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MANNER OF STATING CAUSE OF ACTION

CARL C. WHEATON

"The complaint shall contain: A plain and concise statement of the facts constituting the cause of action, without unnecessary repetition." This innocent-looking statement is found, with but practically unimportant changes, in the statute books of over thirty states of our country and in the federal equity rules.¹ The Massachusetts law provides for pleading *substantive facts* and that of Wisconsin for stating *ultimate facts*. The Pennsylvania enactment says that *evidence* should not be pleaded. The federal equity rule demands the alleging of *ultimate facts* and the omission of *any mere statement of evidence*. These changes from the usual statute make no real difference, as the ordinary law has been interpreted to mean that the constitutive, final, operative, substantive, or ultimate facts, not evidence, should be pleaded.²

¹ALASKA COMP. LAWS (1913) § 889; ARK. CIV. CODE ANN. (Crawford, 1934) § 109; CAL. CODE CIV. PROC. (Deering, 1931) § 426; COLO. ANN. CODE (Courtright's Mills, 1933) § 55; CONN. GEN. STAT. (1930) § 5506; IDAHO CODE ANN. (1932) § 5-605; IND. STAT. ANN. (Burns, 1933) § 2-1004; IOWA CODE (1931) § 1111; KAN. REV. STAT. (1923) § 60-704; KY. CIV. CODE OF PRAC. (Caitoll, 1932) § 90; MASS. ANN. LAWS (1933) Part 3, § 7; MINN. STAT. (Mason, 1927) § 9250; MISS. CODE ANN. (1930) § 521; MO. REV. STAT. (1929) § 764; MONT. REV. CODE (Choate, 1921) § 9129; NEB. COMP. STAT. (1929) § 20-804; NEV. COMP. LAWS (Hillyer, 1929) § 8594; N. M. STAT. ANN. (Courtright, 1929) § 105-404; N. C. CODE ANN. (1931) § 506; OHIO ANN. CODE (Throckmorton, Baldwin's Rev., 1930) § 11305; OKLA. STAT. (1931) § 198; ORE. CODE ANN. (1930) § 1-604; PA. STAT. (1920) § 17185; S. C. CODE OF LAWS (1932) § 456; S. D. COMP. LAWS (1929) § 2346; TENN. CODE ANN. (Michie, 1932) § 8726; UTAH REV. STAT. ANN. (1933) § 104-7-2; VT. PUB. LAWS (1933) § 1574; WASH. REV. STATS. ANN. (1932) § 258; WIS. STAT. (1933) § 263-03; WYO. REV. STAT. ANN. (1931) § 89-1004; FEDERAL EQUITY RULE 25.

²Dreisbach v. Beckham, 178 Ark. 816, 12 S. W. (2d) 408 (1929); Miles v. McDermott, 31 Cal. 270 (1866); Quinn v. Reilly, 198 Cal. 465, 245 Pac. 1091 (1926); City & County of Denver v. Bowen, 67 Colo. 315, 184 Pac. 357 (1919); Drainage Dist. No. 2 of Ada County v. Ada County, 38 Idaho 778, 226 Pac. 290 (1924); Fee v. State, 74 Ind. 66 (1881); Outing Kumfy-Kab Co. v. Ivey, 74 Ind. App. 286, 125 N. E. 234 (1919); Riley v. Interstate Business Men's Acc. Ass'n, 177 Iowa 449, 159 N. W. 203 (1916); Manwaring v. Reynolds, 108 Kan. 777, 196 Pac. 1086 (1921); Davis v. Watkins, 241 Ky. 261, 43 S. W. (2d) 712 (1931); Burrett v. Wisconsin Cent. Ry. Co., 109 Minn. 216, 123 N. W. 411 (1909); Nichols v. Nichols, 134 Mo. 187, 35 S. W. 577 (1896); Reilly v. Cullen, 159 Mo. 322, 60 S. W. 126 (1900); Moormeister v. Hannibal, 180 Mo. App. 717, 163 S. W. 926 (1914); Berry v. Adams, 71 S. W. (2d) 126 (Mo. App. 1934); Enterprise Sheet Metal Works v. Schendel, 63 Mont. 529, 208 Pac. 933 (1922); First State Bank of Philipsburg v. Mussigbrod, 271 Pac. 695 (Mont. 1928); Johnson v. Johnson, 15 P. (2d)

Parenthetically, it should be stated that, as the usual statute does not, in so many words, make this distinction as to the type of facts to be pleaded, it is difficult to see how the courts can properly read such a differentiation into it. The only plausible ground on which the result can be reached is to avoid prolixity, but that is not a correct ground for the judiciary's adding to the terms of a statute. Again, it may be that sometimes, as will be shown later, it is advisable to plead evidence. Hence, the words of the statute should not be contracted as they are. However, it has been done and, probably, it will take legislation to change the result. It should also be noticed that these enactments have ordinarily been interpreted to exclude the pleading of law.³ This is a valid conclusion, for the legislatures have said that *facts* should be alleged. Unless facts and law are identical the mandate is to state facts, not law.

842 (Mont. 1932); *State ex rel Young v. Osborn*, 60 Neb. 415, 83 N. W. 357 (1900); *Purdin v. Hancock*, 67 Ore. 164, 135 Pac. 515 (1913); *Electric Reduction Co. v. Colonial Steel Co.*, 276 Pa. 181, 120 Atl. 116 (1923); *Park v. Southern Ry. Co.*, 78 S. C. 302, 58 S. E. 931 (1907); *Cooper v. Atlantic Coast Line R. Co.*, 78 S. C. 562, 59 S. E. 704 (1907); *Jones v. Atlantic Coast Lumber Corporation*, 92 S. C. 418, 75 S. E. 698 (1912); *Meyer v. School Dist. No. 31*, 4 S. D. 420, 57 N. W. 68 (1893); *Bush v. Bush*, 55 Utah 237, 184 Pac. 823 (1919); *New Bank of Eau Claire v. Kleiner*, 112 Wis. 287, 87 N. W. 1090 (1901); *Weber v. Naas*, 250 N. W. 436 (Wis. 1933).

³*Cambers v. First Nat. Bank*, 144 Fed. 717 (C. C. Ore. 1906); *In re McGraw*, 254 Fed. 442 (N. D. W. Va. 1918); *Lucas v. Federal Reserve Bank of Richmond*, 59 F. (2d) 617 (C. C. A. 4th, 1932); *Harrington v. Denny*, 3 F. Supp. 584 (W. D. Mo. 1933); *Chicago, R. I. & P. Ry. v. Smith*, 94 Ark. 524, 127 S. W. 715 (1910); *Wood v. Drainage Dist. No. 2*, 110 Ark. 416, 161 S. W. 1057 (1913); *Wilkins v. Stidger*, 22 Cal. 231, 83 Am. Dec. 64 (1863); *Ellis v. Central California Traction Co.*, 37 Cal. App. 390, 174 Pac. 407 (1918); *Peters v. Binnard*, 17 P. (2d) 797 (Cal. App. 1932); *Fishback v. J. C. Forkner Fig Gardens Inc.*, 30 P. (2d) 586 (Cal. App. 1934); *Bailey v. Bussing*, 29 Conn. 1 (1860); *Abrams v. Jones*, 35 Idaho 532, 207 Pac. 724 (1922); *Logansport v. LaRose*, 99 Ind. 117 (1884); *Frain v. Burgett*, 152 Ind. 55, 50 N. E. 873 (1898); *Dailey v. State*, 171 Ind. 646, 87 N. E. 4 (1909); *Euclid Ave. State Bank v. Nesbitt*, 201 Iowa 506, 207 N. W. 761 (1926); *Mitchell Mill Remnant Corporation v. Long*, 223 Ky. 242, 3 S. W. (2d) 639 (1928); *Begley v. Jones*, 238 Ky. 239, 37 S. W. (2d) 44 (1931); *Johnson v. Inter-Southern Life Ins. Co.*, 244 Ky. 83, 50 S. W. (2d) 16 (1932); *Garvey v. Wesson*, 154 N. E. 516 (Mass. 1927); *Adams v. Corrison*, 7 Minn. 456 (1862); *Clark v. Chicago, Milwaukee & St. Paul Ry. Co.*, 28 Minn. 69, 9 N. W. 75 (1881); *Kramer v. Kansas City Power & Light Co.*, 311 Mo. 369, 279 S. W. 43 (1926); *Snow v. Ferril*, 8 S. W. (2d) 1008 (Mo. 1928); *Dyrcz v. Hammond Packing Co.*, 194 S. W. 761 (Mo. App. 1917); *Totman v. Christopher*, 237 S. W. 822 (Mo. App. 1922); *Roberts v. Anderson*, 254 S. W. 723 (Mo. App. 1923); *American Central Life Ins. Co. v. Buschmeyer*, 65 S. W. (2d) 959 (Mo. App. 1933); *Hensen v. Merton*, 57 Mont. 231, 187 Pac. 1017 (1920); *Brown v. Columbia Amusement Co.*, 6 P. (2d) 874 (Mont. 1931); *Woodward v. State*, 58 Neb. 598, 79 N. W. 164 (1899); *International Har-*

An innocuous statute, one says at first glance. Investigate, however, the thousands of cases interpreting it and see what your idea of it will be. Changed, I assure you. And why? Because the courts and lawyers are, in multitudes of instances, at sea as to what are statements of evidentiary facts, constitutive, final, operative, substantive, or ultimate facts, and law. The result must be a large, incalculable yearly loss of money in the form of attorneys' fees and the cost of running courts as well as the wastage of a huge number of the working hours of lawyers, the judiciary, and court officials, while an attempt is made to discover whether or not the proper type of facts has been pleaded. A few voices have, to some effect, cried out in the wilderness against the imposition of this statute⁴ but, on the whole, the status existing before they spoke has been retained. If this is true, a very definite, strenuous, and concerted effort should be made to abolish the statute wherever it exists and to provide in its place an enactment or rule of court which will eliminate this unpardonable squandering of time and money.

The primary purpose of this discussion will be to show that lawyers generally are unable to make the distinctions necessitated by the statute under investigation, and to call attention to the change necessary in the law to avoid the suggested loss. Since, moreover, I am well aware of the inertia of legislatures when it comes to varying procedural law and know that it may be decades before the statute is corrected, thus giving litigants and taxpayers a square deal in relation to this matter, I have the temerity to state my own opinion as to whether some of the allegations most frequently used in setting forth causes of action are statements of law or fact. Also, as a basis for doing that, I dare to reinvestigate the distinctions among law and the different types of facts.

vester Co. of America v. Cameron, 25 Okla. 256, 105 Pac. 189 (1909); Hoover v. Board of Com'rs of Garvin County, 157 Okla. 225, 13 P. (2d) 207 (1932); Dryden v. Daly, 89 Ore. 218, 173 Pac. 667 (1918); Almada v. Vandecar, 94 Ore. 515, 185 Pac. 907 (1919); Pearson v. Richards, 106 Ore. 78, 211 Pac. 167 (1922); Jones v. Atlantic Coast Lumber Corporation, *supra* note 2; Gunnison Irr. Co. v. Peterson, 280 Pac. 715 (Utah, 1929); Hoard v. Gilbert, 238 N. W. 371 (Wis. 1931).

⁴See Book Review (1919) 33 HARV. L. REV. 326 by Dean Pound, approving the attitude of Judge Works found on pages 44 and 45 of the latter's JURIDICAL REFORM (1919). The judge there suggests doing away with the necessity of stating facts constituting the cause of action. Dean Clark is, apparently, of the same opinion when he says at page 151 of his work on CODE PLEADING (1928), "But at any rate their [the New York codifiers'] ideal of pleading facts as it has worked out, has proven probably the most unsatisfactory part of their reform." Professors Sunderland and McCaskill seem to have had the same idea in mind, for the provision in the new Illinois practice code dealing with the statement of one's cause of action, with the wording of which they had much to do, steers clear of the form

IS THERE ANY DISTINCTION BETWEEN LAW AND FACTS?

As a foundation for our subsequent study, let us determine what, if any, differences there are among law and various types of facts. Now, there are some keen minds who believe there is *no* true dissimilarity between fact and law. Thus, Prof. Cook says that there is no logical distinction between statements which are grouped by courts as statements of facts and conclusions of law. The slightest analysis will show, he claims, that no pleading ever was, or ever will be, framed to carry out the rule that only naked facts should be stated.⁵ With deference, this last sentence is thought to be a great misstatement which is readily disproved. Prof. Cook apparently means that it is impossible to state a cause of action under the statute without alleging law. How about merely stating the occurrences giving rise to actions of fraud and negligence? Numerous other similar situations could be suggested. However, if he means that law is always a part of one's cause of action, I agree with him; for, to have a cause of action, one must have a legal right, to which there is a correlative duty. The statute does not deny this. It merely says one should state only that part of a cause of action which relates to facts. The great Judge Mitchell of Minnesota declared that it may be impossible to define fact and law so as to distinguish them and that precedent and analogy are our only guides.⁶ Dean Clark asserts, "The attempted distinction between facts, law and evidence, viewed as anything other than a convenient distinction of degree, seems philosophically and logically unsound."⁷ These ideas are the products of keen minds and to oppose them may seem heresy, but one must be mentally honest. It is one thing to say it is folly to force lawyers to plead facts, not law, since there is such a confusion of ideas as to what is law and what is fact, but it is another thing to say the difference does not exist. Moreover, there have been, and are, other alert minds which believe that there is a distinction between law and fact. Prof. Thayer surely believed in the distinction.⁸ We also find Professors Michael and Adler are of that view, for they say, "Ques-

of statute which we are considering. The Illinois enactment reads as follows: "Sec. 33 (Form of pleadings) (1) All pleadings shall contain a plain and concise statement of the pleader's cause of action, counterclaim, defense, or reply." Perhaps, Prof. Isaacs has the same thing in mind when, in his article in (1922) 22 COL. L. REV. 1, he says that statutes should avoid reference to the distinction between law and fact as a simple one.

⁵Cook, *Statements of Fact in Code Pleading* (1921) 21 COL. L. REV. 416.

⁶Clark v. C. M. & St. P. Ry. Co., *supra* note 3.

⁷CLARK, CODE PLEADING (1928) 155.

⁸THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT COMMON LAW (1898) 191-194.

tions of fact and law are often intimately related and the relation is often so close and intricate that it is not always profitable to attempt sharply to separate them *although it is always possible to make the separation.*"⁹

I, personally, believe that law and fact *are* distinguishable. So let us be about our task of discovering that difference. First, we can best turn our attention to what others have said on the subject, and then personal conclusions can be expressed in the light of work that has been previously done.

LAW

The great master of this subject was Prof. Thayer, but he wrote primarily in respect to evidence and his words dealing with his definition of law must be rephrased in order that they may apply to pleading. He says, "It is enough here to say, that in the sense now under consideration (here the writer is dealing with law and fact in jury trials) nothing is law that is not a rule or standard which it is the duty of official tribunals to apply and enforce."¹⁰ As applied to our problem, his statement must mean that only allegations relating to rules or standards are averments of law. Prof. Cook claims that a conclusion of law is a generic statement which can be made only after some legal rule has been applied to some specific group of operative facts. Thus, the statement that the defendant owes the plaintiff \$500, standing by itself, is usually treated as a mere conclusion of law. It is, in fact, the conclusion of a logical argument. Whenever certain facts, *a, b, c, etc.*, exist, *B* (defendant) owes *A* (plaintiff) \$500; facts *a, b, c, etc.* exist, therefore *B* owes *A* \$500. This being so, when the bare statement is made that *B* owes *A* \$500, we may, if we wish, regard it as a statement in generic form that all the facts necessary to create the legal duty to pay money described by the word "owe" are true as between *A* and *B*.¹¹ Dean Ross appears to believe that usually an allegation of law deals with legal rights and obligations to which stated events give rise.¹² Prof. Isaacs tells us that what is fact today may be law tomorrow. If a clause has been given an authoritative judicial interpretation, its meaning is a question of law, otherwise it is a question of fact.¹³ Very little is said in the cases as to what constitutes an allegation of law, but we do find courts saying, "Where the conclusion

⁹MICHAEL AND ADLER, *THE NATURE OF JUDICIAL PROOF* (1931) 24.

¹⁰THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT COMMON LAW* (1898) 192-193.

¹¹Cook, *Statements of Fact in Code Pleading* (1921) 21 COL. L. REV. 416.

¹²ROSS, *Minnesota Pleading as "Fact Pleading"* (1929) 13 MINN. L. REV. 348.

¹³Isaacs, *The Law and the Facts* (1922) 22 COL. L. REV. 1.

describes a legal status or condition or a legal offense it would ordinarily be termed a conclusion of law, . . ."¹⁴ Also, one judicial authority declares, "We deduce the ultimate fact from certain probative facts by a process of natural reasoning. We draw the inference or conclusion of law by a process of artificial reasoning; . . ."¹⁵ The same idea may be expressed in the following words, "Whether a finding is an ultimate fact or conclusion of law depends upon whether it is reached by natural reasoning or by the application of fixed rules of law.' That is, where the ultimate conclusion can be arrived at only by applying a rule of law, the result so reached embodies a conclusion of law and is not a finding of fact."¹⁶

This is not a long list of authority to help us in our quest for a proper solution of the meaning of "law" as it relates to the statute under consideration. Even some of that is not directly in point. But it is helpful. If by rules or standards is meant the manner in which the government says we must live when in contact with our fellow men, Prof. Thayer's definition properly defines most of the ground covered by "law", as far as we are now interested in "law". This is true, for the government (including the judicial, legislative, and executive branches thereof) tells us, in laying down rules of conduct, what our rights and duties are, and it is statements of rights and duties recognized by governments as existing and enforceable that comprise most of the legal averments that are barred in pleading a cause of action. The same idea is probably hinted at in the first set of cases cited. Of course, as is pointed out by Prof. Cook, the fact that an allegation relating to such rights and duties is based upon fact situations does not change it from a statement of law to one of fact. Add to what has been said Prof. Isaacs' idea that as soon as a word or phrase has been given an authoritative judicial interpretation it becomes law and you have your definition of "law" as it relates to the statute of which we are treating. Surely, he is correct in claiming that, as soon as courts take over the task of defining the meaning of words, those words become legal terms—the court says they are going to make a standard of conduct out of them. The suggestion that it is only when one uses artificial reasoning that his conclusion relates to "law" as distinguished from "fact" should be a severe indictment against the law, and such a

¹⁴Reed v. Woodmen of the World, 94 Mont. 374, 22 P. (2d) 819 (1933); State v. Whitcomb, 94 Mont. 415, 22 P. (2d) 823 (1933); Travelers' Ins. Co. v. Hallauer, 131 Wis. 371, 111 N. W. 527 (1907).

¹⁵Levins v. Rovegno, 71 Cal. 273, 12 Pac. 161 (1886).

¹⁶Tesch v. Industrial Commission, 229 N. W. 194 (Wis. 1930). Also see Travelers' Ins. Co. v. Hallauer, *supra* note 14; Village of Weyauwega v. Kramer, 180 Wis. 168, 192 N. W. 452 (1923).

standard should not be used to determine what is law. The courts which say that a finding is one of law if it is reached by the application of fixed rules of law do not help us, for they only use the term which we are trying to define, that is, "law".

It is my conclusion that, in the final analysis, a statement of law is averred as a part of a cause of action if it deals, to any extent, with rights and duties which are enforced by the government, for such rights and duties are the bone and sinew of that with which the legal arms of the government deal. The only other instance when law is stated occurs when a word or phrase is set forth, the definition of which has been taken over by the judiciary.

FACTS IN GENERAL

Now, to discover the meaning of "facts". Our present search for authorities is to be more fruitful than it was when we were dealing with "law". Let us again see what Prof. Thayer says. We find, "The fundamental conception of 'fact' is that of a thing as existing, or being true. It is not limited to what is tangible or visible, or in any way the object of sense; things invisible, mere thoughts, intentions, fancies of the mind, when conceived of as existing or being true, are conceived of as facts. . . All inquiries into the truth, the reality, the actuality of things are inquiries into the fact about them. Nothing is a question of fact which is not a question of the existence, reality, truth of something; of the *rei veritas* . . . it is no test of a question of fact that it should be ascertainable without reasoning and the use of the 'adjudging' faculty; much must be conceived of as fact which is invisible to the senses, and ascertainable only in this way . . . the right inference or conclusion, in point of fact, is itself matter of fact, . . ."¹⁷ Dean Ross concludes that "fact" generally means an event—something that took place, but it may refer to an existing condition.¹⁸ Much the same ideas are expressed by a judge who says, "A 'fact', as the term is used in legal proceedings, is an event, a thing done or said, an act or action which is the subject of testimony. The condition or state of mind at a given time is a fact. If any emotion is felt, as joy, grief, or anger, the feeling is a fact. If the operations of the mind produce an effect, as knowledge, skill, intention, this effect on the mind is a fact. When the mental processes lead up to and produce a desire or intention to do a certain thing, such a state of mind is a fact."¹⁹ A New York court²⁰ de-

¹⁷THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT COMMON LAW (1898) 191-194.

¹⁸Ross, *Minnesota Pleading as "Fact Pleading"* (1929) 13 MINN. L. REV. 348.

¹⁹Barr v. Chicago, St. L. & P. R. Co., 10 Ind. App. 433, 37 N. E. 814 (1894).

²⁰Fowler-Curtis Co. v. Dean, 203 App. Div. 317, 196 N. Y. Supp. 750 (3rd Dept. 1922).

clares, "A fact, according to Webster, 'is a thing done; . . . an actual happening in time or space; any event mental or physical.' A misrepresentation of one's intention at the time is a misrepresentation of an existing fact. As Lord Bowen once said: 'The state of a man's mind is as much a fact as the state of his digestion.'" Additional courts dealing only with allegations of intention or will have said that they have to do with fact.²¹ The same has been asserted of averments relating to knowledge.²² Again, judges have said, ". . . where, on the other hand, the conclusion describes a condition or status not represented or designated by some definite legal term or rule, it will ordinarily be a conclusion of fact."²³

Michael and Adler assert, "A fact is any determinate entity which has a determined place in the order of existence."²⁴

A still different test is given us when it is claimed that, "Evidentiary facts are acquired by the sense of sight, hearing, taste, touch, smell, and muscular resistance, . . ."²⁵ Again, in *Hulings v. Hulings Lumber Co.*,²⁶ the court says, "A fact, as distinguished from law, may be taken as that out of which the point of law arises, that which is asserted to be or not to be and is to be presumed or proved to be or not to be, for the purpose of applying or refusing to apply a rule of law."

Then too, it is stated in *Travelers' Ins. Co. v. Hallauer*,²⁷ "Where, . . . , the conclusion describes a condition or status not represented or designated by some legal term or rule, it will ordinarily be a conclusion of fact."

Finally, to determine what a fact is, it is suggested that one should look to the conception of the mind of a person of common understanding.²⁸

These ideas are, for the most part, of real value to us. There is little to object to as far as the majority of them go. One difficulty with the

²¹Kane v. Eastman, 288 Pac. 819 (Cal. App. 1930); Barr v. Chicago, St. L. & P. R. R. Co., *supra* note 19; Louisville, E. & St. L. R. Co. v. Hart, 21 Ind. App. 130, 28 N. E. 218 (1891); Kavanaugh v. Kavanaugh Knitting Co., 226 N. Y. 185, 123 N. E. 148 (1919). Cf. Atlantic Coast Line Co. v. Cheeks, 10 Ga. App. 411, 73 S. E. 545 (1912).

²²Hall v. Montgomery, 208 Ala. 383, 94 So. 363 (1922); Heinemann v. Barfield, 136 Ark. 456, 207 S. W. 58 (1918); Farmers' Life Ins. Co. v. Ignacio State Bank, 85 Colo. 46, 272 Pac. 1116 (1928); Cousins v. Wilson, 94 Okla. 29, 220 Pac. 923 (1923); Heitkemper v. Schmeer, 281 Pac. 169 (Ore. 1929).

²³Reed v. Woodmen of the World, *supra* note 14; State v. Whitcomb, *supra* note 14; Travelers' Ins. Co. v. Hallauer, *supra* note 14.

²⁴MICHAEL AND ADLER, THE NATURE OF JUDICIAL PROOF (1931) 1.

²⁵Bjelka v. M. & Z. Mizeson Realty Co., 260 N. Y. Supp. 473 (1932).

²⁶38 W. Va. 351, 18 S. E. 620 (1893).

²⁷*Supra* note 14.

²⁸D. L. Adams Co. v. Federal Glass Co., 180 Ind. 576, 103 N. E. 414 (1913).

statement by Professors Michael and Adler is in discovering what is meant by "entity". If it is to cover the field at all adequately it must refer to more than existing things. It probably was meant to include happenings and existences, such as mental states. If it goes further and encompasses situations dealing with rights and duties enforceable by governmental agencies, it is too broad. Why the distinction was made in *Bjelka v. M. & Z. Mizeson Realty Co.*²⁹ between evidentiary and other facts is not known, for surely one can discover by sense certain ultimate facts as well as evidentiary facts. The declaration in *Hulings v. Hulings Lumber Co.*³⁰ properly gives us a new angle to the meaning of facts, and is only deficient in using the term "law" without giving us a hint of what "law" is. The same may be said of the excerpt from *Travelers' Ins. Co. v. Hallauer*.³¹ The holding in *D. L. Adams Co. v. Federal Glass Co.*,³² which applies the test of "the mind of one of common understanding," cannot be approved, because such a mind is not trained to think in the terms of law and fact. It considers only the occurrences back of such allegations as "ownership", which, as will be shown, avers law. Doing that, it would unhesitatingly say, if my experiments in questioning laymen as to these matters amount to anything, that, when one says he owns property, he states a fact. Now, when lawyers, and good ones, too, cannot agree on what is law and what is fact, we will err in relying on "the mind of one of common understanding."

What, then, is "fact" as that term relates to the pleading of a cause of action? There are different ways of looking at the matter. An easy, though to some a very unsatisfactory approach, would be to say that that is "fact" which does not deal somewhat, or wholly, with rights and duties enforceable through governmental agencies or with terms whose definition has been taken over by the courts. If one knows when a statement concerns such rights and duties, or is so defined, he is master of the situation. It will be helpful, however, to go further. Usually facts are discovered through the five senses, and one can say with assurance that, when a statement is made relating solely to something that can be so ascertained, a fact has been alleged. But other expressions are within the realm of fact. An averment that anything exists or occurs, though the truth of such an allegation cannot be determined by the senses, is a declaration of fact as long as it in no way deals with the rights and duties already mentioned. The clearest example of such a situation is a mental condition. Thus, statements that one thinks a thing is so, that he intends to act in a particular way,

²⁹See *supra* note 25.

³¹See *supra* note 27.

³⁰See *supra* note 26.

³²See *supra* note 28.

that he grieves, is joyful, well pleased, or angry are all allegations of fact. That reasoning is involved in determining the truth or falsity of a statement does not prove it to be an averment of law, for the process of drawing inferences and reaching conclusions from a consideration of data or premises must go on in almost every case when we say our senses tell us a certain thing is true.

EVIDENTIARY FACTS

Our next task is to analyze "evidence" and "constitutive, final, operative, substantive, or ultimate facts," to find out what each is, and to determine their differences, if any.

"An 'evidentiary' fact is one that furnishes evidence of the existence of some other fact."³³ Such a fact is one which, on being ascertained, affords some logical basis, not conclusive, for inferring some other fact.³⁴ Another suggestion is that evidentiary or probative facts are those tending to show that operative facts exist.³⁵ Again, it is said that evidential facts "are those upon which a material issue cannot be taken, and from which the issuable facts may be inferred."³⁶ Much the same idea is expressed in the statement that evidentiary facts are not those essential to the cause of action.³⁷

ULTIMATE FACTS

It will be more satisfactory to discuss all types of facts together than to consider them separately, so let us at this time also look at the authorities treating of "ultimate facts".

"An 'ultimate fact' is the final resulting effect which is reached by processes of logical reasoning from the evidentiary facts."³⁸

"Ultimate facts are nothing more than issuable, constitutive facts essential to the statement of the cause of action."³⁹

³³Oregon Home Builders v. Montgomery Inv. Co., 94 Ore. 349, 184 Pac. 487 (1919). In accord: Maeder Steel Products Co. v. Zanello, 109 Ore. 562, 220 Pac. 155 (1923).

³⁴HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS (1923) 32-33.

³⁵Johnson v. Inter-Southern Life Ins. Co., 244 Ky. 83, 50 S. W. (2d) 16 (1932); PHILLIPS, CODE PLEADING (2d ed. 1932) 398; POMEROY, CODE REMEDIES (5th ed. 1929) §§ 420 and 426.

³⁶Nichols v. Nichols, *supra* note 2.

³⁷Danerhirsch v. Great Eastern Casualty Co., 160 N. Y. Supp. 1015 (1916).

³⁸Oregon Home Builders v. Montgomery Ins. Co., *supra* note 33. In accord: Ellis v. Central California Traction Co., *supra* note 3; Bjelka v. M. & Z. Mizeson Realty Co., *supra* note 25. See also Russell Grain Co. v. Wabash R. R. Co., 114 Mo. App. 488, 89 S. W. 908 (1905).

³⁹Musser v. Musser, 281 Mo. 649, 221 S. W. 46 (1920). In accord: Nichols v. Nichols, *supra* note 2; Johnson v. Johnson, *supra* note 2; Meyer v. School District No. 31, 4 S. D. 420, 57 N. W. 68 (1893).

Other utterances on this subject should be noticed. An ultimate fact, it has been said, is frequently an inference and conclusion from many evidentiary facts and is, in a sense, a mixed conclusion of law and fact.⁴⁰ Phillips has claimed that operative or ultimate facts are those which enter into and create jural relations between persons. They operate to create these rights and obligations and are thus called operative facts.⁴¹ The same thought is expressed by Dean Ross who says an "operative fact" means substantially an event which creates a legal right or obligation or which changes somebody's rights or obligations.⁴² Another authority asserts, "Whether a finding is an ultimate fact or a conclusion of law depends upon whether it is reached by natural reasoning or by application of the artificial rules of law."⁴³ Again, we find this statement, "The principal and perhaps the only way to determine what is ultimate fact is by precedent."⁴⁴

What of the soundness of these authorities? If one is to distinguish between evidentiary and ultimate facts, those are right who say the former go to prove the latter, since that which is evidence makes manifest and tends to furnish proof of something else. As evidence is not to be pleaded, authorities claiming that evidential facts cannot be put in issue are correct, for only pleadable, pleaded facts can properly be attacked. This being true, ultimate facts (also known as constitutive, final, operative, or substantive facts) must be those which are issuable and to be pleaded. Further, as Phillips has well stated, they are those which are relied upon to show the existence of enforceable rights and obligations. On the other hand, they do not prove any other fact. If, as is claimed to be the case, evidentiary and ultimate facts are distinguishable, one should not have to rely upon precedent to discover what an ultimate fact is, for that can be done by the application of a premise, a principle of law. Moreover, if precedent were the sole loadstar by which ultimate facts could be distinguished, how would one ever get a start in his search, for the court must act before any precedent exists?

The authorities having been stated and criticized, full personal opinions having been given as to the meaning of evidentiary and ultimate facts and of law, may I be permitted briefly to recapitulate?

Let us draw a circle and premise that it contains all possible allegations that could ever be stated in any cause of action. Then let us

⁴⁰Crane v. Schaefer, 140 Ill. App. 647 (1908).

⁴¹PHILLIPS, CODE PLEADING (2d ed. 1932) § 398.

⁴²Ross, *Minnesota Pleading as "Fact Pleading"* (1929) 13 MINN. L. REV. 348.

⁴³Travelers' Ins. Co. v. Hallauer, *supra* note 14.

⁴⁴City & County of Denver v. Bowen, *supra* note 2.

draw two more circles, one within the other, both inside of the outer circle. Let the space between the outer and middle circles represent all possible statements of law, that between the inner and middle circles all possible statements of ultimate fact, and that within the inner circle all possible statements of evidentiary facts. The facts, as distinguished from law, will deal only with existences, conditions, and occurrences which in no way have to do with enforceable rights and duties. The evidentiary facts will prove other facts, the broadest of such evidentiary facts proving ultimate facts, which, in turn, will never prove facts, but will be the outposts of facts from which the proper governmental authorities will determine what, if any, rights and duties exist which the state will enforce.

SPECIFIC ALLEGATIONS

It is now meet to examine a few of the more important allegations which appear when attempts are made to state causes of action. First, the authorities will be stated and then personal opinions will be given. Initially, will be considered the phrase "according to law" or its equivalent "duly". The great weight of authority is to the effect that this phrase and word deal with law.⁴⁵ But there are several decisions that appear to be the other way.⁴⁶ The usual result seems clearly to be the

⁴⁵Porter v. Coble, 246 Fed. 244, 158 C. C. A. 404 (C. C. A. 8th, 1917); Romaniuk v. Locke, 3 F. Supp. 529 (S. D. N. Y. 1932); Woodson v. Wilson, 144 So. 122 (Ala. App. 1932); Moran v. Bonyng, 157 Cal. 295, 107 Pac. 312 (1910); Crawford v. Felkey, 73 Colo. 444, 216 Pac. 520 (1923); Rapelye v. Bayley, 3 Conn. 438, 8 Am. Dec. 199 (1820); Willmer v. Newsom, 149 So. 3 (Fla. 1933); Nightingale v. City of Brunswick, 29 Ga. App. 184, 114 S. E. 584 (1922); Weed v. Idaho Copper Co., 10 P. (2d) 613 (Idaho, 1932); Fiedler v. Eckfeldt, 335 Ill. 11, 166 N. E. 504 (1929); Temple v. State, 185 Ind. 139, 113 N. E. 233 (1916); Taylor County Farm Bureau v. Board of Sup'rs of Taylor County, 252 N. W. 498 (Iowa, 1934); Houser v. Smith, 80 Kan. 260, 101 Pac. 1001 (1909); Hoskins v. Helton, 252 Ky. 616, 67 S. W. (2d) 975 (1934); Mann v. Farmers' Exchange Bank of Gallatin, 50 S. W. (2d) 146 (Mo. App. 1932); Clark v. Demers, 254 Pac. 162 (Mont. 1927); Woodward v. State, 58 Neb. 598, 79 N. W. 164 (1899); Samuel Kronman & Co. v. Public Nat. Bank of New York, 218 App. Div. 624, 218 N. Y. Supp. 616 (1st Dept. 1927); American Exch. Nat. Bank v. Segroves, 166 N. C. 608, 82 S. E. 947 (1910); Zimmerman v. Hoss, 23 P. (2d) 897 (Ore. 1933).

⁴⁶Brown v. Carbonate Bank of Leadville, 34 Fed. 776 (C. C. Colo. 1888); Breckinridge County v. McCracken, 61 Fed. 191, 9 C. C. A. 442 (C. C. A. 6th, 1894); Knox v. Rivers Bros., 17 Ala. App. 630, 88 So. 33 (1920); Caswell v. Copper River & N. W. Ry., 4 Alaska 709 (1913); Los Angeles County v. Delahunt, 279 Pac. 187 (Cal. App. 1929); Ley v. Babcock, 5 P. (2d) 620 (Cal. App. 1931); Brannin v. Gleason, 14 Ky. Law Rep. 109 (1892); Curtiss v. Livingston, 36 Minn. 380, 31 N. W. 357 (1887); DeRuntz v. St. Louis Police Relief Ass'n, 180 Mo. App. 1, 162 S. W. 1053 (1913); Freeman v. City of Huron, 10 S. D. 368, 73 N. W. 260 (1897).

correct one, since, without question, the words involve an imposed duty to act in a certain fashion.

The terms "legal" and "illegal" are so prevalently treated as legal averments that it seems useless to set forth a long list of authorities to that effect. However, it is interesting to find it stated that it is proper to allege that the plaintiff was a "legal constable."⁴⁷ Of course, those words are as purely legal as could be possible, for they treat most decidedly of rights and duties. The same can with assurance be said of "lawful" and "unlawful", yet one finds it claimed that an allegation that salaries were "excessive and unlawful" is a statement "of mixed conclusions of fact and law, the ultimate of which is, in a broad sense, a conclusion of fact, and consequently may be pleaded according to" its legal effect.⁴⁸ "Entitled to" is most often said to state a bare legal conclusion,⁴⁹ but there are contrary holdings.⁵⁰ Again, the majority ruling is correct, as the phrase could not more definitely speak of rights. On the other hand, we have the expression "subject to." Once more there is a split of authority.⁵¹ Why this is so is quite beyond my powers of comprehension, for, as certainly as "entitled to" is saturated with the idea of "right", these words are pregnant with the thought of "duty."

A plurality of courts say that "agent" alleges a legal conclusion,⁵²

⁴⁷Culver v. Sparkman, 149 So. 877 (Ala. App. 1933).

⁴⁸Thauer v. Gaebler, 232 N. W. 561 (Wis. 1930). Perhaps a similar idea is expressed in Nance v. Georgia, C. & N. Ry. Co., 35 S. C. 307, 14 S. E. 629 (1892).

⁴⁹Moran v. Bonyng, 157 Cal. 195, 107 Pac. 312 (1910); Street v. Sederburg, 41 Colo. 128, 92 Pac. 29 (1907); Garner v. McCullough, 48 Mo. 318 (1871); Sheridan v. Jackson, 72 N. Y. 170 (1878); Burdick v. Chesebrough, 94 App. Div. 532, 88 N. Y. Supp. 13 (3rd Dept. 1904).

⁵⁰McCauley v. Gilmer, 2 Mont. 202 (1874); Farmers' & Fruit-Growers' Bank v. Davis, 93 Ore. 655, 184 Pac. 275 (1919).

⁵¹To the effect that "subject to" is a statement of law, see Wright v. Board of Sup'rs. of Sonoma County, 190 Cal. 382, 212 Pac. 921 (1923); Bistor v. McDonough, 348 Ill. 624, 181 N. E. 417 (1932); Ridpath v. Heller, 46 Mont. 586, 129 Pac. 1054 (1913). *Contra*: L. L. & G. R. R. Co. v. Leahy, 12 Kan. 124 (1873); Boynton v. Faulk County, 7 S. D. 423, 64 N. W. 518 (1895).

⁵²Calumet & Hecla Mining Co. v. Equitable Trust Co., 275 Fed. 552 (S. D. N. Y. 1919); Amalgamated Royalty Oil Corporation v. Hemme, 282 Fed. 750 (C. C. A. 8th, 1922); Schotis v. North Coast Stevedoring Co., 24 F. (2d) 591 (W. D. Wash. 1927); Coen v. Watson, 287 Pac. 525 (Cal. App. 1930); People v. Chicago Rys. Co., 270 Ill. 278, 110 N. E. 394 (1915); Premier Motor Mfg. Co. v. Tilford, 61 Ind. App. 164, 111 N. E. 645 (1916); Tuck v. Harmon, 151 So. 803 La. App. 1934; Lovell v. Marshall, 162 Minn. 18, 202 N. W. 64 (1925); Seymour . Mechanics & Metals Nat. Bank of New York City, 108 Misc. 138, 177 N. Y. upp. 493 (1919); Ottman v. Nixon-Nirdlinger, 301 Pa. 234, 151 Atl. 879 (1930); orne Zoölogical Arena Co. v. City of Dallas, 45 S. W. (2d) 714 (Tex. Civ. App. 931); Hamp v. Universal Auto Co., 24 P. (2d) 77 (Wash. 1933).

while a few are contrary minded.⁵³ Courts generally have taken over the job of defining the word, hence it has properly become a legal term. They have done the same with the language "within the scope of employment," therefore it should be deemed a legal averment. Most of the judiciary is of that opinion,⁵⁴ but some think otherwise.⁵⁵

"Converted" has raised controversies. Of the few cases discovered, a bare majority have held that it is a mere legal conclusion.⁵⁶ Of the remaining cases, one said it alleged a fact which could be described as "composite."⁵⁷ Another said that to allege, "The books of said business showed that the defendant had taken from said business and wrongfully converted to his own use the sum of \$1,299," was to state the existence of evidence.⁵⁸ The majority holding must be right, for here we have another instance of a term defined by the courts.

There are many cases holding that statements that there was, or

⁵³*Ivey v. Railway Fuel Co.*, 211 Ala. 10, 99 So. 177 (1924); *Cullinan v. Mercantile Trust Co. of California*, 252 Pac. 647 (Cal. App. 1926-7); *Bryce v. Louisville, N. A. & C. Ry. Co.*, 73 Hun 233, 25 N. Y. Supp. 1043, 57 N. Y. St. Rep. 116 (1893); *Beckham v. Cayton*, 262 S. W. 840 (Tex. Civ. App. 1924).

⁵⁴*National Park Bank of New York v. Louisville & N. R. Co.*, 199 Ala. 192, 74 So. 69 (1917); *Burge v. Scarbrough*, 211 Ala. 377, 100 So. 653 (1924); *Reed v. Trinity Drilling Co.*, 170 Ark. 657, 280 S. W. 639 (1926); *Idemoto v. Scheidecker*, 193 Cal. 653, 226 Pac. 922 (1924); *People v. Beach*, 49 Colo. 516, 113 Pac. 513, 37 L. R. A. (N. S.) 873 (1911); *People v. Pacific Surety Co.*, 50 Colo. 273, 109 Pac. 961, ANN. CAS. 1912C 577 (1910); *Friedlander v. Rapley*, 38 App. D. C. 208 (1912); *Clark v. Chesapeake & Potomac Telephone Co.*, 42 App. D. C. 444 (1914); *Southern Grocery Stores Inc. v. Childs*, 174 Ga. 888, 164 S. E. 766 (1932); *Cahill v. Plumbers' Gas and Steam Fitters' and Helpers' Local 93*, 238 Ill. App. 123 (1926); *Indianapolis & G. R. T. Co. v. Foreman*, 162 Ind. 85, 69 N. E. 669, 102 Am. St. Rep. 185 (1904); *Jones v. Van Bever*, 164 Ky. 80, 174 S. W. 795, L. R. A. 1915E 172 (1915); *Hale v. Gilliland Oil Co.*, 151 La. 500, 91 So. 853 (1922); *Valley v. Clay*, 151 La. 710, 92 So. 308 (1922); *Snyder v. Hannibal & St. J. R. Co.*, 60 Mo. 413 (1875); *Boling v. Clinton Cotton Mills*, 161 S. E. 195 (S. C. 1931); *Waalor v. Great Northern Ry. Co.*, 18 S. D. 420, 100 N. W. 1097, 70 L. R. A. 731, 112 Am. St. Rep. 794 (1904); *Wall v. Royal Indemnity Co.*, 299 S. W. 319 (Tex. Civ. App. 1927).

⁵⁵*May v. Farrell*, 271 Pac. 789 (Cal. App. 1928); *Savannah Electric Co. v. McCants*, 130 Ga. 741, 61 S. E. 713 (1908); *Riordan v. Thompson-Starrett Co.*, 204 Ill. App. 488 (1917); *Singer Sewing Mach. Co. v. Phipps*, 49 Ind. App. 116, 94 N. E. 793 (1911); *Southern Surety Co. v. Weaver*, 273 S. W. 838 (Tex. Comm. App. 1925).

⁵⁶*Sebastian County Coal & Mining Co. v. Fidelity Fuel Co.*, 310 Mo. 158, 274 S. W. 774 (1925); *Givens, Headly & Co. v. Jordan*, 13 Ky. Law Rep. 258 (1891); *Day v. Duckworth*, 17 Misc. 305, 40 N. Y. Supp. 378 (1896); *Newton v. Livingston County Trust Co.*, 231 App. Div. 355, 247 N. Y. Supp. 121 (4th Dept. 1931).

⁵⁷*Duggan v. Wright*, 157 Mass. 228, 32 N. E. 159 (1892). In accord, in effect: *Livingston v. Lovgren*, 27 Wash. 102, 67 Pac. 599 (1902).

⁵⁸*Robinson v. Stanley*, 61 Misc. 608, 114 N. Y. Supp. 162 (1909).

was not, "adequate consideration" in a particular instance are but allegations of legal conclusions.⁵⁹ On the other hand, we find it claimed that "for a valuable consideration" is so commonly used, and has such a well known meaning in commercial and legal usage, that it is illogical to say that it expresses a legal conclusion rather than a statement of fact.⁶⁰ Again, it is directly said that those words state an ultimate fact.⁶¹ Which view is right? The answer is found in the reply to the question, who tells us what "consideration" is—laymen or the judiciary? The clear answer is the latter; thus "consideration" becomes a legal averment. The argument that it is illogical to say that the term "for a valuable consideration" states a legal conclusion because it is commonly used and has a well known meaning, is untenable. The court has the power, by assuming the duty of explaining an expression, to turn what has been an allegation of fact into one of law. Moreover, consideration has not such a well known meaning as the court would make one think. To discover this, all one need do is to read the cases attempting to explain that word. Of course, as Dean Pound said, while he was a commissioner in Nebraska, when the nature and circumstances of a conveyance are fully set forth, and its purpose disclosed, an allegation in connection with these statements that a note was executed without consideration is not open to objection.⁶² The only exception that could legitimately be taken to his opinion is that he suggests that "consideration" should, under such circumstances, be treated as a fact. However, from the rest of the opinion it seems doubtful that he meant that, as he appears to say that "consideration" standing by itself would be an averment of law. If it is to be so treated under such circumstances, it should be deemed a useless allegation of law when pleaded after facts showing the existence or non-existence of consideration. The setting forth of such facts will not change "consideration" from a word stating law to one alleging fact.

One of the most discussed set of words, with which the statute now

⁵⁹Some of these cases are *Meyer v. Bloch*, 139 Ala. 174, 35 So. 705 (1903); *Magee v. Magee*, 174 Cal. 276, 162 Pac. 1023, L. R. A. 1917D 629, ANN. CAS. 1918B 227 (1917); *Peters v. Binnard*, 17 P. (2d) 797 (Cal. App. 1932); *Winne v. Colorado Springs Co.*, 3 Colo. 155 (1877); *Higgins v. Gose*, 144 Ky. 123, 137 S. W. 1038 (1911); *Harris v. Rayner*, 8 Pick. 541 (Mass. 1829); *German Bank v. Mulhall*, 8 Mo. App. 558 (1880); *California Packing Corporation v. Kelly Storage & Distributing Co.*, 228 N. Y. 49, 126 N. E. 269 (1920); *Cole v. Levy*, 212 App. Div. 84, 208 N. Y. Supp. 481 (3rd Dept. 1925).

⁶⁰*St. Lawrence County Nat. Bank of Canton v. Watkins*, 153 App. Div. 551, 138 N. Y. Supp. 116 (3rd Dept. 1912).

⁶¹*Royal Bank of Canada v. Williams*, 220 App. Div. 603, 222 N. Y. Supp. 425 (1st Dept. 1927).

⁶²*Bennett v. Bennett*, 65 Neb. 432, 91 N. W. 409 (1902).

being considered deals, consists of "negligence", "negligent", and "negligently." Do they relate to law or fact? The courts have given every conceivable answer to that question. Some have said that "negligence", standing alone, alleges law,⁶³ a smaller number have claimed it avers fact.⁶⁴ We, also, find this statement, "It would be, as we think, better practice if the plaintiff in his petition were required to set out, at least in a general way, the grounds of negligence complained of, . . . But our rather indefinite system of pleading in this class of cases has been followed so long and is so well understood by the profession that it would create much confusion as well as injustice and delay to make any radical changes in it."⁶⁵ The answer to such talk is clear. A statute which says "facts" should be stated is not "indefinite." The instant that enactment became law any uncertain practice of prior days was abandoned, and any court that seeks to retain the old procedure is improperly legislating. The saddest thing about this statement is that the court thinks the practice is defective, and yet, with a statute to aid it in enforcing what the court believes is a preferable mode of pleading, it bows to the ancient, a thing no court should do under such circumstances. Another member of the judiciary

⁶³King v. City of Beaumont, 296 Fed. 531 (E. D. Tex. 1924); Stokes v. Great Southern Lumber Co., 21 F. (2d) 185 (S. D. Miss. 1927); Rosselott v. Road Improvement Dist. No. 1 of Lawrence County, 141 Ark. 8, 215 S. W. 891 (1919); Catlett v. Colorado & S. Ry. Co., 56 Colo. 463, 139 Pac. 14 (1914); Atlanta, K. & N. Ry. Co. v. Gardner, 122 Ga. 82, 49 S. E. 818 (1905); Cleveland, C. C. & St. L. Ry. Co. v. Morrey, 172 Ind. 513, 88 N. E. 932 (1909); S. K. Jones Const. Co. v. Hendley, 224 Ky. 83, 5 S. W. (2d) 482 (1928); Fidelity Union Casualty Co. v. Romero, 10 La. App. 796, 122 So. 288 (1929); State to use of Jeter v. Schwind Quarry Co., 97 Md. 696, 55 Atl. 366 (1903); Horton v. Lincoln County, 116 Miss. 813, 77 So. 796 (1918); Mitchell v. Westport Hotel Operating Co., 19 S. W. (2d) 528 (Mo. App. 1929); Fusselman v. Yellowstone Valley Land & Irrigation Co., 53 Mont. 254, 163 Pac. 473, ANN. CAS. 1918B 420 (1917); Bray v. Cove Irr. Dist., 86 Mont. 562, 284 Pac. 539 (1930); Walsh v. Van Ameringen-Haebler, 231 App. Div. 653, 248 N. Y. Supp. 1 (1st Dept. 1931); Whitehead v. Carolina Telephone & Telegraph Co., 190 N. C. 197, 129 S. E. 602 (1925); Johnson v. Stilwell, 90 Ore. 211, 176 Pac. 123 (1918); Wright v. Atlantic Coast Line R. Co., 110 Va. 670, 66 S. E. 848, 25 L. R. A. (N. S.) 972, 19 ANN. CAS. 439 (1910); Wilson v. Guyandotte Timber Co., 70 W. Va. 602, 74 S. E. 870 (1912); Emond v. Kimberly-Clark Co., 159 Wis. 83, 149 N. W. 760 (1914).

⁶⁴St. Louis & S. F. R. Co. v. Fancher, 1 Ala. App. 295, 55 So. 458 (1911); May v. Farrell, *supra* note 55; McIntyre v. Gritton, 5 Ky. Law Rep. 694 (1884); Clark v. Chicago, Milwaukee & St. Paul Ry. Co., *supra* note 3; Rueter v. Terminal R. Ass'n, of St. Louis, 261 S. W. 713 (Mo. App. 1924); Johnson v. American Smelting & Refining Co., 80 Neb. 255, 116 N. W. 517 (1908); Robinson v. Ocean S. S. Co. of Savannah, Ga., 162 App. Div. 169, 147 N. Y. Supp. 310 (1st Dept. 1914); Levine v. Carrell, 68 S. W. (2d) 259 (Tex. Civ. App. 1934).

⁶⁵Hall v. Mengel Box Co., 160 Ky. 586, 169 S. W. 985 (1914).

says that "without proper and ordinary care and prudence, and without due examination, inquiry and proof" is a conclusion of fact, as it embraces the sum of all the evidence necessary to establish it, and is sufficient. If all details are set forth, the complaint alleges evidence and that is improper.⁶⁶ Now, wherein would stating those facts which are the elements of negligence, such as averring the manner of driving an automobile, be an allegation of evidence? Those facts would not be used to prove the existence of other facts, but would merely allow the court to see that the component parts of a negligent act existed, that is, they would show, and only show, that someone failed to act as a reasonable person should act under the circumstances. Many judges who have failed to go so far as to say that "negligence" by itself is sufficient, have declared that one may correctly plead that another did a named act negligently, omitting all further statement as to how the deed was done.⁶⁷ One of the proponents of this idea says that negligence may consist of the negligent doing of acts otherwise lawful. It results, he adds, from the simplest logic, that, when the claim arises from such cause, the pleader should be allowed to state the fact of negligent performance on which he relies. In doing so, he states a substantive, issuable fact. The pleader does not rely on the act. The legal wrong, the court continues, does not arise from that but from the color and character which the qualifying language gives it. Hence, general allegations of negligence should be allowed as qualifying an act otherwise lawful.⁶⁸ So the court thinks it isn't the act on which the one asserting a claim must rely in convincing the legal arbiter that he has a cause of action, but that his right to recover rests on color. What he means, of course, is that he doesn't merely rely on the fact that the alleged wrongdoer did a certain kind of thing such as drive an automo-

⁶⁶Ayers v. Russell, 50 Hun 282, 3 N. Y. Supp. 338, 20 N. Y. St. Rep. 323 (1888).

⁶⁷Tatum v. Louisville & N. R. Co., 253 Fed. 898, 165 C. C. A. 378 (C. C. A. 5th, 1918); Doullut & Williams v. Hoffman, 204 Ala. 33, 86 So. 73 (1920); Grossetti v. Sweasey, 176 Cal. 793, 169 Pac. 687 (1918); Adams Exp. Co. v. Aldridge, 20 Colo. App. 74, 77 Pac. 6 (1904); Western & A. R. R. v. Grover, 155 S. E. 500 (Ga. App. 1930); Nickey v. Steuder, 164 Ind. 189, 73 N. E. 117 (1905); Murray v. Chesapeake & O. Ry. Co. of Ky., 139 Ky. 379, 115 S. W. 821 (1909); Philadelphia, B. & W. R. Co. v. Allen, 102 Md. 110, 62 Atl. 245 (1905); Gayle v. Missouri Car & Foundry Co., 177 Mo. 427, 76 S. W. 987 (1903); Zichler v. St. Louis Public Service Co., 59 S. W. (2d) 654 (Mo. 1933); Thompson v. Shanley, 17 P. (2d) 1085 (Mont. 1933); Jones v. Great Northern Ry. Co., 12 N. D. 343, 97 N. W. 535 (1903); Merriam v. Hamilton, 64 Ore. 476, 130 Pac. 406 (1913); Freedman v. Denhalter Bottling Co., 54 Utah 513, 182 Pac. 843 (1919); Zimmerman v. Auerbach, 17 P. (2d) 251 (Utah, 1932); Parker v. Boston & M. R. R., 84 Vt. 329, 79 Atl. 865 (1911).

⁶⁸Hill v. Fairhaven & W. R. Co., 75 Conn. 177, 52 Atl. 725 (1902)

ble, but that the claimant can recover only if it was driven in a certain way. That is correct, but, still, the injured person relies on an act or acts, such as driving an automobile at an excessive rate of speed, and the driving and the rate of speed cannot possibly be divorced one from the other, for, at the same time he drives, he drives in a particular way. There is but a single occurrence. If he relies on any of it, he depends on all of it to obtain a judgment. Several decisions directly oppose the view just discussed.⁶⁹

In a few jurisdictions one finds holdings that definitely demand a statement of facts showing the existence of a duty on the part of the actor to the claimant not to do the act resulting in harm, as well an allegation of the negligent doing of something.⁷⁰ These cases can scarcely be thought to add anything new, as, in any instance, words must be asserted which show the existence of such an obligation. There are some adjudications which, on their face, appear to go still further. They seem to declare that, if one alleges facts which disclose a duty on the part of the defendant to the plaintiff not to do a certain thing, the only other statement that the claimant needs to set forth is general negligence on the defendant's part.⁷¹ If this is so, we have the rule already stated to the effect that "negligence", without more, sufficiently alleges lack of due care. It is believed, however, that these cases are not intended to establish this rule, for they all come from states in which the law is that one must at least aver that a particular act was negligently done.

Another school of thought, closely akin to that which says "negligence" states an ultimate fact, is sponsored by those who assert that

⁶⁹Northern Alabama R. Co. v. Mitchell, 205 Ala. 448, 88 So. 558 (1921); Stratton's Independence v. Sterrett, 51 Colo. 17, 117 Pac. 351 (1911); Louisville & N. R. Co. v. Barnwell, 131 Ga. 791, 63 S. E. 501 (1909); Payne v. Moore, 31 Ind. App. 360, 67 N. E. 1005 (1903); Cooley v. Killingsworth, 228 N. W. 880 (Iowa, 1930); Bourgoyne v. Louisiana Public Utilities Co., 152 So. 150 (La. App. 1934); Phelps v. Board of Com'rs of Howard County, 117 Md. 175, 82 Atl. 1058 (1912); Kramer v. Kansas City Power & Light Co., 311 Mo. 369, 279 S. W. 43 (1926); Peerrot v. Mt. Morris Bank, 120 App. Div. 247, 104 N. Y. Supp. 1045 (1st Dept. 1907); Texas & N. O. R. Co. v. Conn, 30 S. W. (2d) 939 (Tex. Civ. App. 1930); Baker v. Butterworth, 119 Va. 402, 89 S. E. 849, L. R. A. 1916F, 1287 (1916); Moen v. Madison Rys. Co., 225 N. W. 821 (Wis. 1929).

⁷⁰Macke v. Sutterer, 224 Ala. 681, 141 So. 651 (1932); Atlantic Coast Line R. Co. v. Holliday, 73 Fla. 269, 74 So. 479 (1916); Pittsburgh, C. C. & St. L. Ry. Co. v. Arnott, 189 Ind. 350, 126 N. E. 13 (1920); Consolidated Coach Corporation v. Burge, 245 Ky. 631, 54 S. W. (2d) 16 (1932).

⁷¹Southern Ry. Co. v. Arnold, 162 Ala. 570, 50 So. 293 (1910); Mauney v. Electric Const. Co., 210 Ala. 554, 98 So. 874 (1924); Cleveland, C. C. & St. L. Ry. Co. v. Morrey, *supra* note 50; Indianapolis Abattoir Co. v. Neidlinger, 174 Ind. 400, 92 N. E. 169 (1910).

"negligence" is an allegation of mixed law and fact and thus is to be treated as an ultimate fact.⁷² Surely, anybody will freely admit that there are fact bases to an act deemed negligent by courts, but there are several objections to the rule suggested at this point. The first is that the word "negligence" is a word defined by the court; hence it is a legal term. Again, it is a standard, not a fact. Moreover, the statute says that "facts", not admixtures of facts and law, should be pleaded. The trouble here, as in so many other cases, has been that, prior to the statute, lawyers were in the habit of using certain legal terms in their pleadings. They were convenient and, in certain instances, the best terms to use, for they sufficiently told the opposing party, his counsel, and the court what the claimant had in mind and shortened pleadings. The result was that, when a statute came along which demanded the pleading of facts, the judges, seeing the efficacy of such legal words and phrases, and being trained in their use, called them allegations of fact, though they certainly dealt with rights and duties or were words defined by the judiciary. But "negligently" and kindred words have not even the saving grace of adequately informing others of the claim involved. By now, it should be clear that my idea is that "negligently" and like terms are language the definition of which the courts have assumed. Thus, they have become legal expressions which, under the code provision involved, are not pleadable. One whose action is based on negligence should, in setting forth the careless act involved, state the occurrences which will show that the alleged tort-feasor did not conduct himself as a reasonable person should.

"Fraud", "fraudulent", and "fraudulently" are not especially interesting because of any conflict of opinion as to whether they assert fact or law. Of a host of cases dealing with these words, only a very few decide that they state facts,⁷³ though, as might be expected, a

⁷²*Ellis v. Central California Traction Co.*, *supra* note 3; *Hill v. Fairhaven & W. R. Co.*, *supra* note 55; *Clark v. Chicago, Milwaukee & St. Paul Ry. Co.*, *supra* note 3.

⁷³The following is a small selection of decisions holding that these terms are statements of law. *Chamberlain Mach. Works v. United States*, 270 U. S. 347, 46 Sup. Ct. 225, 70 L. ed. 619 (1926); *Williamson v. Beardsley*, 137 Fed. 467, 69 C. C. A. 615 (C. C. A. 8th, 1905); *Cella v. Brown*, 144 Fed. 742, 75 C. C. A. 608 (C. C. A. 8th, 1906); *Wannamaker v. Edisto Nat. Bank of Orangeburg*, 62 F. (2d) 696 (C. C. A. 4th, 1933); *Driesbach v. Beckham*, *supra* note 2; *Finch v. Watson Inv. Co.*, 42 S. W. (2d) 214 (Ark. 1931); *La Mesa Lemon Grove & Spring Valley Irr. Dist. v. Halley*, 195 Cal. 739, 235 Pac. 999 (1925); *Earl v. Lofquist*, 27 P. (2d) 416 (Cal. App. 1933); *Martinez v. Martinez*, 57 Colo. 292, 141 Pac. 469 (1914); *State v. Martin*, 198 Ind. 516, 154 N. E. 284 (1927); *Legler v. West Side Mut. Fire Ins. Ass'n of Linn County*, 243 N. W. 157 (Iowa 1932); *Gorsage v. Steinmann-McCord & Co.*, 138 Kan. 400, 26 P. (2d) 455 (1933); *R. G. Wilmott Coal Co. v. State Pur-*

minority view does exist.⁷⁴ What is interesting is the fact that the courts are so certain that "fraud" treats of law, whereas there is so little unanimity in regard to "negligence". We even discover such a broad statement as this. "The term 'negligence' is not, like fraud, a mere legal conclusion, or epithet applied to the act complained of. Negligence is a fact." Why such a result has been reached is incomprehensible to me. The job of explaining the meaning of both of these words has been taken over by the courts, and each should, therefore, be deemed a statement of law.

Yet another set of expressions that has caused widespread difficulty consists of "ownership", "owner", and "owns". Once again, we have a direct clash of opinion as to whether these terms are statements of law or fact. There are many who believe they aver law,⁷⁵ but, probably,

chasing Commission, 246 Ky. 115, 54 S. W. (2d) 634 (1932); *Cosmopolitan Trust Co. v. S. L. Agoos Tanning Co.*, 245 Mass. 69, 139 N. E. 806 (1923); *Young v. Lindquist*, 126 Minn. 414, 148 N. W. 455 (1914); *Jones v. Rogers*, 85 Miss. 802, 38 So. 742 (1905); *Robinson v. Wiese*, 210 S. W. 889 (Mo. 1919); *Brandt v. McIntosh*, 47 Mont. 70, 13 Pac. 413 (1913); *U. S. Theatre Supply Co. v. Creal*, 241 N. W. 529 (Neb. 1932); *Sugarman Iron & Metal Co. v. Morse Bros. Machinery & Supply Co.*, 255 Pac. 1010 (Nev. 1927); *Finsilver v. Still*, 269 N. Y. Supp. 9 (1934); *Lanier v. John L. Roper Lumber Co.*, 177 N. C. 200, 98 S. E. 593 (1919); *Kelly v. Scott*, 125 Okla. 208, 257 Pac. 303 (1927); *Interior Warehouse Co. v. Dunn*, 80 Ore. 528, 157 Pac. 806 (1916); *Schuster v. Largman*, 308 Pa. 520, 162 Atl. 305 (1932); *Drennan v. Brown*, 112 S. C. 340, 100 S. E. 75 (1919); *Madsen v. Madsen*, 269 Pac. 132 (Utah, 1928); *Quinn v. Valiquette*, 80 Vt. 434, 68 Atl. 515, 14 L. R. A. (N. S.) 962 (1908); *Burke v. Bladine*, 99 Wash. 383, 169 Pac. 811 (1918); *Forest County v. Shaw*, 150 Wis. 294, 136 N. W. 642 (1912); *Smith v. Stone*, 21 Wyo. 62, 128 Pac. 612 (1912).

⁷⁴*Gwillim v. Asher*, 71 Colo. 143, 204 Pac. 609 (1922); *Taylor v. Jones*, 150 So. 254 (Fla. 1933); *Langston v. Langston*, 156 S. E. 469 (Ga. App. 1930); *Hovey v. Holcomb*, 11 Ill. 660 (1850); *Zimmerman v. Willard*, 114 Ill. 364, 2 N. E. 70 (1885); *Drummond v. Allen Nat. Bank*, 152 S. W. 739 (Tex. Civ. App. 1913); *Wetmore & Morse Granite Co. v. Bertoli*, 87 Vt. 257, 88 Atl. 898 (1913).

⁷⁵*Knights of Ku Klux Klan v. International Magazine Co.*, 294 Fed. 661 (C. C. A. 2d, 1923); *Kelley v. Kelley*, 9 Ala. App. 306, 63 So. 740 (1913); *Loud v. Luse*, 3 P. (2d) 542 (Cal. 1931); *Foston v. Swanson*, 306 Ill. 518, 138 N. E. 119 (1923); *Pittsburgh, C. C. & St. L. Ry. Co. v. Ft. Wayne & Northern Indiana Traction Co.*, 193 Ind. 405, 138 N. E. 759 (1923); *McAnulty v. Peisen*, 226 N. W. 144 (Iowa, 1929); *Gowin v. Lake*, 243 Ky. 442, 48 S. W. (2d) 1059 (1932); *Levy v. Deposito*, 133 La. 126, 62 So. 599 (1913); *Myerberg v. Hall*, 162 Md. 578, 160 Atl. 621 (1932); *Smith & Kinzer v. Dean*, 19 Mo. 63 (1853); *Wabaska Electric Co. v. City of Wymore*, 60 Neb. 199, 82 N. W. 626 (1900); *Oliver v. Enriquez*, 17 N. M. 206, 124 Pac. 798 (1912); *Irving Nat. Bank v. Gray*, 174 App. Div. 29, 160 N. Y. Supp. 341 (1st Dept. 1916); *Reynolds v. Gregg*, 258 S. W. 1088 (Tex. Civ. App. 1924); *Buttles v. DeBaun*, 116 Wis. 323, 93 N. W. 5 (1903). This is only a partial list of cases. See, to same effect, Ross, *Minnesota Pleading as "Fact Pleading"* (1929) 13 MINN. L. REV. 348.

the majority opinion is that they allege fact.⁷⁶ We find one of the advocates of the latter view saying, "That the allegation of ownership is the statement of a fact, is hardly to be questioned."⁷⁷ What assurance! But listen to this. "In one sense it might be thought to be [an allegation of law], because ownership depends upon the conclusion which the law pronounces as the result of certain facts. But ownership is, in reality, merely an ultimate fact resting on many other facts. This does not require a pleader to state all the minute circumstances and course of proceedings by which that ultimate fact will be established. It is not at all necessary to aver with particularity how, or from whom, or the precise method in which, the fact of that ownership arose. That would be a matter of evidence."⁷⁸ A few decisions claim that "ownership" is a statement of mixed law and fact,⁷⁹ since it embodies, not alone the rights and duties inherent in the term, but also the facts upon which they are based. This conclusion definitely admits the existence of the law side of the expressions dealing with ownership. In the face of that admission, however, those terms, according to these courts, may be pleaded by themselves. Let us inquire just how language relating to ownership should be classified. To begin with, it seems plain that, when one says he is the owner of something, he, in part at least, talks of enforceable rights and duties in relation to some property. If that is true, and it seems uncontroversial, how can anyone say "owner" is an allegation of fact? A pure

⁷⁶*O'Keefe v. Cannon*, 52 Fed. 898 (C. C. Mont. 1892); *Geo. Adams & Frederick Co. v. South Omaha Nat. Bank*, 123 Fed. 641, 60 C. C. A. 579 (C. C. A. 8th, 1903); *Beall v. Folmar*, 199 Ala. 596, 75 So. 172 (1917); *Aronson & Co. v. Pearson*, 249 Pac. 191 (Cal. 1926); *Gromer v. Papke*, 71 Colo. 440, 207 Pac. 862 (1922); *Griffith v. Sands*, 271 Pac. 191 (Colo. 1928); *Domin v. Brush*, 161 S. E. 809 (Ga. 1931); *Coin'rs of Saline Co. v. Young*, 18 Kan. 440 (1877); *Louisville & N. R. Co. v. Scomp*, 124 Ky. 330, 30 Ky. Law Rep. 487, 98 S. W. 1024 (1907); *Curtiss v. Livingston*, 36 Minn. 380, 31 N. W. 357 (1887); *Berry v. Adams*, 71 S. W. (2d) 126 (Mo. App. 1934); *President & Directors of Manhattan Co. v. Morgan*, 199 App. Div. 767, 192 N. Y. Supp. 239 (1st Dept. 1922); *Red Hawk v. Jones*, 278 Pac. 572 (Ore. 1929); *Brasington v. Williams*, 143 S. C. 223, 141 S. E. 375 (1927); *Grace v. Ballou*, 4 S. D. 333, 56 N. W. 1075 (1893); *Slayden-Kirksey Woolen Mill v. Robinson*, 143 S. W. 294 (Tex. Civ. App. 1912); *Robins v. Roberts*, 15 P. (2d) 340 (Utah, 1932); *Harris v. Halverson*, 23 Wash. 779, 63 Pac. 549 (1901); *Comstock v. J. R. Dronney Lumber Co.*, 69 W. Va. 100, 71 S. E. 255 (1911); *Gillett v. Robbins*, 12 Wis. 354 (1860); *Watts v. Laurence*, 26 Wyo. 367, 185 Pac. 719 (1919). This is but a partial list of cases.

⁷⁷*L. L. & G. R. Co. v. Leahy*, 12 Kan. 124 (1873).

⁷⁸*Jones v. Schaff Bros. Co.*, 187 Mo. App. 597, 174 S. W. 177 (1915). In accord in principle: *McCaughy v. Schuette*, 117 Cal. 223, 46 Pac. 666 (1896).

⁷⁹*Norton v. Newerf*, 45 Cal. App. 10, 187 Pac. 57 (1919); *McKee v. Jessup*, 62 App. Div. 143, 70 N. Y. Supp. 796 (1st Dept., 1901); *Gillett v. Robbins*, *supra* note 76; *Marshall v. Wittig*, 238 N. W. 390 (Wis. 1931).

avermment of fact can not possibly be tainted with legal ideas. That being true, how is one properly to allege facts to support ownership? Ah, there's the rub. I see no way out of it but to state the occurrences that give one title. That means setting forth documents. But how far are we to go back in the chain of title? It looks as if we would have to go back to the original grant. This might not be so hard in some cases when realty is involved, but to do this with personalty would, in a vast number of cases, be impossible. What are we going to do about it? What *should* be done is to eliminate the present statute and have a rule allowing an allegation of ownership. What will be done? That is another story. As in ages past, the legislative mills as to this matter will grind slowly; courts, finding it intolerable to demand the pleading of deeds, will, as of yore, permit pleaders to allege such terms as "owner" without statements of facts, and they will say, whether they believe it or not, that they are only permitting statements of facts. And we laugh at the old formal action of ejectment! Have we a right to smile, much less laugh, at ye lawyers of olde? It has been said that to plead the deeds and occurrences connected with them is to plead evidence,⁸⁰ which procedure is not permissible under the code. Just how is that true? What other facts do the existence and terms of the transfer papers prove? None. Figure as long as you wish and the answer must be that the deeds and occurrences just mentioned are ultimate facts to which the courts are obliged to look in determining the existence, or non-existence, of rights and duties bound up in the idea of ownership.

The final problem which I wish to discuss relates to the correct method of pleading a contract. Here is found as great a clash of opinion as is possible. We are told that one *may* plead a contract according to its legal effect.⁸¹ Thus, one is allowed to allege that the defendant agreed to do certain things without pleading the contract.⁸² However, the opposing view has its supporter.⁸³ Again, we are informed that an agreement may be set out *either according to its legal effect or in its very words*.⁸⁴ And, lo, the other possibility that one cannot plead the very language of a contract, but must aver its legal effect.⁸⁵ Read this.

⁸⁰See cases *supra* note 78.

⁸¹*Giltner v. McCombs Producing & Refining Co.*, 190 Ky. 601, 228 S. W. 8 (1921); *Jones v. Louderman*, 39 Mo. 287 (1866).

⁸²*Giltner v. McCombs Producing & Refining Co.*, *supra* note 81.

⁸³*White v. Maryland Casualty Co.*, 139 App. Div. 179, 123 N. Y. Supp. 840 (2d Dept. 1910).

⁸⁴*Bank of Alameda County v. Hering*, 25 P. (2d) 1004 (Cal. App. 1933); *Long v. Dufur*, 58 Ore. 162, 113 Pac. 59 (1911).

⁸⁵*City & County of Denver v. Bowen*, *supra* note 2; *Strange-McGuire Paving*

"The statute requires the facts constituting the cause of action to be stated. . . To set out in the petition *in haec verba* the contract on which the case is founded is to plead the evidence, not the facts. A pleader should determine in his own mind the legal effect of the written contract or other document that underlies his case, and plead it by its legal effect, as he understands it, and as he proposes to maintain it."⁸⁶ So the code permits that, does it? Let us see. We are told that *we must allege facts not law*. Just what does one do when he states the legal effect of a document. He does nothing other, nor less, than to interpret the writing. He states what he thinks the rights and duties of the parties to the instrument are. If that isn't stating law, please explain when one would aver that which is legal. Therefore, the court first says, "State not law," then it orders, "State it." What admirable consistency! But, say the judges, if one pleads the very words of the document, he sets forth evidence and acts contrary to the dictates of the statute. To begin with, the legislation in question doesn't say evidence cannot be stated. Presume, nevertheless, that it is improper to plead evidence. How can one maintain that averring the exact words of an instrument pleads evidence? Evidence proves facts. The words of the contract under no circumstances prove other facts. They are the last fringe of facts; they tell the court nothing about other facts but give it the data, at least in part, from which the rights and duties involved in the agreement may be determined. Is there by now any question in the minds of those few souls who may read this that the distinctions among law and the different types of facts is, to say the very least, hazy to the general run of lawyers, both off and on the bench? If you are not yet convinced of that fact, give ear to these expressions of opinion:

"It is not easy to formulate a definition that will always describe what is a mere conclusion of law so as to distinguish it from a pleadable ultimate fact, or that will define how great an inclusion of law will be held to enter into the composition of a pleadable fact."⁸⁷

"The line of separation between a conclusion of law and an al-

Co. v. Blauvelt, 77 Colo. 441, 237 Pac. 153 (1925); Reilly v. Cullen, 159 Mo. 322, 60 S. W. 126 (1900); Haggerty v. St. Louis, K. & N. W. R. Co., 100 Mo. App. 424, 74 S. W. 456 (1903); Cantrell v. Knight, 72 S. W. (2d) 196 (Mo. App. 1934); United States Printing and Lithograph Co. v. Powers, 183 App. Div. 513, 170 N. Y. Supp. 314 (1st Dept. 1918); Murphy v. New York Yellow Cab Co. Sales Agency, 207 App. Div. 820, 201 N. Y. Supp. 493 (2d Dept. 1923).

⁸⁶Reilly v. Cullen, *supra* note 85. Italics are the author's.

⁸⁷Clark v. Chicago, Milwaukee & St. Paul Ry. Co., *supra* note 3; Travelers' Ins. Co. v. Hallauer, *supra* note 14.

legation of ultimate fact is as uncertain as the line separating the cardinal colors in the spectrum."⁸⁸

Nor are these the only expressions of despair to be encountered in the decisions.⁸⁹

The situation calls for drastic action, which, we know, will be very slowly taken. But some day an aroused citizenry in the states where the statute under consideration exists, finally realizing in part what an unnecessary toll in time and money is being taken, will demand a change. What type of law should be enacted? That depends upon the purpose of a pleading which states a cause of action. The best general idea of the function of language stating a cause of action which I have found is discovered in *Moore v. Hobbs*.⁹⁰ The court there says that a cause of action should be so alleged that the defendant will be fully informed as to the situation so that he can make his defense by proper pleadings and proofs, and so that the jury and court may see what they have to try and decide. Portions of this idea are found in several other cases.⁹¹ Another way of putting the same general idea is discovered in the thought that one should so plead his cause that his adversary should not be taken by surprise during the proceedings.⁹² Perhaps there is, in the background, the idea of proper notice when courts say that one purpose of pleading should be to avoid prolixity.⁹³

⁸⁸*Gill v. Manhattan Life Ins. Co.*, 11 Ariz. 232, 95 Pac. 89 (1908).

⁸⁹*Levins v. Rovegno*, *supra* note 15; *Huber v. H. R. Douglas Inc.*, 94 Conn. 167, 108 Atl. 727 (1919); *Crane v. Schaefer*, 140 Ill. App. 647 (1908); *Mallinger v. Webster City Oil Co.*, 234 N. W. 254 (Iowa, 1931); *Maylender v. Fulton County Gas & Electric Co.*, 227 N. Y. Supp. 209 (1928); *Oregon Home Builders v. Montgomery Inv. Co.*, *supra* note 33; *Laun v. Kipp*, 155 Wis. 347, 145 N. W. 183, 5 A. L. R. 655 (1914); *Tesch v. Industrial Commission*, *supra* note 16.

⁹⁰9 N. C. 535 (1878).

⁹¹*Lumley v. Wabash R. Co.*, 71 Fed. 21 (C. C. E. D. Mich. 1895); *Fox v. Hale & Norcross Silver-Min. Co.*, 53 Pac. 32 (Cal. 1898); *Central of Georgia Ry. Co. v. Jeffers*, 34 Ga. App. 35, 128 S. E. 202 (1925); *Sparks v. Floyd County*, 15 Ga. App. 80, 82 S. E. 583 (1914); *Stewart v. Brady*, 300 Ill. 425, 133 N. E. 310 (1921); *Avery v. Dougherty*, 102 Ind. 443, 2 N. E. 123, 52 Am. Rep. 680 (1885); *State v. Hackley, Hume & Joyce*, 124 La. 854, 50 So. 772 (1909); *State to the use of Jeter v. Schwind Quarry Co.*, *supra* note 63; *Greenfield v. Nye*, 173 App. Div. 106, 159 N. Y. Supp. 344 (1st Dept. 1916); *Stabilimento Metallurgico Ligure v. Joseph*, 189 App. Div. 173, 178 N. Y. Supp. 241 (1st Dept. 1919); *Donaldson v. Temple*, 96 S. C. 240, 80 S. E. 437 (S. C. 1915); *Hicks v. Emerson-Brantingham Implement Co.*, 229 S. W. 348 (Tex. Civ. App. 1921); *Texas & N. O. R. Co. v. Conn*, 30 S. W. (2d) 939 (Tex. Civ. App. 1930); *Chesapeake & O. Ry. Co. v. Hunter*, 109 Va. 341, 64 S. E. 44 (1909); *Matthews v. LaPrade*, 144 Va. 795, 130 S. E. 788 (1925); *Williams v. Brunson*, 41 Wis. 418 (1877); *Weber v. Naas*, *supra* note 2.

⁹²*Winne v. Colorado Springs Co.*, *supra* note 59; *Brainard v. Van Dyke*, 71 Vt. 359, 45 Atl. 758 (1899).

⁹³*Simon v. Stangl*, 54 F. (2d) 73 (Minn. 1931); *Curtiss v. Livingston*, 36 Minn.

To me, the general conception that the purpose of pleading a cause of action is to give fair notice to all concerned of what the cause consists is correct. However, the usual idea that this must be done by stating ultimate facts appears to be unsound. My reason for this difference of opinion is, as I hope has been clearly shown, that, in a multitude of instances, no general agreement as to whether a term states law or fact, evidentiary or ultimate, seems possible. Again, if clarity demands the pleading of evidence, that should be permitted. How, then, should the statute read? I propose the following enactment, or, where possible, rule of court. *Every cause of action is to be stated in plain and reasonably concise language, without unnecessary repetition. It shall give fair notice of the claim involved to all persons concerned. Statements of law and evidence are permissible when conciseness or fair notice are promoted by their use.*

We have made a detailed study of this matter and some of us may be convinced of the righteousness of our cause. But let us not be deluded. Change will not come in a hurry. There is, as yet, too little active interest favorable to a different order, and there is far too much diligent concern among certain influential lawyers who, for various reasons which need no statement, desire the present regime. It is only when a militant populace takes a hand in this matter and sends to the legislatures the proper type of men and women that we can hope, in many states, for the thorough purging of our procedural laws that is today, and for centuries has been, a crying need. But mark my word—that day will come though, perhaps, only in the yet dim and distant future.

380, 31 N. W. 357 (1887); *Gillett v. Robbins*, *supra* note 76; *Marshall v. Wittig*, *supra* note 79.