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Some Difficulties of Code Pleading

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SOME DIFFICULTIES OF CODE PLEADING.—The common law system of pleading was founded upon the theory that issues of fact, representing the gist of the controversy between the contending parties to a suit, should be developed by the pleadings. In practice this was not always realized, for many

fictions and legal conclusions obtained recognition as legitimate allegations, and upon them issues were formed which satisfied the courts. The most striking and familiar instance of this is found in the common counts. Here there is an allegation of indebtedness, which is a mere legal conclusion, and with this as a consideration a promise to pay is alleged, which in all cases of implied contracts is a pure fiction.

The framers of the Code sought to establish a really logical and consistent system, and to that end a statute was enacted, which is common to all the codes, providing for the abolition of all forms of action and for the allegation of facts constituting the cause of action in simple and concise language. Clearly, this, by its terms, excludes fictions and conclusions of law.

But the common counts, as known at the common law, were too useful to be relinquished, and in spite of a few early adverse decisions and the strenuous opposition of such text writers as Mr. Pomeroy, the courts of the code states, with almost no exception, have declared them sufficient under the reformed procedure. *Goodman* v. *Alexander,* 165 N. Y. 289; *Nichols* v. *Randall,* 136 Cal. 426; *Burton* v. *Rosemary Co.,* 132 N. C. 17. At most they have been held merely subject to a motion to make more definite and certain. *Minor* v. *Baldridge,* 123 Cal. 187; *Thomson* v. *Town of Elton,* 109 Wis. 589; *Kimball* v. *Lyton,* 19 Col. 266.

Common law pleading doubtless contained much that was formal and technical, and it failed in many instances to spread the actual facts of the case upon the record, but it is not so clear that this was always a fault. The very formalism of the common law was often a real protection to the pleader and his client, and so far as the plaintiff was concerned, it enabled him, by the use of approved formulæ, to get into court and stay there with the least amount of labor and risk, while at the same time the defendant was protected by his right to demand particulars. The pleader under the code, always predisposed and frequently required to disregard the common law conventions, often finds that the license given by the statute is a path leading among the quicksands. Curious instances of this constantly appear in the decisions, and lead one to question whether the code is founded upon a really satisfactory theory.

In a recent California case, the plaintiff sued for the purchase price of goods, and he alleged in his complaint that he sold to the defendant a horse and buggy for the sum of $550.00, that the defendant paid $200.00 on account thereof, and that there was still due and owing and unpaid on account of said sale $350.00. *Christensen* v. *Cram* (1909), — Cal. —, 105 Pac. 950. Here was a typical case for the common counts. A common law pleader could hardly have failed to state an unimpeachable cause of action. But the code pleader, disdaining precedent, attempted to state his cause of action "in simple and concise language," as the code directs. Two objections were raised. First, there was no allegation of a promise on defendant's part to pay the $350.00. The court held, however, that plaintiff's allegation of a sale for a stated price was by implication an averment of a promise to pay, and it considered the defect cured by verdict. Second, there was no allegation showing that the price was due and payable, and since, in the absence of an agreement to the

contrary, the price of goods sold is not payable until delivery, it must appear from the complaint that delivery has been made. At common law the counts for goods sold and delivered or goods bargained and sold would have answered the purpose. But the pleader here used only the term *sold*. It was conceded that his count was bad unless sold included the idea of delivery. At common law it did not. 1 CHITTY, PLEADING, *346 (11th Am. Ed.). The California court was willing, however, to strain a point to sustain the pleading, and held that the term sold was equivalent to sold and delivered.

Whether this ruling was correct is perhaps questionable. In *Kirkpatrick-Koch Dry Goods Co.* v. *Box*, 13 Utah 494, a precisely similar point was raised upon an almost identical pleading, and the court held that the term sold did not include the notion of a delivery, and that the complaint failed for that reason to state a cause of action.

In a case of this kind the pleader's task is hardly more than clerical at common law, but under the code, if its directions are followed, it becomes a matter requiring some skill and care. In other words, the code has not made it easier, but has made it harder, to draw a good pleading on a quasi-contract. Of course the defendant, in either the California or the Utah case, could hardly have been misled by the language used. He doubtless understood perfectly the nature of the claim made against him. The established theory of pleading was the only sufferer, for under this theory the test of a good complaint is the sufficiency of the facts stated to constitute a cause of action, and not their sufficiency to inform the defendant of the nature of the plaintiff's case. Whether it would be better to change this theory and establish in its stead a system based upon the idea of notice, is another question, which has been discussed with some care by Professor Whittier in a recent number of the Illinois Law Review. It is perhaps safe to say that such a change would destroy the occasion for raising three-fourths of the questions on pleading which are now so frequent under the code system. E. R. S.