. (i.e. any matter not in the compl.), but the mover may. Penal in nature. But, P may rebut.
44 S.E. 705 – in Va. + N.Y., motion for Bill of Particulars should be made before answer.

If compl. is verified, all subsequent pleadings must be verified, including the Bill/Par.
G.S. 15-143 – Bill/Par. also allowed in criminal actions.

If compl. is defective, the Bill/Par. cannot supply any deficiency. The compl. must be sufficient per se.

Assign. – Read Discovery + Adjudication w/o Trial.

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Re Bill of Particulars – 212/462 (*): held an application of parties for a Bill of Par. and motion for more def. & certain Amt. = matter of discretion, and should not be denied by the Judge as a matter of law. Such a ruling entitles the moving party to a reconsideration.

128 N.Y.S.2d 410 (1958)
128 N.Y.S.2d 428.

219/416 - see also.

See also 219 N.C. 416, Livingstone Case.

Motion to make more def. & certain refers to a defective stmt. and seeks an amendment. But, a Bill of Par. admits a good stmt. of the c/a, but just seeks more info. to allow better drafting of pleadings & the more and better preparation of case for trial

If the Bill of Par. is defective, the mover does not demur, but applies to court (see 117/330; 216/582) to have the Bill of Par. amended. 216/579 — allowal of amendment of Bill of Par. is w/in discretion of the trial judge. This amendment is like any other amendment and governed by the same rules of amendment.

The motion for Bill of Par. and " " " more def. and certain stmt. must be made "in apt time", i.e., before answer or demur

209/463 at 469

338 U.S. 384 (1949)

rer. However, since they are w/in discretion of court, the court MAY allow the motions at any time it deems appropriate. Minor defects in ~~the~~ a pleading may be disregarded.

Fed. Rule 10(b) - when a claim is based on more than one theory, separate counts are not required. But, separate paragraphing is desirable for the separate grounds; and some fed. cts. say it is required. See 338 U.S. 384 (1949).

Fed. Rule 12(e) - Motion for a more definite stmt. is ltd. to cases on the pleading to wh it is addressed ~~is~~ so vague and ambiguous that a response cannot reas. be expected to be drawn. Motion to strike applies on the pleading is on its face insuff.

So, since 12(e) does not specifically relate to 10(b), under 10(b) you would have to "move for separate statements."

Porter v. Shoemaker (p. 353)

Motions under 12(e) and 12(f) are directed only to the form of the complaint or other pleading, and are regarded unfavorably because of great liberality of construction given to Rule 8(e).

On the motions (or any one of the above) are granted, P will always be given leave to amend.

The motions under 12(b) are favored because of the avowed purpose of the Fed. Rules as stated in Fed. Rule 1.

A granting of any one of these 7 (seven) may result in final adjudication, i.e., dismissal.

No Bill of Particulars under the Fed. rules!!

Watch out for this on exam.

Beware of possibility of drafting of complaint on the exam. No mention was made of this, but it may come

(3) Shall The Pendulum Swing Again?

Dioguardi v. Diering (p. 307)

T. I. case. D = Customs officer who sold illegal goods, taken at customs, in an auction as per fed. law. P = bidder at the auction and the one from whom the "spirited tonics" had originally been taken.

Judgment was finally given for D after many appeals on procedure and many remands.

This case shows how liberally fed. cts. construe the fed. rule re "short & plain stmt. of the claim entitling the party to relief."

Assign. — Section (c), p. 316, et seq. What are the common counts and are they available under Code pleading?

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(c) PURPOSES APPLIED: SOME SPECIAL CASES

(1.) CONTRACTS

Riley v. White (p. 216)

Did P's compl. state a c/a in K in count II?

Ct. held that the compl. stated a c/a in K in Count 1, and that that was sufi.

This P pleaded the legal effect of the K, one method that can be used. In K, need only really allege right, duty and breach, supplemented by a prayer for damages.

In K actions, nominal dams. may always be recovered even tho' the measure of dams. may be erroneous & such though no other types of dams. are pleaded.

C.L. Rule – acts constituting the breach must be alleged explicitly.

Note (C), p. 323 – what are the common counts? (Mrs. Dedmond discussed C.L. forms of K action: gen. and special assumpsit.) Gen. assumpsit is divided into different types of actions, and they are the common counts.

The whole field of Gen. Assumpsit has come to be called Restitution or unjust enrichment.

Assumpsit

(1.) Special

(2.) General - on an obligation implied by law as the consideration is executed.

(A.) Indebitatus:

(1.) Money counts
- a. Money had & rec'd.
- b. Money lent.
- c. Money for the use & benefit of another.

(2.) Other counts
- a. For use and occupation.
- b. For Board & lodging.
- c. For goods sold & delivered.
- d. For goods bargained & sold.
- e. For work, labor & materials.

(B.) Quantum meruit (for services rendered).

(C) Quantum valebat (for goods delivered).

In the Indebitatus counts, action could not be maintained in the absence of alleging a promise to pay. In the quantum counts it need have been no allegation of a promise to pay. Some States still follow this.

The way of alleging common counts:

(1.) D requested the goods or services
(2.) P complied.
(3.) Services or goods were reas. worth the $ paid.
(4.) D promised to pay the reas.

value of the goods or services. (The majority of juris. still require this.)

(5.) D failed to pay, i.e., breach. This mode is recognized under the Codes (N.C.).

Covenant was a C.L. form of K action on Ks under seal and specialities (bonds etc.).

Re quantum meruit — 228/540. Jamerson Case — P alleged that deceased would will all of his property to P if P and his wife would live w/ the deceased and care for him. P complied for 6 years and then deceased died. — Re lower court granted judgment for P on K; but on appeal, it was remanded for consideration on the quantum meruit theory. P recovered on that theory

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If P seeks to recover on an implied K, P must allege the facts from wh the K can be implied. Not necessary nor proper under Codes to plead a promise of the D when seeking to recover on implied K. At C.L., you had to allege a promise of D even on implied K.

Usually no election between ~~express~~ actual and implied K. (But see nimes N.C. case last bounded out.).

But, in N.C., if ∃ is an express K, recovery must be had on same. But, if the express K has been breached, recovery may be allowed on the implied K. The better way is to state 2 or more (82/252) counts, but you can get away (117/142) w/ pleading so generally that either theory would apply. See 107/721 — waive tort & sue in assumpsit. Ct. will choose (159/306) one of the other to sustain jurisdiction.

Tort judgments are given priority over other claims v. a judg. debtor. This induces

228/540

some parties to choose tort rather than K on same (choice) can be made.

204 N.C. 747 - although the gen. rule is that an oral K for the conveyance of land is w/in the S/F, this case and a few others say this K would not be unenforceable.

82/252

Gen. Rule - And see 82 N.C. 252 - P will not be denied relief on the facts show that P is entitled to relief (205 N.C. 243 - leading case) based on quantum meruit (196/397) for services rendered. Failure to prove the K does not preclude recovery on quatum meruit on the facts show P to be entitled to recovery. — Some cases say both theories may be submitted to the jury alternatively. Contra: 182 N.C. 563 - election is required. May be distinguished because suit was brought before the alleged promisor of land in return for care in old age had died. And see 219 N.C. 755

182/563

219/755

All factors of quantum meruit should be alleged.

In the absence of facts showing the contrary, it is a presumption that the receiver of services intends to pay. This inference is rebutted in situations of ties of blood and family situations. inference of gratuitous services here.

See 229 N.C. 561, Hawkins v. Dallas; 185 N.C. 479, 32 A.L.R. 196 (noted); 170 N.C. 463 (on P has breached K and now sues in quantum meruit — allowed.)

* See 26 N.C.L.R. 417.

(2) DAMAGES

Types:

1. Compensatory — return-to-status-quo damages.
2. Punitive or Exemplary — designed to punish and deter others. w/in discretion of jury and judge may set these aside if they are disproportionate. Only awarded along w/ compensatory dams even if only nominal. Only in tort actions except in cases (126/100) of br/promise to marry. 11 N.C.L.R. 160. Complaint

must show aggravating circumstances (e.g. ACTUAL malice, recklessness or wilfull conduct). Financial cond. of D but not P may be showed and pleaded. See 216/282.

Comp. dams. are a matter of right. Punitive dams. are awarded as a matter of Policy.

165 N.C. 58 – Def. of dams.

Actual dams. —

(1.) General dams. — those which the law implies or presumes to flow necessarily from the wrong complained of or the specific injuries alleged.

Universally covers mental and physical injuries. Need not be set out w/ particularity.

(2.) Special dams. — those which flow naturally but not necessarily. e.g. loss of profits. Must be pleaded w/

particularity because surprise to D should and must be avoided.

Gen. dams:
(1.) Pain + suffering
(2.) Loss of wages
(3.) Loss of future earnings — some diversity of opinion here.

Special dams. —
(1.) Doctor bills
(2.) Hospital bills
(3.) Loss of profits.

two types of cases on the term "special dams." is a term of art:
(1.) Defamation
(2.) Public nuisance.
In these two cases, special dams. is a sine qua non of recovery.

Measure of dams. in K —
Hadley v. Baxendale (N.C. + vast majority) rule prevails. Dams. must be foreseeable and must have been in the contemplation of the parties." Not required in tort actions for all dams. are recoverable subject only to

limitations of remoteness.

Action is grounded on tort theory but based on K, the rule of K re "contemplation" will prevail.

And see * 140 N.C. 140.

C.C. Action of dams. can be maintained even tho' no substantial dams. resulted and even if the tres. was to P's benefit. Nature + extent of dams. not T.I.

Special dams. (215/427) mean Actual dams. and must show this in defamation. And, in public nuisance cases, ~~pl~~ must show that he actually suffered special dams. as an indiv., not merely as a member of the public.

Double + Treble dams. should be specifically pleaded or same are allowed.

174 N.C. 719 — N.C. fairly liberal in allowing generally proof of dams, alleged.

Assign. – Read remainder of sec. A up to p. 352.

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Hobbs v. Carolina Coca-Cola Bottling Co. p. 326
Ou P had not pleaded special dams., evid. of sp. dams. was inadmissable. P had not alleged that his biz had suffered, so evid. of same was not allowed.

Varley v. Neatyl p. 328
Re aggravation by injury of a pre-existing cond. Ord., this is okay so long as same is pleaded.
Ct. held this = sufficient notice that P's heart was further injured by pleading it "affected and injured his heart" even though P said nothing of a PRE-EXISTING cond.

(2) Re DAMAGES, see 31 N.C.L.R. 249 (Brandeis). — Read This. There is usually a question on the bar exam on damages.
233/637 – loss of profits.
235/281 – re pleading dams. for mental anguish b/c injury was to land rather than to an individual. D carried away flowers from grave of wife: tres. ¶CF.

31 N.C.L.R. 249 – Brandeis Re Damages.

233/607

This was allowed even though unaccompanied by any phy. injury to P!! Cts. are sharply divided on this.
233 N.C. 607 - re dams. for living expenses.
224 N.C. 821 - dams. in nat'l by H & W for personal injuries.
112 F. Supp. 114 - aff'd. 208 F. 2d 280 - personal injuries and wrongful death actions.
292 N.Y. Supp 662; 234 N.Y. Supp. 337(?) — require special pleadings of dams.

(3) Fraud and Related Allegations

The same rules govern pleading in a reply as in a complaint.

Fiduciary rel. or confidential rel. should be specifically pleaded.

On a claim or defense is based on fraud, mis-rep., mistake or undue influence, same must be (241/109) alleged specifically. Same for duress. See 107/731.
All essential elements of fraud must be alleged (218/560) even tho' the

word "fraud" never appears.

Requirements of pleading fraud:
1. Rep.
2. False rep.
3. Scienter (knew it was false or rep. in not knowing)
4. Intent to deceive.
5. Reas. relied upon.
6. Caused injury.
7. Damages.
See 237/97 (1952); 199/242 - distinguishes fraud & mistake.

Constructive (in law) fraud:
1. Must allege rel. of the parties.
2. Dealings of the parties.
Then fraud will be presumed. See 190/268.

Re fraudulent conveyances:
1. Must allege conveyance
2. Fraudulent intent or the facts showing same.
See N.C.G.S. 39-15 & 39-17. See 132/730.

e.g., assignee form he did not intend to assign due to the fraud.

Fraud in fact = void transaction. Relief in law.
Fraud in inducement (collateral fraud) - voidable transaction

and relief in Equity. e.g., signed intended form but was fraudulently induced to so do. See 218/560. 217/437, Hill v. Snider.

Even under Fed. Rule 9(b), fraud must be alleged w/ particularity (mistake and cond. of mind, too.). Reason: approaches criminal charge. Impugns character of D.

Same requirement applies to libel and slander.

(D) Excessive Detail

Buckley v. Altheimer 1.334

The motion to strike the complaint was allowed for failure to state briefly and plainly the claim of P notwithstanding Rule 9(b) because this was too much particularity. There were about 300 pages (typed) to the complaint.

Defamatory matter can be stated in the complaint generally. Also, good character of D can be put

need not be pleaded. The defamatory matter should be set out in haec verba, verbatim. See 93/10; 128/402.

On the defamatory words are not so per se, must allege that D intended the remark w/ malice to be defamatory and that the person(s) to whom the words were communicated understood or took the words as defamatory. This is libel per quod. P must allege damages. and may recover actual and special damages. Omission of allegation of special dams. renders the pleading fatally defective.

In libel per se, need not plead special dams.

See re newspapers, G.S. 99-1 thru 99-3 - P must give 5 days written notice to paper (to allow retraction). Must plead giving of notice to D- newspaper.

Bar Exam question:
Hypo: P v. D alleging libellous

161/201

99-1 thru 99-3

Retraction will serve only to mitigate the damages.

212/780

conversation. — If libel per quod, must plead malice and special damages. If libel per se need not plead either, but must set out in either case the allegable slanderous words in hac verba.

Jeanne's birthday. 10 JAN. 63

THE ANSWER

Atty for D should ask himself several questions:

1. What allegations is my client prepared to admit — answer will simply admit or say nothing (every material allegation not denied is deemed admitted).

2. What allegations D is prepared to deny. ⊛ See G.S. 1-135

3. Are any new or unmentioned matters which should be brought up.

G.S.
1-124 to
1-126
1-134.1 to
1-139 (esp. 1-135)

(E.) THE Detail Required of a Denial; the Need for a Reply

Denials:

1. General — controverts several or all allegations of compl.

2. Special — controverts only a particular allegation, and used mainly to con-

traverst an allegation wh) denies partly true and partly false. (Note: Usually each allegation is in a separate paragraph wh is numbered.)

Form of denials:
1. Absolute
2. Upon info. or belief.
3. Any knowledge or info. suff to form a belief re the truth of the allegation.

Any allegation wh is unqualified is deemed by law to be upon info. and belief (risk of perjury if false).

General Denial —
Usually permitted under Codes w provision that same is not proper if the compl. is verified or contains allegations re capacity of P to sue.
A qualified gen. denial denies generally but includes some part of the compl. as admitted spec.

Usual code provision is that a denial must deny gen. or specifically. F.C. has same provision, but

has interpreted it to mean that all denials must be specific, that a gen. denial must deny each paragraph of the compl. specifically. 71 N.C. 440; 76/28; 106/461. This reps. min. view under code as to what = gen. denial. The stat. is G.S. 1-135.

4 are improper forms of denial (purpose of denial = develop. of issues of fact):

1. Denial of each and every "material" allegation: makes court guess wh allegations D deems "material".

2. Negative pregnant - a denial pregnant w/ an admission or the proof of a part of the allegation. Usually occurs on D substitutes word "denies" for "alleges" in a haec verba repetition of P's allegation. E.g., "D denies that on Jan. 1, 1962, D hit P with stick." = implication that D hit P but not on Jan. 1. i.e., Court would deem this an admission

of the material allegations, and a denial only of the immaterial allegations. See 47 P. 2d 491 (1945) wh is contra to case on p. 338 of cbk. — Much author. advocating doing away w/ penalties for negative pregnants.

If D says, "D denies each and every allegation of paragraph 3 of P's compl.", that O.K.

A neg. preg. w/ an admission may be defined as that form of denial wh involves an affirmative implication favorable to the adversary.

Implication is that D may have Know. or info. to form belief of some or one of the allegations. This means that "each and every" is equated w/ "all."

3. Denial of know. or info. suff. to form a belief" as to each and every alleg. of the compl." Also a neg. pregnant.

4. Argumentative denial — stating another version of the facts that impliedly negates the allegation. See 187 N.C. 252.

United States v. Long

Re use of gen. denial in fed. cts. Rule 8(b) allows a general denial. Is a gen. denial of the entire compl. in one sentence permitted? Yes, but D must instead, in good faith, to deny ALL allegations. Rule 11 relates to atty's. certification of the

pleading. — But, it is a rare case on a true gen. denial can be made. Still would be a gen. denial if a couple or three paragraphs are admitted but the rest of the compl. is denied. Gen. denial governs what evid. would admissible. See Allery v. Sd., p. 346.

REPLY —

C.C.P. 1-159 - not necessary to file reply: An allegation of new matter not constituting a CC is deemed denied. — That's the usual Code provision.

What is "new matter amounting to a CC"? i.e., Suppose the new matter in the answer is not designated as such? Under Fed. rules 7(a) no reply necessary unless the CC is designated as such. If it is, a reply must be made.

When I pleads stat./lims., may be advisable to plead

new matter (Sec 145/254) in avoidance via reply.

If D pleads contrib. negl., P may want to take advantage of the "last clear chance" doctrine, but P need not reply because law would deem plea of C/N denied. N.C. requires that "last clear chance" must be raised in the pleadings in order for evid. to be allowed on it.

164 P. 398
215 F. 2d 65 (1954)

4 elements of "L.C.C."

1. P could not by exer. of reas. care escape from peril in wh he had ~~not~~ negl. placed himself.

2. D knew ~~of~~ could have known of ~~this~~.

3. D had time and means to avoid injury to P after discovery of P's peril and P's inability to escape.

4. D negl. failed to use the time and means to avoid inflicting injury.

See 33 N.C.L.R. 301 on pleading "L.C.C."; and 33 N.C.L.R. p. 138 re substan. law of "L.C.C."

The modern trend is that P MUST plead L.C.C. if he wishes any evid. to be ad-

mitted on L.C.C.
Danger of pleading L.C.C. in compl = anticipating defense & D. not allowed to anticipate in some states.
Some states dont require P to plead L.C.C. because it impliedly admits negl.

Assign. - Discovery. Read Hickman v. Taylor esp.

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✳ DISCOVERY: DEVICES AND PROCEDURE

Developed primarily in Equity. The pleading stage is over and the issues are formed and case is ready for trial.

Examination Before Trial — hyp: P v. D Corp. for machinery sold and delivered (K action). D's answer denies all material allegs. of P's compl. and specifically denies some parts, and a CC alleging br/warranty by P. P then replies denying the allegations of D's CC.
Although the burden of

proof re non-pymt by D is motion P, P may want to intro. some evid. on this matter.

Reasons for Depositions:
(1.) Essential witnesses may not be available by time of trial.
(2.) Each atty. can use these to assess hostile witnesses.
(3.) May obviate necessity for calling distant wits. at trial.
(4.) May reveal strengths & weaknesses of respective cases.
(5.) May furnish basis for motion for summary judg.

Two classes of person whose deps. may be taken after close of pleadings:
(1.) Parties.
(2.) Witnesses other than parties.

Examination of Parties -
Must show that the testimony sought is material and necessary in the prosecution or defense of the action. Even then, ct. has broad discretion to refuse deps. if justice would not be subserved.
"Party" — orig. owner of claim; corp., unincorp. assn., officers, directors, agents and Exes of such corp. Mere interest

would not make one a party. e.g., An undisclosed principal cannot be examined in an action brought by the agent in his own name. 106 N.Y. Supp. 827.
Past ~~ees~~ of corp., etc., cannot be deemed parties on that (217/19) basis alone.
Municipal corps. maybe examined.
D can compel P to submit to a phy. exam.
Blood grouping tests may be required in paternity cases.

Witnesses —
(1.) Testimony must be material (logically relevant to the issues and admissible under rules of evid) and necessary (needful).
(2.) Witness must be...
a. About to depart from the state, or
b. Be w/o the state, or
c. Reside more than 100 miles away, or
d. So sick and infirmed that it is reas. that he will be unable to attend the trial.

This "examination before trial" is not the same as a pre-trial conference which comes later.

— Under the Fed. Rules —
Ten (10) states have adopted the Fed. Rules in toto.
Major types:
(1.) Depositions - Rule 26
a. On oral or written interrs.
(2.) Interrogatories
(3.) Production & inspec. of documents.
(4.) Demand for phy. exam.
(5.) Requests for admissions — stipulations.

Cannot get privileged matter as answers. See Rule 30.

Rule 26 — very broad. See last sentence of 26(b): most states don't follow this part.

Fed. → Deps. may be used for purposes:
(1.) To impeach testimony of deponent.
(2.) Dep. of a party may be used by an adverse party for any purpose.
(3.) Dep. of wit. may be used for any purpose if the court

makes certain prelim. findings. (true universally)
(a.) Death
(b.) Inconvenience
(c.) Unavailability.
(d.) Other justifying circumstances.

(4.) Introduction of part of a dep. may open the door to all of that deposition at demand of adversary.

Objections to deps. maybe made when dep. is offered into evid. unless failure to object at time of taking the dep. (Rule 32(c)) constitutes waiver.

Intro. of any part of a dep. for any purpose other than for the contradiction and impeachment, makes the deponent that party's witness. This does not apply to the use of dep. of adverse party or his depts. Rule 26(d)(2).

Refusal to give deps. when so ordered — contempt.

Hickman v. Taylor (p. 359)

Is any atty. a "party"? Rule 33 relates to parties and their agents if the party is a corp.

Court held that atty. – client communications are not the subject of discovery "in the absence of a showing of good cause." This last phrase has caused the bar much concern.

The Hickman rule of non-disclosure does not cover crew reports of accidents made routinely at the end of a run by a carrier, nor reports of witnesses made after an accident. Reasons: inequalities of investigating facilities are eliminated.

Two tests were formulated by the court.

Outside Readings

Stansbury on Evid., sec. 18 – re deps. of N.C. parties.

G.S. 8-89 et seq. – production of documents.

G.S. 1-568.1 to 1-568.27 – pre-trial exam.

29 N.C.L.R. 373

*See 240 N.C. 533 – Read: leading case Assign. – Adjudication w/o Trial

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(Pick up mimeographed case on "demurrer.")

Under "Hickman Rule", data supplied by experts hired by a party is not protected.

Materials prepared by trial counsel — not protected from deps. except on prepared as an adverse trial counsel.

Good cause must be shown under "Hickman," and ct. found none. Fed. cts. have not worked out def. of "good cause."

Fed. Written Interrs. See the Fed. rules generally on written interrogs. — to parties or to witnesses. Usually answered by atty. for the party. Widely used in civil rights cases. Have can be inexpensive compared to oral exam.

Disadvantages of written interrogs. —

1. On facts are complicated.
2. On facts can be qualified.

On oral exam., the party or wit. answers himself. But, W. Interrogs are good:

1. On the party or wit is inconveniently located
2. Because they take less time to prepare.

Fed. Rules Production of Documents — Fed. Rules 34 and 45 - 34 requires motion, but 45 only requires subpoena duces tecum and requires (maybe) motion to vacate by party to whom deps. are addressed.

Fed. Requests for Admissions — Rule 36 — will be admitted if not denied w/in not less than 10 days after service.

Fed. Requests for Order for Phy. + Ment. Exam — Rule 35

1. Supported by motion
2. Upon showing of good cause.
3. Discretionary w/ court.
4. Ct. may appoint doctor.
5. P may request copy of doctor's report, but that = (9 F.R.D. 58 D.C. of D.C. 1949) waiver of any other exam of P.

Effect of Refusal to Make Discovery Rule 37

1. Seeker may apply for order

to compel answer. If ct. finds
y was not justification
for refusal, ct may grant
Motion + costs of all
this sequence would be
On refuser.
or 2. Contempt, or
3. Ct. may make such
orders re the refusal
as may be just, e.g., (see
Rule 37 (b)(2)(i, ii, et seq.),

DISCOVERY IN NORTH CAROLINA
Very broad but not fully
used by lawyers.

DEVICES:
1. Exam. of Adverse Parties—
(oral) G.S. 1-568.1 to 1-568.
27. Permits these exams.
to get info TO DRAFT
PLEADINGS OR TO GET EVID.
(On Bar Exam re pleadings.)
Application must be accompanied
by affidavit showing:
A. Commencement of action
and purpose of action.
B. Info necessary to draft
pleadings.
C. That info. is not other-
wise available.
D. If the proposed wit. is
not a party, he is one
for whose benefit the

action is being defended or prosecuted.
E. In good faith.
F. Ou to be held & reason for choice of location.
Dem, ct can appt. (1-568.10) commiss. & set time & place: usually cty of residence of examinee or, if agent of corp., ou home office, principal place of bus, place of residence of ou agent usually performs his duties for corp.; or ct may appoint another place when deemed appropriate; or parties can agree to any place.
After filing of pleadings, either party may examine as of right (after both have filed pleadings).
Examinee's objections, exceptions and motions are noted in the exam record, and objections (1-568.23) etc. to competency of wit. or evid. are waived unless ↓ taken. Objections re form are waived unless taken at exam.
Scope of exam (1-568.10) ltd. by order setting up exam.

See also 211/664 - exam as of right; 230/748.

2. G.S. 1-568.17 - On written interrogs. (Exam. of adverse parties on ....)
G.S. 1-568.18 & .19 - consequences of refusal to answer or appear: contempt, or other ~~fine~~ order the Ct. may deem just. Like Fed Rule 37.

3. G.S. 8-71 to 8-78 - Depositions. 8-83 re use for evidence.

4. G.S. 8-89 - Inspection of Writings. G.S. 8-90 - production of writings in Ct. G.S. 8-91 - demands for admissions of genuineness.

Effect of these two (2) cases is that a P will usually agree on phy. exam by one acceptable to both sides.

No stat. re phy. exam of P (*190/449; *195/757), but left up to discretion of court.

Assignment
1-127, 1-131, 1123 - re use

Mimeographed material handed out.

ADJUDICATION W/o TRIAL

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MOTIONS BEFORE TRIAL

After a pleading is served on the opposing atty, he will look for defects.
Defects:
1. Minor – merely to be corrected.
2. Major – may result in judg. for the served party right away.
Since both are questions of law, they may be decided w/o trial.

Motions:
(1.) Corrective (or Regulatory) – minor defects.
(a.) Motion to Separately State and Number – results in amendment of the defective pleading (true of all corrective motions).
(b.) Motion to make more Definite and Certain – reaches form of stmt. of claim or defense G.S. 1-153.
(c.) Motion To Strike Out Unnecessary and Improper Matter – G.S. 1-126: Sham and irrelevant

~~factual~~ allegations and defenses. e.g. "To allegation of P's compl. is true," so says D's answer. = Sham. Also, redundancy. *Must be made before answer, demurrer or before responsive pleading. G.S. 1-219: frivolous pleading (may be fatally defective) on its face; patently w/o foundation. Irrelevant = w/o substantial (226/732) connection. G.S. 1-153. When timely made, it is of right. 231/155; 29 N.C.L.R. 3 at 29. *236/299; *233 N.C. 472 (Bar exam); 171/209; scandalous matter: 88 N.C. 156. If " " is relevant, ≠ defect subject to motion to strike.

(Bar exam) *No single test of irrelevancy in N.C. There are two definite views: 203/514 (said competency of matter at hearing = irrelevancy.) —

(1) This is the "No Charting" Rule.

205/599 — "No Charting" Rule: against attempting to chart the course of the trial. See also 207/237; 209/746. This

view results in offen-
ance in trial cts. ruling
w/o ruling on cor-
rectness.

(2) 214 N.C. 38 - Second View
The test will be the
competency of the matter
if it were intro. at
trial.

N.C. tried to reconcile
these views: 221 N.C.
292 - "Purpose of the
Allegation" Test. Court here
allowed allegations that
would have been incom-
petent if offered into evid.
- Sup. Ct. of N.C. distin-
guished evidentiary rele-
vancy and pleading rele-
vancy. - But, N.C. still re-
mains almost equally
divided. See 29 N.C.L.R. 3
at 13.

In some states, motion
to strike the whole plead-
ing may be made, but
very unusual in N.C.
169/235. In N.C., its treated
as a demurrer. 226/332;
225 N.C. 189.

G.S. 1-277 - review
immediately of decision on
motion to strike made as
of right.

221/292

169/235
226/332
225/189

(d.) Motion to treat the pleading as a nullity because of sham.
(e.) Motion to drop parties.

(2.) Motions in Point of law
(a.) Mot. for Judgt on the Complaint – D may move for judg. by dismissing the whole compl. or any part of it on it appearing patently that it lacks juris. of parties, Action, or that P has no standing to sue, etc. = equivalent to demurrer in N.C. because this motion is not used in N.C. but is used in N.Y.

(b.) Motion for Judg. on the Compl. and Affadavits – not found in N.C. like the above motion but D supports his motion w/ affadavit because the defect does not appear on the face of the pleading. (Note: N.C. does not allow S/L to be raised by demurrer or motion.) In N.Y. and fed. cts. and several other cts.

(c.) Plaintiff's Motion for Judg. On the Answer – defect must appear on the

face of the answer.

(d.) P's motion for judgment on the Answer and affidavits.

(e.) Motion for judgment on the Reply — made by D.

(f.) Motion for Judgment on the Pleadings — found everywhere — and N.C.! (ha.) This comes after close of the pleadings. Raises issue of law like demurrer, but is broader. Seeks immediate FINAL judgment whereas demurrer can be intermediate and not final. Leading case: Ericson v. Starling, 235 N.C. 643 (1952). A demurrer is rarely final. Are the demurrer and Mot. for J. on the pl. incompatible? See Ericson case supra. An appeal (125/175) lies from granting the motion, but not from denial (that would = interlocutory appeal which is gen. not allowed). So on denied, party can take exception.

Ericson v. Starling
235/643 (1952)

See fed. Rule on Summary judg.

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DEMURRER

D can respond to compl. by:
(1.) Answer
(2.) Objecting to form or legal substance of c/a by:
  (a.) Demurrer
  (b.) 1-136, 1-134.1, 1-150, 1-153
  1-219 — Motion. 1-577 to
  1-592 (motions & notices).

Code provisions for demurrers:
(1.) To complaint — (1-124)

Grounds for demurrers:
see 12 (b) of Fed. Rules for usual grounds.
(2.) To Answer (by P) — to whole or any part. G.S. 1-140 & 1-141.
(3.) To Reply (by D) — G.S. 1-142.

A demurrer is a formal method of objecting and it tests (190/389) the sufficiency of the pleading by admitting truth of all allegations. Raises ? of law.

Dem. delays action except on result is dismissal in 4 cases:
1. No juris.
2. No c/a.
3. Pending action.
4. Misjoinder of parties & causes.

Bar Exam (44/549)

Ruling on Dem. is rarely final. 5 days allowed P to amend after filing of dem. and before disposition of demurrer. Parties can agree when dem. hearing will be held.

If dem. is sustained, P allowed 30 days to amend. If he stands on his compl. & does not amend, at c.l. = res judicata because it was deemed final. But, today, if P does not amend w/in 30 days & stands on the pleading, a final judg. will be entered sustaining the demurrer. P can then appeal. If affirmed, P can start "new action" w/in one year. If overruled, D then must plead again by filing an answer.

Demurrer considered a pleading.

If dem. is overruled, D cannot appeal then except on demurrer was on ground of misjoinder of parties and causes/a. Otherwise, D can only take exception. However, even on D cannot ord. take

immediate appeal if he feels a substantial right will be PREJUDICED he may seek by petition a writ of CERTIORARI (not an appeal because it is addressed to discretion of the court).

No appeal from interlocutory orders except in some few exceptional cases.

If the cause for demurrer does not appear on the face of (G.S. 1-133, 1-134.1, 220/393) the complaint, objecting must be by answer ~~or motion~~.

All causes for demurrer are waived unless objected to in apt time except:
(1.) juris. of subject matter.
(2.) failure to state c/a.

If cause for dem. appears on face of compl., objecting must be made by demurrer. 165/600; 154/441.

165/600, 154/441

On prisone c/a ← Cannot demur & answer at same time. 224/602. Exception: Ill. by statute.

If both are filed, answer will overrule dem.

If, having (85/105) answered, D wants to demur, he should seek leave of court to withdraw answer!

12 (b) F.R.C.P. = 9.5-1-1341.

On defect of juris. over person or prop. appears on face of compl., demurrer may be taken.

At C.L., two types:

(1.) Gen.
(2.) Special - defects of form only, & set forth special reasons.

Under Codes, every demurrer must be for a specific cause except a few codes. Dem. must (1-128) specify grounds or it will be disregarded.

If cy are several c/a in compl., may demur to one or more and answer one or more AT THE SAME TIME.

Hypo: P & B as admr of C's estate to recover on K (implied) for services rendered by P's deceased, C. B answered & denied allegations by several specific paragraphs, some of wh set up new matter. P demurred: no c/a.

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Dem. sustained; D appealed. Rosd. on appeal:
(1.) Dem. failed to specify grounds for demurrer. Must state why no c/a was stated by the facts.
(2.) Cannot demur to a part of a c/a. Must demur (233/362) to the whole.
* So, in N.C., all demurrers are special.

Only applies in two cases:
(1.) lack of subj. matter juris.
(2.) Failure to state a c/a.
Like all demurrers, must have grounds that appear on face of the pleading to which dem. is made.

Demurrer Ore Tenus — when D assigned formal demurrer, or when no formal demurrer has been filed, oral demurrer may be made, too. May be taken at any time, even in Sup. Ct. on appeal. Equivalent to a motion. Must make particular grounds known here, too. 235/300; 154/674.

Speaking Demurrer — bad & not permitted. This states facts, as the ground of objection, that do not appear on the face of the pleading. Should be done by answer. 254/624.

No dem. under fed. rules,

but fed. rules = motions to dismiss and for S.J. 252 F. Rep. 614(?) (Re Equity Rule 29).

Speaking motion ("demurrer") under fed. rule 12(b) are gen. said to be permissible. (4 is an opposing majority of jurisdictions.) Matter dehors (outside of) the record as basis of motion allowed and will be a "speaking motion" but will be treated as motion for S.J. (12(b)).

No Sum. Judg. in N.C.

Assign.

See 1-123 - joinder of c/a. Joinder of parties 1-57 thru 1-75. Look at the permitted categories. See fed. rules on joinder of parties.

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in pleadings to wh a respon. pleading is required

New matter not denied is taken as admitted. See 1-140 (232/557). But allegations (material) in pleadings to wh no responsive pleading is required are deemed denied.

Only material allegations are admitted if not denied.

Express admission of erroneous allegation of law = nullity because you can't change the law by admission.

EXCEPTIONS:

G.S. 1-159 (119/13) — admissions in a final pleading are judicial admissions that need not even be intro. into evid. because they are taken as irrebuttably true.

On y are superseded pleadings, allegations in the superseded pleading must be intro. into evid. if you wish to use them for they are ordinary admissions and not judicial admissions.

And see 1-149 — re admissions in a separate trial's pleadings.

When joining parties, all parties must be interested in all causes of action.

232/65; 232/169 ~~224/115~~ When y is a misjoinder of parties AND (a) no severance of parties allowed under G.S. 1-132. Demurrer would lie for dismissal. But, before find pldg. for " , amendment will lie. ⊗ In State Sup. Ct. reverses denial of demurrer and remands, P has opportunity for leave to amend. But, if Sup Ct itself dismisses after

reversing ~~refusal~~ denial of demurrer, that would be final and leave to amend would not lie. But, could bring new action w/in one year.

Only is a defective statt. of a good c/a, demurrer should be ~~overruled~~ sustained w/ leave to amend.

See bases (6) for demurrer.

JOINDER OF ~~PARTIES~~ CAUSES G.S. 1-123
relates to joinder of c/a.

at C.L. and under Codes, unless thereby changed, K and tort could not be ~~joined~~.

Cannot cut across classes under 1-123.

Types:

(1.) Permissive joinder (procedural)

(2.) Required or Compulsive joinder (substantive as part of res judicata + estoppel.) (Under 1-123 - 1st class = "same transaction."

Presley v. Ark, 226/518 - leading case on "same transaction" class of G.S. 1-123. N.C. takes narrow view of "same transaction." But, ct. gave lip service to liberality. "Connected story" test was used.

e.g., defective c/a.

New Action can be taken whether the demurrer went to the merits or not and = res judicata. But, in the new action, D could plead res judicata and that would be decided at trial. On found, new action will be dismissed.

Compulsive Joinder

At C.L., the rule was that you could not split the c/a. That's on = is only one c/a. The effect is that a judg. for or against a proceeding on a split c/a will be res judicata as to the "whole" c/a. Code Rule too.

What = "c/a" is crucial.

145 S.E. 851, 62 A.L.R. 256 — Ga. case (leading) re filing a supplemental complaint. (or wrong)

"Singleness of the Act" Test — On one tort gives rise to personal injury and property damage, the weight of authority says that they must be joined because the c/a = singleness of the act of the tortfeasor.

147 N.E. 599; 197/100, Underwood v. Dooley 242/408

Majority Rule

Minority Rule — On one wrongful act of D gives rise to more than one right of action, each right arising = c/a. — Better Rule. This is "Singleness of the RIGHT" test

Cal., N.Y., N.J., U.A.

Minority Rule

Br/K on an account: one store v. several branches.

On one ACT involves several parcels of land, each parcel violated = c/a. Calif. follows this even tho' it follows minority rule, supra.

If one tort involves more than one person injured, each one has a separate c/a.

* Multiple parties –

In Joinder of Causes statute is restriction on joinder of parties: (No one stat. re joinder of parties.) if one tort injures several parties, the parties cannot, under N.C. Code, join v. D. (1-123)

But, many states have more liberal views. And see G.S. 1-57: "real party in interest" statute. Real party in interest is one who owns the claim and would be entitled to the fruits of the action.

Finis!