

THE REPLY*

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GENERAL PROVISIONS

Curtailing the Pleadings.

The common-law system of pleading contemplated successive pleadings in alternation by each party until an issue was reached upon which one party assumed the affirmative and the other party the negative. This process was to be followed no matter what time was thereby consumed. Under the code system of pleading, however, the purpose is not so much to obtain a narrow issue, as to have each party's view of the facts on record as concisely and as quickly as possible. This difference in purpose led to a striking difference in attitude towards the reply to the answer under the two systems. At common law the replication was a necessary part of the hierarchy of pleadings whenever the plea contained matter in confession and avoidance, *i.e.*, new matter. It was, however, but one of a series of pleadings and might be followed in turn by the rejoinder, the surrejoinder, the rebutter, the surrebutter and further pleadings, if necessary.¹ The plan of the code, on the other hand, was to cut off the pleadings quite sharply at the reply or before. Under the original code, the plaintiff might reply to new matter;² but under many modern codes the reply either is not available or is available only in a limited class of cases.³ The result is that the issue is more quickly arrived at under the codes, but it is presumably a broader and more general one.

The Code Provisions.

The code rules differ in various details in the different code states. In general, they are of three different kinds. (1) In a limited number of states, of which California is an example, no provision is made for a reply, though provision is made for an

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¹SHIPMAN, COMMON LAW PLEADING (Ballantine's ed. 1923) 31, 366-381; STEPHEN, PLEADING (Williston's ed.) *63,*66. Cf. Brookside Pratt Mining Co. v. Booth, 211 Ala. 268, 100 So. 240 (1924) and see also, *History, Systems and Functions of Pleading* (1925) 11 VA. L. REV. 817.

²First Rep., N. Y. Com'rs PL & Pr. (1848) §131; N. Y. Laws (1848) c. 379, §131.

³See *infra* note 4.

"answer" to a counterclaim.⁴ (2) In a somewhat greater number of states, provision is made for a "reply" to a counterclaim. Such reply is in effect an answer to the counterclaim.⁵ Usually this provision is accompanied by another to the effect that where new matter appears in the answer, the court may, upon motion of the defendant, order a reply.⁶ (3) In the greater number of code states a reply is necessary in order to deny or avoid any new matter contained in the answer.⁷

In New York the third rule was originally adopted,⁸ but this was changed and for many years the second rule has been followed, with a provision that the court might order a reply. This provision is still retained in the Civil Practice Act of 1920,⁹ but there was added a statute that the defendant or the plaintiff, as the case might be, must plead affirmatively all matters of defense or reply which might take the opposing party by surprise, etc.¹⁰ It has been suggested by a commentator that this provision changes the rule as to reply and makes a reply necessary to any plea of new matter of the kind referred to in the latter statute.¹¹ Apparently, however, this is not the case, and the new provision is intended to apply only in case a reply is otherwise necessary, and does not state when a reply is necessary.¹²

⁴Cal. Code Civ. Proc. (1923) §§421, 442; Idaho Comp. Stat. (1919) §§66, 99; Ariz. Rev. Stat. (1913) §428 (but see note 7, *infra*); Porto Rico Code Civ. Proc. (1911) §101 (apparently not permitting even an answer to a counterclaim); San Joaquin Brick Co. v. Mulcahy, 58 Cal. App. 295, 208 Pac. 351 (1922).

⁵Ark. Dig. Stat. (1921) §1205; N. C. Con. Stat. (1919) §§524, 525; N. D. Comp. Stat. (1913) §7452; N. Y. Civ. Prac. Act, §§272, 494; Code Civ. Proc. §514; S. C. Code (1922) §414; S. D. Rev. Code (1919) §2357; Wis. Stat. (1921) §§2660, 2661.

⁶See the statutes of N. C., N. D., S. C., and S. D. *supra* note 5; N. Y. Civ. Prac. Act, §274; Code Civ. Proc. §215.

⁷Alaska, Code (1913) §899; Colo. Code (1921) §66; Conn. Gen. Stat. (1918) §5633; Ind. Code (Burns, 1926) §381; Kan. Rev. Stat. (1925) §§60-717; Ky. Civ. Code (Carroll, 1919) §98; Minn. Gen. Stat. (1923) §9257; Mo. Rev. Stat. (1919) §1235; Mont. Rev. Code (1921) §9158; Neb. Comp. Stat. (1922) § 8624; N. M. Ann. Stat. (1915) §4119; Ohio Gen. Code (1921) §11326; Okla. Comp. Stat. (1921) §281; Or. Code (1920) §77; Wash. Comp. Stat. (Remington, 1922) §277; Wyo. Comp. Stat. (1920) §5669. In Iowa, Nevada and Utah, a reply in avoidance of new matter is required. Iowa Code (1924) §11156; Nev. Rev. Laws (1912) §5057; Utah Comp. Stat. (1917) §6590. In Arizona, in such cases, the plaintiff has the option of replying. Ariz. Rev. Stat. (1913) §424; Copper Belle Mining Co. v. Costello, 12 Ariz. 105, 95 Pac. 803 (1908).

⁸See *supra* note 2.

⁹See *supra* notes 5, 6.

¹⁰N. Y. Civ. Prac. Act, §242.

¹¹7 CORN. L. Q. 397.

¹²See Fitch v. Weir, 203 N. Y. Supp. 904 (1924); Globe & Rutgers Fire Ins. Co. v. Whitman Co., 215 N. Y. Supp. 225 (1926); cf. CARMODY, NEW YORK

Effect of Failure to Reply.

Where a party is prohibited by the code from filing a reply, new matter in the answer is considered as denied, or as sometimes put, as "controverted by traverse or avoidance," as the case requires.¹³ This is obviously necessary in order that the rules for curtailing the pleadings may not operate to exclude a meritorious defense to the matter claimed in the answer. But, as in the case of the answer, where a party is required under the rules to answer and fails to do so, he is considered as admitting the matter not denied.¹⁴ Hence, it becomes important, especially under the third rule, and somewhat under the second rule above, for the plaintiff to file a reply to new matter in order to avoid an admission of it.¹⁵ Often the defendant is able to avail himself of such admission at the trial by a motion, as for judgment on the pleadings, and the plaintiff's case is lost by inadvertence.¹⁶ If, however, the parties go to trial as though the matter were denied by a formal reply, it will then be held that the defendant has waived the requirement of a formal reply.¹⁷

Unnecessary Reply.

Where a reply is not provided for under the rules, the plaintiff has no option to file a reply and if he undertakes to do so, the paper will be entirely disregarded, unless it is accepted by the defendant. This rule is applied where no reply is permitted, and also where a reply may be had by order of court upon motion of the defendant, where no such order is made.¹⁸

PRACTICE, §§ 256-258. See also N. Y. Civ. Prac. Act, §243; Code Civ. Proc. §522, providing for the effect of a failure to deny new matter in the answer where "a reply is required" and where it "is not required."

¹³N. Y. Civ. Prac. Act, §243. Cf. *Stern v. Freeman*, 4 Metc. 309 (Ky. 1863).

¹⁴See *supra* note 13; also statutes *supra*.

¹⁵Under the second rule the plaintiff must reply to a counterclaim, and, where ordered, to new matter. It thus often becomes necessary to distinguish between new matter and a counterclaim, as under the third rule it is necessary to distinguish between a denial and new matter. See next section.

¹⁶*Benicia Agr. Works v. Creighton*, 21 Or. 495, 28 Pac. 775 (1892).

¹⁷*McAllister v. Hawell*, 42 Ind. 15 (1873); *Rhine v. Montgomery*, 50 Mo. 566 (1872); *Irwin v. Smith*, 60 Wis. 172 (1882).

¹⁸*Davis Confectionery Co. v. Rochester Germ. Ins. Co.*, 141 App. Div. 909, 126 N. Y. Supp. 723 (1910); *Ortiz v. Cornell*, 116 N. Y. Supp. 89 (1908); *Madden v. Anderson*, 5 Ind. T. 552, 82 S. W. 904 (1904); *Stenson v. Elfmann*, 26 S. D. 134, 128 N. W. 588 (1910). The defendant may, however, accept the reply. *Sullivan v. Traders' Ins. Co.*, 169 N. Y. 213, 62 N. E. 146 (1901). The reply may constitute an admission against the plaintiff. *Garland Corp. v. Waterloo L. & T. Co.*, 170 N. W. 373 (Iowa, 1919); *Johnson v. Butler*, 170 N. W. 140 (S. D. 1918).

WHEN REPLY IS NECESSARY

Reply to New Matter.

Under the more usual rule as to replies, stated in the preceding section, a reply is necessary to any *new matter* in the answer, or else it stands admitted; while under another rule followed in many codes, a reply to new matter in the answer may be ordered by the court on motion of the defendant.¹⁹ It, therefore, becomes important to determine whether allegations in an answer in form new matter are really such, or are only argumentative denials of the allegations of the complaint. This presents the same underlying problem which arises in connection with the answer, for, as certain issues cannot be raised by the defendant under a denial but affirmative allegations of fact in the answer are required, so similar issues cannot be raised in the answer except by new matter in a reply. The solution of these problems as to what is new matter is not subject to any one rule, but to many considerations such as history and precedent, logical form, and, especially, views of policy more or less consciously expressed, as to the particular issues in question.²⁰ A few examples of cases arising in connection with the reply are given in the foot note.²¹

Even though the matter is stated in the answer in form as new, the plaintiff is entitled to treat it as only a denial, if such is the case.²² It would seem safer, however, for the plaintiff,

¹⁹See *supra*. As to when a court should order a reply, see *Guinzburg v. Joseph*, 141 App. Div. 472, 126 N. Y. Supp. 324 (1910) (answer of the Statute of Frauds); *Hungarian Bank v. Titus*, 175 App. Div. 504, N. Y. Supp. (1916). It is ordered particularly either where it is possible to narrow the issues, and perhaps lead to a disposition of the case before trial, or to avoid surprise of the defendant. The validity of the defense is not passed upon. *Coffey v. Roche*, 194 App. Div. 447, 185 N. Y. Supp. 371 (1920).

²⁰*Cf.* *Brandt v. Meade*, 17 Ariz. 34, 148 Pac. 297 (1915).

²¹*Stephens v. Conley*, 48 Mont. 352, 138 Pac. 189, Ann. Cas. 1915D, 958 (1914) (malicious prosecution; probable cause and absence of malice are not new matter); *State v. Williams*, 48 Mo. 210 (1871) (suit on attachment bond; that action is still pending is not new matter); *Craig v. Cook*, 28 Minn. 232 (1885) (answer justifying an assault is not new matter;); *Vassear v. Livingston*, 13 N. Y. 248 (1855) (matter by way of recoupment is a defense, not a counterclaim); *Benicia Agr. Works v. Creighton*, 21 Or. 495, 28 Pac. 775 (1892) (no reply to answer of payment admits the defense). That answer of contributory negligence must be denied by reply or else it is admitted, see *Louisville & N. R. Co. v. Paynter's Adm'x*, 26 Ky. Law 761, 82 S. W. 412 (1904); *Straight Creek Fuel Co. v. Mullins*, 189 Ky. 661, 225 S. W. 726 (1920); *State v. District Court*, 32 Mont. 37, 79 Pac. 546 (1905); *cf.* *Pullman Co. v. Finley*, 20 Wyo. 456, 125 Pac. 380 (1912); *Enid City Ry. Co. v. Webber*, 32 Okla. 180, 121 Pac. 235 (1911). Where the matter does not amount to a defense, no reply is necessary. *West v. Cameron*, 39 Kan. 736, 18 Pac. 895 (1888).

²²*Stephenson v. Conley*, *State v. Williams*, *Craig v. Cook*, *supra* note 21.

where he is requested to reply to new matter, to file a reply wherever the form of the answer calls for it. In theory such a reply would probably be disregarded, unless the court held that the answer stated new matter,²³ though it might well be considered in any event since the defendant by the form of his answer has made it desirable.²⁴ But the plaintiff is thus protected if the court should hold that new matter is stated in the answer, a question, as we have seen, of much doubt and difficulty. In some states no reply to new matter is necessary where it is to be denied, but a reply is necessary when new matter in turn is to be pleaded to the answer.²⁵ This seems a desirable provision, avoiding to a large extent the possibility of a dispute over what is, or is not, new matter.

Reply to a Counterclaim.

A "reply" or "answer" to a counterclaim is necessary under all codes.²⁶ Where it is clear that the answer contains a counterclaim, the reply thus required is substantially an answer to an independent cause of action, and subject to the rules governing the answer.²⁷ But it is often difficult to decide whether allegations contained in an answer amount to a counterclaim or not. Where a transaction entirely independent of the cause stated in a complaint is made the subject of a counterclaim there is no difficulty; but where the two claims arise out of the same transaction,—where, for example, the defendant's claim is one in "recoupment",—it is difficult for the pleader to determine in advance just how the court will view the problem.²⁸ Again the matter of the so-called equitable defense has presented special difficulties. Historically, matter now considered the subject of an equitable defense was presented only by an affirmative action in equity, and hence would seem now the proper subject of a counterclaim; analytically and logically the matter is defensive only; and certain courts have tried to state a third rule, an indefinite and unworkable compromise between the two, treating some such defenses as defenses and others as counterclaims. The writer has concluded elsewhere that as a mere matter of

²³*Cf.* cases *supra* note 18.

²⁴*Cf.* *Gunn v. Madigan*, 28 Wis. 158 (1871).

²⁵See Iowa and Utah statutes, *supra* note 7.

²⁶See statutes *supra* notes 4-7.

²⁷Cal. Code Civ. Proc. (1923) §442; Ind. Stat. (Burns, 1926) §381; *Supra* notes 4-7.

²⁸*Vassear v. Livingston*, 13 N. Y. 248 (1855); *Siebert v. Dunn*, 216 N. Y. 237, 110 N. E. 447 (1915); (1916) 1 CORN. L. Q. 198.

pleading little is to be gained by forcing these matters to be pleaded either as counterclaims, or more logically as defenses, and that the effort might well be abandoned, if, as is further urged, the form of trial should not depend on the mere form of pleading.²⁹ On similar principles, the plaintiff ought not to be trapped, so far as failing to reply is concerned, by the decision which the court may make as to whether a defense or a counterclaim is involved. In theory the name given by the defendant does not control;³⁰ in practice it should at least so far as affects a plaintiff who has relied on the defendant's view of his answer.³¹ So where the defendant has made his allegations as a defense, the plaintiff should not be held to have admitted them as a counterclaim.³² Where the defendant has made his allegations as a counterclaim and the court holds them to be only matters of defense, the plaintiff's failure to reply is not considered an admission of the allegations.³³

CONTENTS OF THE REPLY

Where a reply is required to new matter, the plaintiff must deny "generally or specifically the allegations controverted by him, or any knowledge or information thereof, sufficient to form a belief, and he may allege in ordinary and concise language, and without repetition, any new matter not inconsistent with the petition, constituting a defense to the new matter in the answer."³⁴ Where a reply is required to a counterclaim, it "must contain a general or specific denial of each material allegation of the counterclaim controverted by the plaintiff, or of any knowledge or information thereof sufficient to form a belief", with a similar provision as to new matter constituting a defense to the counterclaim.³⁵ The rules, therefore, preserve

²⁹Clark, *Trial of Actions under the Code* (1926) 11 CORN. L. Q. 482. See also Clark, *The Union of Law and Equity* (1925) 25 COL. L. REV. 1; (1925), 13 CAL. L. REV. 345.

³⁰*Susquehanna S. S. Co. Inc. v. A. O. Anderson & Co. Inc.*, 239 N. Y. 285, 146 N. E. 381 (1925).

³¹*Gunn v. Madigan*, 28 Wis. 158 (1871).

³²*Gunn v. Madigan*, *supra* note 31. *Resch v. Senn*, 31 Wis. 138 (1872); *Am. Guild v. Damon*, 186 N. Y. 360, 78 N. E. 1081 (1906); *Young v. Stillwater Crushed Stone Co.*, 153 App. Div. 453, 138 N. Y. Supp. 539 (1912). But see *City of Huron v. Meyers*, 13 S. D. 420, 83 N. W. 553 (1900).

³³*Vassear v. Livingston*, 13 N. Y. 248 (1855); *Bates v. Rosenkrans*, 37 N. Y. 409 (1867); *Resch v. Senn*, *supra* note 32; *Ettlinger v. Surety Co.*, 221 N. Y. 467, 117 N. E. 945 (1917). *Cf.* cases in note 22, *supra*.

³⁴Mo. Rev. Stat. (1919) §1235; see statutes, *supra* note 7.

³⁵N. Y. Civ. Prac. Act, § 272; see statutes, *supra* note 5.

the distinction between denials and new matter found so troublesome in connection with the answer.³⁶

Counterclaims in the Reply.

Usually the codes contain no reference to counterclaims in the reply.³⁷ In New York and other jurisdictions it has been ruled that they are not permissible, except for recoupment or set-off arising out of the transaction from which a counterclaim of the defendant arises.³⁸ In other code jurisdictions they are permitted in answer to a counterclaim of the defendant.³⁹ The latter rule avoids the necessity of attempting a distinction between recoupment and counterclaim.⁴⁰ The former rule may, as it is claimed, lead to a confusion of issues, but practically speaking it is desirable to settle all issues possible between the parties to a pending suit.⁴¹

Equitable Defenses in the Reply.

Equitable defenses, so called, should be available in the reply as are any other defenses. It may be possible for a court to construe them as counterclaims in view of the confusion as to their character and then consider that they are not to be pleaded in the reply, but this seems decidedly improper.⁴² In the states where equity and law are not united, but equitable defenses in the answer are permitted, it may be a question whether the statute is broad enough to include such defenses in the reply. As to the equitable defense statute, applicable to the federal district courts, a difference of opinion has already

³⁶See the preceding section. Thus estoppel must be affirmatively set up in the reply, *Louisville Tobacco Warehouse Co. v. Lee*, 172 Ky. 171, 189 S. W. 16 (1916); matters avoiding the Statute of Limitations must be specially pleaded and cannot be proved under a reply by way of denial. *Moore v. Granby*, 80 Mo. 86 (1883).

³⁷See statutes *supra* notes 4-7.

³⁸*Anderson v. Smitley*, 141 App. Div. 421, 126 N. Y. Supp. 25 (1910); *Goosen v. Goosen*, 32 N. Y. Supp. 814 (1895); *Beakey v. Meenchen*, 78 Kan. 538, 97 Pac. 478 (1908); *Boyett v. Vaughan*, 85 N. C. 363 (1881); *Watson v. Ruderman*, 79 Conn. 687, 66 Atl. 515 (1907); *Imperial Elev. Co. v. Hartford Acc. & Ind. Co.*, 163 Minn. 481, 204 N. W. 531 (1925).

³⁹*Veden v. Maul*, 118 Ind. 556 (1888); Ky. Civ. Code (Carroll, 1919) §98.

⁴⁰See *supra* note 28.

⁴¹*Cf. Clark, Joinder and Splitting of Causes of Action* (1927) 25 MICH. L. REV. 395; *Clark and Brownell, Joinder of Parties* (Nov. 1927) 37 YALE L. J.; *Clark and Surbeck, Counterclaims* (Jan. 1928) 37 YALE L. J.—.

⁴²*Taft, J.*, in *Wagner v. Ins. Co.*, 90 Fed. 395 (1898); but see *McIsaac v. McMurray*, 77 N. H. 466, 93 Atl. 115 (1915), L. R. A. 1916 B, 769, note; *Perry v. M. O'Neill & Co.*, 78 Ohio St. 200, 85 N. E. 41 (1908); *Hancock v. Blackwell*, 139 Mo. 440 (1897). See note 20 L. R. A. (N. S.) 915.

arisen in the circuit courts of appeals of two circuits.⁴³ In view of the possible injustice to a plaintiff of the contrary holding and the probable interest of the legislative body to make such defenses freely pleadable, the broader interpretation seems more desirable.⁴⁴

DEPARTURE

At common law the rule was that the plaintiff in his replication, or the defendant in his rejoinder might not *depart* from the case or defense he had first made and have recourse to another. This rule was consistent with the common law purpose of securing a definite limited issue, the achieving of which would be prevented if the parties continually might seek new ground for their respective claims.⁴⁵ The rule has been similarly stated and applied under the codes.⁴⁶ In the model rules prepared by the American Judicature Society it is provided that: "Except by way of amendment no pleading shall contain any allegation of fact inconsistent with previous pleadings by the same party."⁴⁷ It should be noted, however, that with the freedom of amendment permitted under the codes, the rule of departure becomes of comparatively less importance, since the plaintiff can, in general, correct any mistake by amendment. The question, therefore, becomes one whether the plaintiff should set up such new matter by way of amendment to his complaint, or by way of reply. Since the rule against departure now is, therefore, more or less one of formality, it would seem desirable under the codes that it should not be strictly applied. While the enforcement of this rule may help to preserve some logical form to the pleadings, and thus to clarify the issue,

⁴³In *Keatley v. U. S. Trust Co.*, 249 Fed. 296 (C. C. A. 1st, 1918) it was held, L. Hand, J., dissenting, that the matter could not be pleaded, but Judge Hand's views were approved and followed in *Plews v. Burrage*, 274 Fed. 881 (C. C. A. 2d, 1921). The latter decision is approved in 22 COL. L. REV. 482; 35 HARV. L. REV. 345; 20 MICH. L. REV. 680.

⁴⁴See law review comments cited in note 43 *supra*. The Missouri holding, note 42 *supra*, led to a statute expressly authorizing the pleading in a reply of fraud in obtaining a release set up in the answer. Mo. Rev. Stat. (1919) §1238; *Non-royalty Shoe Co. v. Phoenix Ins. Co.*, 277 Mo. 399, 210 S. W. 37 (1919). Cf. Ky. Civ. Code (Carroll, 1919) §101. As to the manner of trial of the answer thus raised, see *supra*.

⁴⁵*Finn v. Modern Brotherhood*, 118 Minn. 307, 136 N. W. 850 (1912).

⁴⁶*Von Dorn v. Bodley*, 38 Ind. 402 (1871); *Finn v. Modern Brotherhood*, *supra*. See cases in notes 49-51, *infra*.

⁴⁷AM. JUD. SOC. BULL. VII-A, Rules of Civil Proc., Art. 15, §14; in the note thereto it is stated "The old rule against departure is still binding under these rules. This is necessary to make the *res judicata* clear and also to limit the issues."

the results do not seem of sufficient importance to justify long consideration of the question whether or not a departure exists.⁴⁸ Examples of the application of the rule are cases such as where the plaintiff originally relies on a lease and later shifts to a contract in substitution of the lease,⁴⁹ or where the plaintiff, in suing on a contract, alleges proof of performance of conditions precedent to his claim and in his reply relies on a waiver to excuse performance.⁵⁰ Other instances of the same general nature may be cited.⁵¹

NEW ASSIGNMENT

Under common-law pleading it sometimes became necessary for the plaintiff again to set forth his cause of action in his replication, but in a more particular fashion, in order to bring out the issue upon which he was suing. Thus, in a suit for trespass to land, where the complaint was general, the defendant might justify an act other than the one upon which the plaintiff was relying, and the plaintiff would then be compelled in his reply to set forth facts showing the particular act relied upon. This was called a "new assignment" of the cause of action.⁵² The rule only affected a limited class of cases at the common law, and with the more liberal pleading rules of the code there is even less occasion for it than at common law. Nevertheless, it has still been asserted under the codes.⁵³ In any event, it would hardly be treated with the same formality

⁴⁸*Cf.* Clark, *The Complaint in Code Pleading* (1926) 35 YALE L. J. 259. By statute in Kentucky the pleading of equitable matter of avoidance or estoppel in an ordinary action, or of legal matter of avoidance or estoppel in an equitable action, is not departure. Ky. Civ. Code (Carroll, 1919) §101.

⁴⁹*Parlus v. Market Investment Co.*, 95 Wash. 484, 164 Pac. 65 (1917).

⁵⁰*Nat'l Fire Ins. Co. v. Nichols*, 85 Okla. 24, 204 Pac. 272 (1922); *Union Cas. & Surety Co. v. Bragg*, 63 Kan. 291, 65 Pac. 272 (1910); *Waller v. City of N. Y. Ins. Co.*, 84 Or. 284, 164 Pac. 959, Ann. Cas. 1918C, 139 (1912); But see *Western Reciprocal Underwriters Exch. v. Coon*, 38 Okla. 453, 134 Pac. 22 (1913); *Miller v. Nat'l Council*, 103 Kan. 579, 175 Pac. 397 (1918); (1914) 62 U. OF PA. L. REV. 232. *Cf.* *Finn v. Modern Brotherhood*, *supra* note 45; *Trainor v. Worman*, 34 Minn. 237 (1885); AM. DEC., PL. §180 (2).

⁵¹*School Dist. v. Caldwell*, 16 Neb. 68 (1884); *Home State Bank v. School Dist.*, 102 Kan. 98, 169 Pac. 202 (1917); *Chreste v. Louisville Ry. Co.*, 173 Ky. 486, 191 S. W. 265 (1917). *Cf.* *Van Dorn v. Bodley*, note 46, *supra*, reply of new promise to defense of Statute of Limitations not a departure. Many cases are collected in AM. DEC., PL. §190.

⁵²*Stewart v. Wallis*, 30 Barb. 344 (N. Y. 1858); *Campbell v. Bannister*, 79 Ky. 205 (1880).

⁵³*Bishop v. Travis*, 51 Minn. 183, 53 N. W. 461 (1892); *Campbell v. Bannister*, *supra*; *Zorn v. Livesley*, 44 Or. 501, 75 Pac. 1057 (1904). But see *Stewart v. Wallis*, *supra* note 52; *Puget Sound Iron Co. v. Worthington*, 2 Wash. Ter. 472 (1865).

as at common law. In general, the difficulty may be avoided by an amendment of the complaint.⁵⁴

The occasion for the rule is still further limited under the model rules of the American Judicature Society which provide, "No pleading as to answer shall state any ground of claim or defense not included in a previous pleading of the same party."⁵⁵

OBJECTIONS TO THE REPLY

Since under most codes no answer to the reply is permissible, and any new matter in the reply is considered as denied by the defendant, there is little occasion for the defendant to make formal objections to the reply as filed. He may, however, desire to raise the claim that it is insufficient in law, and this he is allowed to do in advance of trial. Thus, the defendant is usually permitted to file a demurrer to the reply for insufficiency, where the reply is made to the defense of new matter, and for failure to state facts sufficient to constitute a defense where it is made to a counterclaim.⁵⁶ In New York where motions are substituted for demurrers, a motion may be addressed to the reply.⁵⁷ In general, motions to correct the reply, to make more definite and certain, and otherwise to attack the form of the reply, would seem to be available, such objections to be considered waived if not raised by timely motion.⁵⁸

PLEADINGS SUBSEQUENT TO THE REPLY

In nearly all the code states the pleadings must stop with the reply, except for the demurrer or motion to the reply discussed in the previous section.⁵⁹ New matter in the reply is to be taken as controverted by the defendant.⁶⁰ In a few jurisdictions a reply by the defendant to the plaintiff's answer to a

⁵⁴Stewart v. Wallis, *supra* note 52; Puget Sound Iron Co. v. Worthington, *supra* note 53.

⁵⁵AM. JUD. SOC. BULL. VII-A, Art. 15, §13.

⁵⁶See Alaska, Code (1913) §902; Ariz. Rev. Stat. (1913) §471; Ark. Dig. Stat. (1921) §1207; Cal. Code Civ. Proc. (1923) §424 (to answer to cross-complaint only); Colo. Code Civ. Proc. (1921) §66; Nev. Rev. Laws (1912) §5059; N. M. Ann. Stat. (1915) §4121; Utah Comp. Laws (1917) §6592; Or. Code Civ. Proc. (1920) §80; Wash. Comp. Stat. (Remington, 1922) §279.

⁵⁷N. Y. Civ. Prac. Act (1926) §§277, 278, rule 109.

⁵⁸Theobald v. U. S. Rubber Co., 157 App. Div. 446, 142 N. Y. Supp. 187 (1913); Griffith v. Wright, 21 Wash. 494, 58 Pac. 582 (1899); AM. DIG., PL. §367 (5).

⁵⁹*Cf.* Kinney v. Miller, 25 Mo. 576 (1857).

⁶⁰See statutes, note 4-7 *supra*. Biggs v. Steinway, 191 App. Div. 526, 182 N. Y. Supp. 101 (1920).

counterclaim is provided for.⁶¹ In Kentucky and Connecticut the pleadings may continue as at common law until the parties arrive at an issue.⁶² The greater precision of issue thus in theory secured is apparently felt under the codes in general not to be worth the time consumed in the process, and, therefore, as noted at the beginning of this chapter the record is rigorously curtailed so far as the pleadings are concerned.

⁶¹Reeve & Co. v. Currier, 60 Colo. 594, 155 Pac. 320 (1916); Indiana, note 7, *supra*.

⁶²Ky. Civ. Code (Carroll, 1919) §§99, 100, providing for rejoinders, surrejoinders and subsequent pleadings. Blair v. Meade, 192 Ky. 720, 234 S. W. 433 (1921). In Conn. by statute, Gen. Stat. (1918) §5633, further pleadings after the reply, subsequent in their nature, may be had if necessary, by leave of court, while by rule, Prac. Bk. (1922) p. 287, §191, they shall be had, if necessary, until issue is joined. Such pleadings are not unusual in that state.