

Incorporation by Reference: Requiem for a Useless Tradition

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I. THE FORMULA
(INCORPORATION BY REFERENCE)

The talismanic practice of repeating and realleging facts in each count in a pleading is particularly dreadful:

Each and every allegation set forth in paragraphs 1 through 45 of this Complaint is hereby repeated, reiterated, and realleged with the same force and effect and incorporated by reference as if fully set forth herein at length and in detail.

Most practitioners use a shorter but equally exasperating formula for “incorporation by reference.” A 25-page simple complaint with seven counts, for example, would have seven useless boilerplate paragraphs, repeating the formula seven times at the beginning of each count, mechanically incorporating previous paragraphs, whether relevant or not. Without these wasteful paragraphs, the complaint would be one full page shorter.

Modern pleadings have no place for antiquated practices or for useless words. But so far this practice has eluded American lawyers, who do it without knowing what they are doing or why they are doing it.

It is common to justify the practice of incorporation by reference by arguing that “[r]ealleging by reference saves the story from redundancy and tedium.”¹ This is a centuries-old, recycled explanation. Two centuries ago, in an English book widely published in the United States, Joseph Chitty famously said:

In framing a second or subsequent count for the same cause of action, care should be taken to avoid any unnecessary repetition of the same matter, and by an inducement in the first count, applying any matter to the following counts, and by referring concisely in the subsequent counts to such inducement, much unnecessary prolixity may be avoided.²

Chitty’s statement was the standard explanation for incorporation by reference; it was cited and plagiarized in dozens of decisions and books for several decades in the 1800s.

More than a century later, in 1913, in the United States, the justification remained the same:

Good pleading demands a plain and concise statement of the facts constituting the cause of action . . . without unnecessary recital or repetition; . . . it is good practice in stating a second cause of action to refer to some prior allegation in the first cause of action to avoid repetition.³

The same justification for incorporation by reference is echoed today in the two most comprehensive treatises on federal practice.⁴ It is as if Chitty’s treatise on pleading is still being read today.

1. Elizabeth Fajans & Mary R. Falk, *Untold Stories: Restoring Narrative to Pleading Practice*, 15 J. LEGAL WRITING INST. 3, 28 (2009).

2. 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON PLEADING AND ON THE PARTIES TO ACTIONS AND THE FORMS OF ACTIONS 396 (New York, Robert M’Dermut 1809). The last American edition of this treatise, published almost a century later, contained the same statement. See 1 CHITTY, *supra*, at 428–29 (Henry Greening & J.C. Perkins eds., Springfield, Mass., G & C Merriam, 7th Eng. ed. & 16th Am. ed. 1876); see also Phillips v. Fielding (1792) 126 Eng. Rep. 464, 469 (KB) (praising incorporation by reference as a means of streamlining documents); Stiles v. Nokes (1806) 103 Eng. Rep. 191, 194–95; 7 East 493, 502, 506 (KB) (same).

3. Maxwell Steel Vault Co. v. Nat’l Casket Co., 205 F. 515, 522 (N.D.N.Y. 1913); see also Griswold v. Nat’l Ins. Co., 3 Cow. 96, 105 (N.Y. Sup. Ct. 1824); Loomis v. Swick, 3 Wend. 205, 207 (N.Y. Sup. Ct. 1829).

4. See 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1326 (3d ed. 2018) (“Federal Rule of Civil Procedure 10(c) permits the pleader to use an incorporation by reference of prior allegations . . . to encourage pleadings that are short, concise, and free of unwarranted repetition . . .”); 2 JEFFREY A. PARNES, MOORE’S FEDERAL PRACTICE—CIVIL § 10.04 (2018) (updated by the Hon. Jerry E. Smith) (noting that incorporation by reference “eliminates redundancy and repetition”); see also CHARLES EDWARD

Incorporation by reference, however, is useless. If the objective is to avoid repetition, the solution cannot be to reiterate the facts through an inherently repetitive formula. Incorporation by reference is the quintessential redundancy. The narrative would be even less redundant and less tedious if parties did not reallege facts previously alleged in the same document.

Yet current legal writing⁵ and civil procedure⁶ books explicitly teach incorporation by reference. Most transcribe complaints with the offending formula, validating its use.⁷ Formbooks perpetuate the formula amongst practitioners.⁸ Books that don't teach the formula either fail to provide a model complaint, present simple complaints with only one count, or do not number the paragraphs.⁹

The Federal Rules of Civil Procedure add to the confusion. Rule 10(c) prescribes that “a statement in a pleading may be adopted by reference elsewhere

CLARK, HANDBOOK OF THE LAW OF CODE PLEADING § 37, at 149 (1928) (“[T]he practice would prevent the repetitions of allegations.”).

5. See, e.g., MARGARET TEMPLE-SMITH & DEBORAH E. CUPPLES, LEGAL DRAFTING: LITIGATION DOCUMENTS, CONTRACTS, LEGISLATION, AND WILLS 34 (2013) (“To avoid redundancy, an attorney can re-allege a paragraph containing a previously alleged fact or incorporate the material by reference.”); DEBORAH E. BOUCHOUX, ASPEN HANDBOOK FOR LEGAL WRITERS: A PRACTICAL REFERENCE 215 (4th ed. 2017); IAN GALLACHER, A FORM AND STYLE MANUAL FOR LAWYERS 130–31 (2005) (“First, however, you should reincorporate all your facts at the start of each count in the complaint.”).

6. See, e.g., RICHARD D. FREER, CIVIL PROCEDURE § 7.3.1 (3d ed. 2012); STEVEN BAICKER-McKEE & WILLIAM M. JANSSEN, A STUDENT’S GUIDE TO THE FEDERAL RULES OF CIVIL PROCEDURE 186 (2018); JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE § 5.13, at 286–89 (4th ed. 2005); GEOFFREY C. HAZARD, JR., JOHN LEUBSDORF & DEBRA LYN BASSETT, CIVIL PROCEDURE § 4.7 (6th ed. 2011); LARRY L. TEPLY & RALPH U. WHITTEN, CIVIL PROCEDURE 556 (4th ed. 2009).

7. See, e.g., HEIDI K. BROWN, THE MINDFUL LEGAL WRITER: MASTERING PREDICTIVE AND PERSUASIVE WRITING 299 (2016); CHARLES R. CALLEROS, LEGAL METHOD AND WRITING 406 (7th ed. 2014); VEDA R. CHARROW ET AL., CLEAR AND EFFECTIVE LEGAL WRITING 34 (5th ed. 2013); BRANDT GOLDSTEIN ET AL., A DOCUMENTARY COMPANION TO *STORMING THE COURT* 23 (2009); LEWIS A. GROSSMAN & ROBERT G. VAUGHN, A DOCUMENTARY COMPANION TO A CIVIL ACTION 78 (4th ed. 2008); NAN D. HUNTER, THE POWER OF PROCEDURE: THE LITIGATION OF *JONES V. CLINTON* 14 (2002); ADAM LAMPARELLO & MEGAN E. BOYD, SHOW, DON’T TELL: LEGAL WRITING FOR THE REAL WORLD 90–102 (2014); KRISTEN KONRAD TISCIONE, RHETORIC FOR LEGAL WRITERS: THE THEORY AND PRACTICE OF ANALYSIS AND PERSUASION 178 (2d ed. 2016).

8. See, e.g., 11 AM. JUR. PLEADING AND PRACTICE FORMS *Federal Practice and Procedure* § 159 (2018); 19C *id.* §§ 15–16 (2019); 1A NICHOLS CYCLOPEDIA OF FEDERAL PROCEDURE FORMS § 38:29 (2018) (“[Plaintiff/Defendant] repeats and realleges each and every allegation contained in paragraphs [number of paragraph] and [number of paragraph], inclusive, of this [complaint/answer/type of pleading] with the same effect as if they were repeated in full in this paragraph.” (alterations in original)); HERZOG’S BANKRUPTCY FORMS & PRACTICE § 6:3 (Nov. 2018); 2C WEST’S FEDERAL FORMS, DISTRICT COURTS-CIVIL §§ 10:62–10:65 (5th ed. 2018); 25B WEST’S MCKINNEY’S FORMS ELECTION LAW § 6-132 Form 5 (2018); 4A NEW YORK PRACTICE, COMMERCIAL LITIGATION IN NEW YORK STATE COURTS § 52:44 (4th ed. 2018); 1 LA COE’S FLORIDA RULES OF CIVIL PROCEDURE r. 1.110(128) (2018) (giving suggestions of best practices); 2 MICHIGAN COURT RULES PRACTICE, FORMS § 26:25 (2018) (giving five different options of a similar useless formula, including “repeats and realleges,” “incorporates . . . adopts . . . and realleges,” and “reiterates and restates”).

9. See, e.g., BRYAN A. GARNER, THE REDBOOK 444–45 (6th ed. 2013); LAUREL CURRIE OATES & ANNE ENQUIST, THE LEGAL WRITING HANDBOOK: ANALYSIS, RESEARCH, AND WRITING (6th ed. 2014); DIANA V. PRATT, LEGAL WRITING: A SYSTEMATIC APPROACH 24 (5th ed. 2015); MARY BARNARD RAY, THE BASICS OF LEGAL WRITING (rev. 1st ed. 2008); TERESA J. REID RAMBO & LEANNE J. PFLAUM, LEGAL WRITING BY DESIGN (2d ed. 2013); HELENE S. SHAPO ET AL., WRITING AND ANALYSIS IN THE LAW 378–82 (6th ed. 2013).

in the same pleading or in any other pleading or motion.”¹⁰ It is a norm without context, a permission without obligation.

Despite being useless, the practice lives on. It is a silly American idiosyncrasy, a ritualistic recitation that clutters complaints, answers, and indictments. It serves no purpose, makes no sense, and is not used in any other legal system. It is there, we can see it, but no one remembers what it is for. And no one asks questions. To borrow an expression of evolutionary biology, incorporation by reference is merely a vestigial evolutionary feature of our litigation procedures, like our vestigial tail.

The time has come for the legal profession to strike this useless recitation from our pleadings and adopt a twenty-first century style. This Article will explain why lawyers had to do it in the past and why they do not need to anymore.

II. THE DOGMA (THE NEED TO REALLEGE ALL FACTS IN EACH COUNT)

A. THE DOGMA IN ENGLISH AND AMERICAN COMMON-LAW PLEADING

The practice of incorporation by reference can be traced back more than four centuries, possibly earlier, back to the Middle Ages. It was forged in the Court of Common Pleas and in the King and Queen’s Bench, in a past so remote that the reports were handwritten on parchment rolls (plea rolls).¹¹ The records of the cases were written in Latin, and many books, in Latin or Law French. The cases are serviceable today only because they were translated into English, generally in a summary of only a few lines.

Incorporation by reference allowed efficient writing at a time when the formulaic common-law pleading rule in England (later transplanted to the United States) substantially restricted the joinder of claims in a legal proceeding. The general rule (subject to debate, exceptions, complications, and litigation) was that a plaintiff could only join claims that required the same kind of judgment, were between the same parties, and proceeded under the same form of action.¹²

10. FED. R. CIV. P. 10(c).

11. Over a million sheep gave their skins to produce the official record of six centuries of court business in England. See Pym Yeatman, *Our Common Law Records*, 4 LAW MAG. & REV. 162, 169 (1875); *Publication of the Ancient Common Law Records*, 2 CENT. L.J. 149, 149–50 (1875). It is ironic that the earliest case on incorporation by reference is about the sale of wool. See *infra* Subpart III.B (discussing *Barnes v. May* (1591) 78 Eng. Rep. 496, Cro. Eliz. 240).

12. See 1 CHITTY, *supra* note 2, at 196, 200 (“The joinder of action depends on the *form* of the action, rather than on the *subject matter* of it . . .”); EDWARD LAWES, AN ELEMENTARY TREATISE ON PLEADING IN CIVIL ACTIONS 72 (London, C. Roworth 1806); ROBERT WYNESS MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 111–22 (1952) (discussing the evolution of joinder of claims in common law and code pleading); FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., CIVIL PROCEDURE 451–63 (2d ed. 1977) (same); HENRY JOHN STEPHEN, A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS 279–80 (London, G. Woodfall 1824); 1 JOHN SIMCOE SAUNDERS, THE LAW OF PLEADING AND EVIDENCE IN CIVIL

The idiosyncratic common-law pleading system, with its arcane technicalities, was elevated to a “science.”¹³ Its excessive formalism generated several distortions which in turn produced inequitable outcomes and inconvenient proceedings. For example, a plaintiff could join two claims arising out of entirely different facts, however inconvenient, as long as they followed the same form of action. But a plaintiff could not join claims arising out of the same occurrence if they proceeded under different forms of actions, even if they required the same evidence and produced a convenient trial package.¹⁴

In the limited circumstances in which a plaintiff could join claims, each count (claim, cause of action, action, paragraph) had to be “separately stated.”¹⁵ This rule meant that each count had to be set separately from the other, eventually in a separate grammatical paragraph. The objective was to facilitate the work of the opponent and the court.¹⁶ This requirement is commonsensical and continues to exist today for the same reason.¹⁷

ACTIONS 418 (London, S. Sweet 1828); BENJAMIN J. SHIPMAN, *HAND-BOOK OF COMMON-LAW PLEADING* § 254, at 363–64 (St. Paul, Minn., West Publ’g Co., 2d ed. 1895); GEORGE L. PHILLIPS, *AN EXPOSITION OF THE PRINCIPLES OF PLEADING UNDER THE CODES OF CIVIL PROCEDURE* § 123, at 106–07 (Chicago, Callaghan & Co. 1896); Edson R. Sunderland, *Joinder of Actions*, 18 MICH. L. REV. 571, 572 (1920) (“Most of the restrictions which the law placed upon such joinder can be shown by experience to be useless.”); William Wirt Blume, *A Rational Theory for Joinder of Causes of Action and Defences, and for the Use of Counterclaims*, 26 MICH. L. REV. 1 (1927) (discussing the irrationality of the old rules of joinder of claims).

13. See LITTLETON’S TENURES 108 (London, Thomas Wright 1600) (1481) (originally published in French) (“[I]t is one of the most honorable, laudable, and profitable things in our law, to have the science of well pleading . . .”); 1 EDWARD COKE, *THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND; OR, A COMMENTARY UPON LITTLETON* § 10, at 17.a. (Francis Hargrave & Charles Butler eds., Kite & Walton 1853) (1628); 2 *id.* § 534, at 303.a.; see also PHILEMON BLISS, *A TREATISE UPON THE LAW OF PLEADING* iii (St. Louis, Mo., F.H. Thomas & Co. 1879) (“[T]o be a good pleader gave one an advantage and a rank among his fellows to be acquired by no other single accomplishment.”); JAMES GOULD, *A TREATISE ON THE PRINCIPLES OF PLEADING, IN CIVIL ACTIONS* vii (Boston, Lilly & Wait 1832) (“[T]he science of pleading [is] . . . the most instructive branch of the common law.”); STEPHEN, *supra* note 12, at v (“The science of pleading . . . always among the highest in professional estimation . . .”).

14. See Blume, *supra* note 12, at 8 (noting that a plaintiff could join a range of claims, even if they were “incongruous and unrelated,” so long as they “could all be included under *one form of original writ*” (emphasis added)); JAMES & HAZARD, *supra* note 12, § 10.2, at 453–54 (“[O]n the other hand, claims which arose out of the very same occurrence could not be joined if they required different forms of action for their redress.”).

15. See, e.g., *Boeckler v. Mo. Pac. Ry. Co.*, 10 Mo. App. 448, 450, 456 (1881); *St. Louis Gas Light Co. v. City of St. Louis*, 86 Mo. 495, 499 (1885); *Eaton v. Or. Ry. & Navigation Co.*, 19 Or. 391, 392 (1890).

16. See, e.g., 1 EDGAR B. KINKEAD, *THE LAW OF PLEADING IN CIVIL ACTIONS AND DEFENSES UNDER THE CODE* § 20, at 17–21 (Cincinnati, Ohio, W.H. Anderson & Co. 1895) (“The object of [separately stating and numbering causes of action] is not only to preserve . . . the legal distinction between causes of action in a petition, but to enable a defendant to answer fully, definitely, and clearly, that the facts alleged may be denied or admitted, and the court readily understand the principal points in controversy.”); CLAUDIUS L. MONELL, *A TREATISE ON THE PRACTICE OF THE COURTS OF THE STATE OF NEW-YORK ADAPTED TO THE CODE OF PROCEDURE* 48 (Albany, N.Y., Charles Van Benthuysen 1849) (stating that when several causes of action are in the same complaint, they must be separately set out so that the defendant can be aware when he may “have a defence to one and not to the other”).

17. FED. R. CIV. P. 10(b) (“A party must state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances.”); see also, e.g., FRIEDENTHAL, KANE & MILLER, *supra* note 6, § 5.13, at 286.

But “separately stated” also had another meaning, less obvious and less useful. It meant that each count had to contain all facts and elements essential to its cause of action, even if they were already mentioned earlier in another count of the same pleading.¹⁸ If one fact happened to be an element of two or more counts, it had to be alleged in each—defects and omissions in one count could not be supplied by the allegations in another.¹⁹

The principle behind this dogma was that each claim was perceived as a separate pleading or even a separate lawsuit.²⁰ Tellingly, in many old books, joinder of claims was called “joinder of actions.”²¹ Because of that, all counts had to be treated as an independent complaint and had to stand by itself: if one count was stricken or dismissed, the remaining counts could survive only if they were complete.²²

18. See, e.g., *Dent’s Adm’r v. Scott*, 3 H. & J. 28, 31–32 (Md. Ct. App. 1810) (discussing why “this form of pleading . . . is not allowed” and that each count “must be a full declaration of itself, and must not depend upon any other count”); *Loomis v. Swick*, 3 Wend. 205, 207 (N.Y. Sup. Ct. 1829); *Canterbury v. Hill*, 4 Stew. & P. 224, 228 (Ala. 1833); see also 1 SAUNDERS, *supra* note 12, at 417; 1 JOHN BOUVIER, A LAW DICTIONARY 245–46 (Philadelphia, T. & J.W. Johnson 1839) (defining “count”); WATKIN WILLIAMS, AN INTRODUCTION TO THE PRINCIPLES AND PRACTICE OF PLEADING IN CIVIL ACTIONS 99 (London, C. Roworth & Sons 1857).

19. See JOHN ANTHON, AMERICAN PRECEDENTS OF DECLARATIONS § 5, at 39 (New York, Gould & Van Winkle 1810) (“Any thing in the first count, which is right, cannot help any defect in the second count; though they are both in one declaration, yet they are as distinct as if they were in two.”); *Nelson v. Swan*, 13 Johns. 483, 484–85 (N.Y. Sup. Ct. 1816) (“The second count is imperfect, unless helped by reference to the first; and when . . . one count is bad, nothing in that count can be resorted to for the purpose of helping out, and aiding, another count.”).

20. See *Smith v. Aiery* (1704) 2 Ld. Raym. 1034, 6 Mod. 128, 129 (Eng.) (“[A]ny Thing in the first Count which was right, could not help any Defect in the Second; for tho’ [sic] they both were put in one Declaration, yet they were as distinct as if they had been in two several actions.”); *Mardis v. Shackelford*, 6 Ala. 433, 436 (1844); *Hitchcock v. Munger*, 15 N.H. 97, 102 (1844); see also JOHN FREDERICK ARCHBOLD, A DIGEST OF THE LAW RELATIVE TO PLEADING AND EVIDENCE IN ACTIONS REAL, PERSONAL, AND MIXED 172 (New York, Stephen Gould & Son 1824); 4 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW, *Pleas and Pleading* at B1 (London, Catherine Lintot 1759); 1 CHITTY, *supra* note 2, at 397; 1 MORRIS M. ESTEE, PRACTICE, PLEADING AND FORMS 210, 531 (San Francisco, H.H. Bancroft & Co. 1870); JOHN NORTON POMEROY, REMEDIES AND REMEDIAL RIGHTS BY THE CIVIL ACTION §§ 442, 447, 550, 716 (Boston, Little, Brown & Co. 1876); BLISS, *supra* note 13, § 121, at 162.

21. See, e.g., 1 CHITTY, *supra* note 2, at 397; 1 JOHN A. DUNLAP, A TREATISE ON THE PRACTICE OF THE SUPREME COURT OF NEW-YORK IN CIVIL ACTIONS 46 (Albany, N.Y., C.S. Van Winkle 1821); SIMEON NASH, PLEADING AND PRACTICE UNDER THE CIVIL CODE 32 (Cincinnati, Ohio, Robert Clarke & Co. rev. 3d ed. 1864); GEORGE VAN SANTVOORD, A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS UNDER THE NEW YORK CODE OF PROCEDURE 183 (Nathaniel Co. Moak ed., Albany, N.Y., John D. Parsons, Jr. 1873) (1852); SAMUEL MAXWELL, A TREATISE OF PLEADING AND PRACTICE UNDER THE CODE OF CIVIL PROCEDURE 28 (Lincoln, Neb., Journal Co. 1880); ALEXANDER MARTIN, CIVIL PROCEDURE AT COMMON LAW § 228, at 183 (1905); 1 JOHN PRENTISS POE, PLEADING AND PRACTICE IN COURTS OF COMMON LAW § 282, at 271 (4th ed. 1906); *Sunderland*, *supra* note 12, at 576; MARTIN P. BURKS, PLEADING AND PRACTICE IN ACTIONS AT COMMON LAW § 473, at 914 (C.H. Morrisett ed., 2d ed. 1921).

22. See *Phillips v. Fielding* (1792) 126 Eng. Rep. 464, 469; 2 H. Bl. 123, 131 (referring to a case in which the first counts were dismissed, but the remaining counts were considered sufficient only because they had referred to the first one); ANTHON, *supra* note 19, § 5, at 40 (“The [first] count struck out was considered as in existence, and as a part of the record, for the purpose of making the new count and judgment on it good.”); *Nelson*, 13 Johns. at 484; *Crookshank v. Gray*, 20 Johns. 344, 344–48 (N.Y. Sup. Ct. 1823) (dismissing the first two counts, but keeping the third count because it made reference to the first); *Lattin v. McCarty*, 17 How. Pr.

Introductory or prefatory information, however, could be stated just once at the beginning of the pleading (there was no need to repeat or refer to it at each count). Introductory information (also called “matters of inducement” by some courts) was a necessary part of the pleading, but contained unessential elements of any specific count and was applicable to several of them. Examples given in cases and textbooks included the character in which persons were made parties, the jurisdiction of the court, the corporate powers of plaintiffs, partnership and agreement between the parties, as well as the names, capacity to sue, citizenship, marital status, corporate existence, and residence of the parties.²³

B. THE DOGMA IN AMERICAN CODE PLEADING

The formalistic common-law pleading dogma (requiring each count to contain all facts and elements of the cause of action) remained in effect in the United States even after 1848, when New York enacted its first Code of Procedure, known as the Field Code.²⁴ Soon thereafter, about thirty states enacted their own codes of civil procedure emulating the New York model, and inaugurating what became known as the American Reform Experience (or code pleading). During the following decades in the United States, about half the states still followed common-law pleading (modernized and influenced by the codes at differing degrees), while the other half followed the then-modern code pleading.²⁵ Textbooks and casebooks on common-law pleading were published

239, 240 (N.Y. Sup. Ct. 1858); *see also* 1 AUSTIN ABBOTT, BRIEF UPON THE PLEADINGS IN CIVIL ACTIONS 34 & n.1 (1904).

23. *See* Sinclair v. Fitch, 3 E.D. Smith 677, 689 (N.Y. Ct. Com. P. 1857); Lowry v. Dutton, 28 Ind. 473, 474–75 (1867); Aull Sav. Bank v. City of Lexington, 74 Mo. 104, 105 (1881); Thompson v. Edwards, 85 Ind. 414, 416–17 (1882); Carver v. Carver, 97 Ind. 497, 503 (1884); West v. Eureka Improvement Co., 40 Minn. 394, 395 (1889); Ronnie v. Ryder, 8 N.Y.S. 5, 6 (City Ct. 1889); Abendroth v. Boardley, 27 Wis. 555, 557 (1871); Stone v. Wendover, 2 Mo. App. 247 (1876); Thompson v. Edwards, 85 Ind. 414, 416–17 (1882); Bigelow v. Drummond, 90 N.Y.S. 913, 914 (App. Div. 1904); *see also* POMEROY, *supra* note 20, §§ 575, 716; GEORGE W. BRADNER, HAND-BOOK OF THE RULES OF PLEADING FOR NEW YORK STATE 47 (Albany, N.Y., Matthew Bender 1892); PHILLIPS, *supra* note 12, § 204, at 183; EVERETT W. PATTISON, CODE PLEADING AS INTERPRETED BY THE COURTS OF MISSOURI § 235, at 138 (1901); 1 ABBOTT, *supra* note 22, at 36; 1 CLARK A. NICHOLS, A TREATISE ON PLEADING AND PRACTICE IN THE COURTS OF RECORD OF NEW YORK 926 (1904); 1 AUSTIN ABBOTT & CARLOS ALDEN, FORMS OF PLEADING IN ACTIONS FOR LEGAL OR EQUITABLE RELIEF 5 (Carlos C. Alden ed., 2d ed. 1918).

24. N.Y. CODE PROC. § 167 (1848) (amended 1863). The code received its name because of the influence of David Dudley Field, widely regarded as its main author and promoter. *Compare* Letter from Charles O'Connor to Messrs. Pope & Haskell (Mar. 14, 1870), in 1 ALBANY L.J. 302, 302 (1870) (“Common fame asserts, and without contradiction, that I am aware of, from any quarter, that Mr. David Dudley Field . . . drew the whole instrument, and may properly be regarded as its sole author.”), with Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311, 317 (1988) (“Although Field wrote much of the original version of this partial code, the other two commissioners apparently contributed significantly.”).

25. *See* CHARLES M. HEPBURN, THE HISTORICAL DEVELOPMENT OF CODE PLEADING IN AMERICA AND ENGLAND 8–16 (Cincinnati, Ohio, W.H. Anderson & Co. 1897) (classifying the states); CLARK, *supra* note 4, § 8 (same).

in the United States well into the twentieth century.²⁶ They shared the lawyers' shelves with textbooks and casebooks on code pleading.

The legislative evolution of the dogma of complete counts in New York, through its several codes and rules of procedure, is informative.

The common-law dogma survived in the New York Field Code of Procedure of 1848, which provided that “[t]he plaintiff may unite in the same complaint several causes of action But the causes of action, so united, . . . must be separately stated.”²⁷ Although the Field Code made pleading and joinder of claims more flexible than the practice at common law, it did not change the rule that each cause of action must be “separately stated.”

The first meaning of “separately stated” in English common-law pleading, as previously discussed, is commonsensical: each claim must be stated separately from the others to avoid confusion.²⁸ But the interpretation of that expression also imported (unnecessarily) its second meaning: that each count must be complete and contain all facts and elements essential to the cause of action, even if they were already mentioned earlier in another count in the same pleading.²⁹ This was the uniform interpretation in New York³⁰ and in all other

26. See, e.g., ALEXANDER MARTIN, *supra* note 21; EDSON R. SUNDERLAND, COMMON LAW PLEADING (1914); CLARKE B. WHITTIER & EDMUND M. MORGAN, CASES ON COMMON LAW PLEADING (William R. Vance ed., 1916); JOHN JAY MCKELVEY, PRINCIPLES OF COMMON-LAW PLEADING (rev. 2d ed. 1917); WALTER WHEELER COOK & EDWARD W. HINTON, CASES ON PLEADING AT COMMON LAW (1920); see also SHIPMAN, *supra* note 12, §§ 78–79, at 200–01 (3d ed. 1923); JOSEPH H. KOFFLER & ALISON REPPY, HANDBOOK OF COMMON LAW PLEADING (1969).

27. N.Y. CODE PROC. § 167 (1848) (amended 1849); see also WILLIAM WAIT, THE CODE OF PROCEDURE OF THE STATE OF NEW YORK 271–72, 305–06 (Albany, N.Y., William Gould & Son 1875); N.Y. CODE CIV. PROC. § 663 (1850) (proposed complete New York Code of Civil Procedure).

28. See *supra* Subpart II.A.

29. See *supra* Subpart II.A.

30. See, e.g., *Benedict v. Seymour*, 6 How. Pr. 298, 302 (N.Y. Sup. Ct. 1852); *Landau v. Levy*, 1 Abb. Pr. 376, 379–80 (N.Y. Sup. Ct. 1855); *Sinclair*, 3 E.D. Smith at 689 (“[E]ach [cause of action] by itself, and unconnected with the other, may show a good cause of action against the defendants.”); *Simmons v. Fairchild*, 42 Barb. 404, 409 (N.Y. Gen. Term 1864); *Victory Webb v. Beecher*, 55 How. Pr., 193, 202–03 (N.Y. Sup. Ct. 1878); *Reiners v. Brandhorst*, 59 How. Pr. 91, 92 (N.Y. Sup. Ct. 1879) (“Each separate cause of action must be complete in itself and contain everything that is essential . . . to show the plaintiff’s right to relief.” (citation omitted)); *Wallace v. Jones*, 74 N.Y.S. 116, 117 (App. Div. 1902) (holding that the complaint should state in each paragraph a separate cause of action and all the facts necessary to make the cause of action facially complete); *Marietta v. Cleveland, Cincinnati, Chi. & St. Louis Ry. Co.*, 100 N.Y.S. 1027, 1028 (Sup. Ct. 1906); *Daly v. Haight*, 146 N.Y.S. 42, 44–45 (App. Div. 1914).

code pleading (and common-law) states.³¹ And the dogma of complete counts was widely taught in all professional books.³²

By the time the Field Code was enacted in 1848, there was no reason why “separately stated” also meant “completely stated,” except inertia. This backward interpretation was comfortable for practitioners trained in the old system, who read old English common-law pleading books.³³ Even at the time, this interpretation was unwarranted. David Dudley Field’s main objective was to bring relief to the formalistic common-law pleading.³⁴ When code pleading abolished the old forms of action and merged law and equity, the parties needed only to plead the facts constituting the cause of action or defense, and the court would apply the law to the facts.³⁵ The Field Code imported this model from Equity practice.³⁶

Although code pleading was not free from technicalities, the enactment of the Field Code was the perfect intellectual environment to abandon the old common-law dogma of complete counts. It was, therefore, the first wasted opportunity in the United States to abandon the old dogma, beating England by a few years.³⁷

31. *See, e.g.*, *Holton v. Muzzy*, 30 Vt. 365, 374–75 (1858); *Leabo v. Detrick*, 18 Ind. 414, 415 (1862); *Sabin v. Austin*, 19 Wis. 421, 423 (1865); *Day v. Vallette*, 25 Ind. 42, 43 (1865) (“Each paragraph must contain within itself sufficient averments to constitute a good cause of action.”); *Mason v. Weston*, 29 Ind. 561, 564 (1868); *Stewart v. Balderston*, 10 Kan. 131, 144–45 (1872); *Haskell v. Haskell*, 54 Cal. 262, 265–66 (1880); *Entsminger v. Jackson*, 73 Ind. 144, 145–46 (1880); *Clark v. Whittaker Iron Co.*, 9 Mo. App. 446, 448–49 (1881); *Porter v. Drennan*, 13 Ill. App. 362, 365 (1883); *Leavenworth, N. & S. Ry. Co. v. Wilkins*, 26 P. 16, 16–17 (Kan. 1891); *Reading v. Reading*, 30 P. 803, 804 (Cal. 1892); *Ramsey v. Johnson*, 52 P. 1084, 1085 (Wyo. 1898); *Merrill v. Post Pub. Co.*, 83 N.E. 419, 423 (Mass. 1908); *Nat’l Lumber Co. v. Wickliffe*, 125 P. 357, 358 (Cal. Ct. App. 1912); *Gardner v. W. Union Tel. Co.*, 81 S.E. 259, 260 (Ga. Ct. App. 1914); *Smith v. Phila., Balt. & Wash. R.R. Co.*, 115 A. 416, 418–19 (Del. Super. Ct. 1921); *Ross v. Chi. & Alton R.R. Co.*, 225 Ill. App. 633, 638 (1922); *Saffold v. Anderson*, 134 S.E. 81, 83 (Ga. 1926); *A. Mortellaro & Co. v. Atl. Coast Line R.R. Co.*, 107 So. 528, 529 (Fla. 1926); *Paterson & Edey Lumber Co. v. Carolina-Portland Cement Co.*, 112 So. 245, 250 (Ala. 1927); *Lance v. Boroughs*, 102 S.E.2d 167, 169 (Ga. 1958).

32. *See, e.g.*, BRADNER, *supra* note 23, at 14, 48; CLARK, *supra* note 4, § 70, at 312–16; POMEROY, *supra* note 20, §§ 442, 447, 550, 716; PHILLIPS, *supra* note 12, §§ 123, 202–04; SHIPMAN, *supra* note 12, § 254; VAN SANTVOORD, *supra* note 21, at 148–49; 1 VICTOR B. WOOLLEY, PRACTICE IN CIVIL ACTIONS AND PROCEEDINGS IN THE LAW COURTS OF THE STATE OF DELAWARE § 343, at 247 (1906).

33. *See, e.g.*, 2 CHITTY, *supra* note 2, at 429 (H. Greening et al. eds., Springfield, Mass., G. & C. Merriam, 7th Eng. ed. & 16th Am. ed. 1872) (citing English and American common-law pleading cases regarding incorporation by reference).

34. *See* Letter from David Dudley Field to John O’Sullivan (Jan. 1, 1842), in 5 DOCUMENTS OF THE ASSEMBLY OF THE STATE OF NEW-YORK, 64TH SESS. 23–62 (1842). The letter was published as Appendix to the Report of the Committee on the Judiciary, in Relation to the More Simple and Speedy Administration of Justice and described proposed pleading rules. *Id.*; *see also* ARPHAXED LOOMIS, HISTORIC SKETCH OF THE NEW YORK SYSTEM OF LAW REFORM IN PRACTICE AND PLEADINGS 25–27 (Little Falls, N.Y., J.R. & G.G. Stebbins 1879) (“[The code] was designed to abolish all forms and technicalities which obstruct justice and prevent a speedy trial on the merits . . .”). Loomis was one of the members of the commission who drafted the Field Code, together with David Dudley Field and David Graham. *Id.* at 13–15.

35. *See* JAMES & HAZARD, *supra* note 12, § 1.6, at 19.

36. *See* LOOMIS, *supra* note 34, at 25–26 (“The system approaches and assimilates more nearly with the equity forms than with those of the common law.”).

37. *See infra* Subpart IV.A.

Instead, the old dogma persisted unchallenged. It was later maintained in the New York Throop Code of 1877, which provided that where a complaint “sets forth two or more causes of action, the statement of the facts constituting each cause of action must be separate and numbered.”³⁸ The same rule was applicable for defendants asserting more than one defense or counterclaim.³⁹ Again, the rule that each cause of action must be “separately stated” had the same common-law interpretation that each count must be complete, containing all facts and elements of the cause of action. After all, that was the only reality that the practitioners knew at the time, and new statutes are interpreted and applied in the context of the time in which they are inserted.

The rule then continued in the New York Rules of Civil Practice of 1921: “Each separate cause of action, counterclaim or defense shall be separately stated and numbered, and shall be divided into paragraphs numbered consecutively, each as nearly as may be containing a separate allegation.”⁴⁰ The rule, however, adopted a different regulation for denials of facts: “Denials of facts alleged in the complaint or in an answer and denied by reply must not be repeated nor incorporated in a separate defense or counterclaim. Any fact once denied, shall be deemed denied for all purposes of the pleading.”⁴¹

The text did not change much in 1962, when the New York Civil Practice Law and Rules were enacted: “Separate causes of action or defenses shall be separately stated and numbered.”⁴² But by then, the phrase “separately stated” did not carry the meaning that each count had to contain all facts and elements essential to the cause of action even if previously mentioned in the same pleading. Actually, the opposite was true.⁴³

Incidentally, the 1938 Federal Rules also contain a similar provision regarding claims being “separately stated.” But it is couched in a much more tentative language: “If doing so would promote clarity, each claim founded on a separate transaction or occurrence—and each defense other than a denial—must be stated in a separate count or defense.”⁴⁴ It is still true today that each paragraph must be numbered, each paragraph must be limited to a single set of circumstances, and each claim must be stated in separate counts.⁴⁵ But the dogma of complete counts was never adopted in the Federal Rules.⁴⁶

38. N.Y. CODE CIV. PROC. § 483 (1877) (emphasis omitted). At the time, the law demanded that the counts be numbered. Now, each paragraph in a pleading must be numbered. *See* FED. R. CIV. P. 10(b) (“A party must state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances.”).

39. N.Y. CODE CIV. PROC. §§ 507, 517; *see also infra* Subpart II.C.

40. N.Y. R. CIV. PRAC. § 90 (1921).

41. *Id.*

42. N.Y. C.P.L.R. 3014 (McKinney 1962).

43. *See infra* Subpart IV.B.

44. FED. R. CIV. P. 10(b) (1938).

45. *But see* 2 PARNES, *supra* note 4, § 10.03 (these rules are not rigidly enforced if their violation does not confuse the opponent); 5A WRIGHT & MILLER, *supra* note 4, §§ 1322–24 (2018) (same).

46. *See infra* Subpart IV.C.

The dogma, therefore, has been dead in this country for almost a century (at least more than eighty years in the federal courts, and more than fifty in New York). But its disappearance went largely unnoticed to the legal profession. Because we neglected to give it a proper burial, its ghost still haunts us.⁴⁷

C. THE DOGMA APPLIED TO DEFENSES

The dogma that required each count to be complete was applied with the same force to responsive pleadings asserting more than one defense (plea) or more than one counterclaim. Each defense or counterclaim had to be “separately stated” and therefore complete: each had to contain all elements of that defense and be able to stand by itself, unaided by other defenses in the same answer.

This was the rule in English common-law pleading,⁴⁸ in American common-law pleading,⁴⁹ and in American code pleading.⁵⁰ So everything said

47. This is an inept attempt to paraphrase Maitland. F.W. MAITLAND, *EQUITY ALSO THE FORMS OF ACTIONS AT COMMON LAW* 296 (A.H. Chaytor & W.J. Whittaker eds., 1910) (“The forms of actions we have buried, but they still rule us from their graves.”). American law’s disorderly development through case law is breeding grounds for a herd of ghosts, zombies, and undead. See, e.g., Geoffrey C. Hazard, Jr., *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 COLUM. L. REV. 1254 (1961).

48. See *Stiles v. Nokes* (1806) 103 Eng. Rep. 191, 196; 7 East 493, 507; see also WILLIAMS, *supra* note 18, at 99.

49. See *Currie v. Henry*, 2 Johns. 433, 437 (N.Y. Sup. Ct. 1807); *Hughes v. Moore*, 11 U.S. 176, 190 (1812); *Day v. Clarke's Adm'r*, 8 Ky. 521, 522 (1819); *Griswold v. Nat'l Ins. Co.*, 3 Cow. 96, 113 (N.Y. Sup. Ct. 1824) (stating that “[e]ach plea [defense] must stand upon itself. One plea [defense] cannot be invoked in aid of another” and transcribing a defense containing incorporation by reference) (citation omitted)); *Shook v. Fulton*, 4 Cow. 424, 425 (N.Y. Sup. Ct. 1825); see also 1 WILLIAM W. HENING, *THE AMERICAN PLEADER AND LAWYER'S GUIDE* 33–38 (New York, Isaac Riley 1811); GOULD, *supra* note 13, at 171.

50. See *Bridge v. Payson*, 5 Sand. 210 (1851); *Benedict v. Seymour*, 6 How. Pr. 298, 303 (N.Y. Sup. Ct. 1852) (“[E]very denial . . . must stand by itself as a separate and distinct defence [sic] and must be so pleaded.”); *Williams v. Richmond*, 9 How. Pr. 522, 523 (N.Y. Sup. Ct. 1854) (discussing a defense referring to a promissory note mentioned in the complaint); *Spencer v. Babcock*, 22 Barb. 326, 335 (N.Y. Sup. Ct. 1856) (“A defense cannot be made out in pleading, by connecting two or more separate defenses together . . . each insufficient of itself.”); *Swift v. Kingsley*, 24 Barb. 541, 543 (N.Y. Sup. Ct. 1857) (“Each answer must stand by itself as a distinct defense . . .”); *Xenia Branch Bank v. Lee*, 7 Abb. Pr. 372, 386 (N.Y. Sup. Ct. 1858) (“Each defence [sic] so separately pleaded must be in itself complete, and must contain all that is necessary to answer the whole cause of action, or to answer that part thereof which it purports to answer.”); *Catlin v. Pedrick*, 17 Wis. 88, 92 (1863); *Baldwin v. U.S. Tel. Co.*, 54 Barb. 505, 517 (N.Y. Sup. Ct. 1867) (“By the well settled rules of pleading, each answer must of itself be a complete answer to the whole complaint; as perfectly so as if it stood alone. Unless, in terms, it adopts or refers to the matter contained in some other answer, it must be tested, as a pleading, alone by the matter itself contains.”); *Nat'l Bank of Mich. v. Green*, 33 Iowa 140, 144 (1871); *Krutz v. Fisher*, 8 Kan. 90, 96–97 (1871); *Truitt v. Baird*, 12 Kan. 420, 423–24 (1874); *Field v. Burton*, 71 Ind. 380, 387 (1880); *Spahr v. Tartt*, 23 Ill. App. 420, 421 (1887); *Eldridge v. Hargreaves*, 46 N.W. 923, 924 (Neb. 1890); *Black v. Holloway*, 41 S.W. 576, 576 (Ky. Ct. App. 1897); *Corbey v. Rogers*, 52 N.E. 748, 749–50 (Ind. 1899); *Eureka Fire & Marine Ins. Co. v. Baldwin*, 57 N.E. 57, 59 (Ohio 1900); *Gardner v. McWilliams*, 42 Or. 14 (1902); *Smith v. Martin*, 94 Or. 132 (1919); see also POMEROY, *supra* note 20, §§ 715–16, at 736 (“[E]ach [defense] must of itself be a complete answer to the whole cause of action against which it is directed, as perfectly so as though it were pleaded alone.”); T. A. GREEN, *A GENERAL TREATISE ON PLEADING AND PRACTICE IN CIVIL PROCEEDINGS AT LAW AND IN EQUITY UNDER THE CODE SYSTEM* §§ 825, 848–49 (WM. G. Myer ed., St. Louis, Mo., W.J. Gilbert 1879); 1 WILLIAM RUMSEY, *THE PRACTICE IN ACTIONS AND SPECIAL PROCEEDINGS IN THE COURTS OF RECORD OF THE STATE OF NEW YORK UNDER THE CODE OF CIVIL PROCEDURE* 355 (Albany, N.Y., Banks & Bros. 1887); 1 ABBOTT & ALDEN, *supra* note 23, at 7, 16; 16 THE ENCYCLOPEDIA OF PLEADING AND

in this Article about a plaintiff's complaint is equally applicable to a defendant's answer and counterclaim.

D. CONSEQUENCES FOR DISREGARDING THE DOGMA

Although the dogma of complete counts seems a frivolous technicality for modern legal minds, violating this fundamental pleading rule led to severe consequences: incomplete claims (or defenses) could be stricken or dismissed for failure to state facts sufficient to constitute a cause of action (or defense).⁵¹ And the arcane rule was rigidly applied because pleadings were strictly construed against the pleader.⁵²

PRACTICE 561–62 (William M. McKinney ed., Long Island, N.Y., Edward Thompson Co. 1899); *see also* N.Y. FIELD CODE PROC. § 150 (1848) (amended 1849) (“[Defenses] shall *each* be separately stated, and refer to the causes of action which they are intended to answer, in any manner by which they may be intelligibly distinguished.”); N.Y. THROOP CODE CIV. PROC. § 507 (1877) (same); N.Y. R. CIV. PROC. § 90 (1920) (same).

51. *See, e.g.*, the defenses filed in *Tindall v. Moore* (1760) 95 Eng. Rep. 716, 716; 2 Wils. KB 114 (old motion in arrest of judgment); *Nelson v. Swan*, 13 Johns. 483, 484 (N.Y. Sup. Ct. 1816) (demurrer); *Crookshank v. Gray*, 20 Johns. 344, 344–48 (N.Y. Sup. Ct. 1823) (incomplete count is not actionable); *Porter v. Cumings*, 7 Wend. 172, 174 (N.Y. Sup. Ct. 1831) (motion to set aside the verdict); *Nestle v. Van Slyck*, 2 Hill 282, 284–85 (N.Y. Sup. Ct. 1842) (motion for nonsuit); *Hitchcock v. Munger*, 15 N.H. 97, 102 (1844) (motion in arrest of judgment); *Sinclair v. Fitch*, 3 E.D. Smith 677, 685 (N.Y. Ct. Com. P. 1857) (direct judgment based on demurrer); *Xenia Branch Bank*, 7 Abb. at 394–95 (motion to strike out a counterclaim from an answer); *Gilmore v. Christ Hosp.*, 52 A. 241, 242 (N.J. 1902) (demurrer); *Richardson v. Lanning*, 26 N.J.L. 130, 132 (1856) (nonsuit); *Abendroth v. Boardley*, 27 Wis. 555, 556 (1871) (demurrer); *Entsminger v. Jackson*, 73 Ind. 144, 146 (1880) (demurrer); *St. Louis Gas Light Co. v. City of St. Louis*, 86 Mo. 495, 498 (1885) (objection to the introduction of evidence); *Ronnie v. Ryder*, 8 N.Y.S. 5, 6 (City Ct. 1889) (motion for a new trial); *Woods v. Armstrong*, 29 Misc. 660, 661 (N.Y. Special Term 1899) (motion to vacate the execution); *Opdycke v. Easton & Amboy R.R. Co.*, 68 N.J.L. 12, 13 (1902) (demurrer); *Henry v. Milner*, 204 Ala. 226, 227 (1920) (demurrer granted after verdict for plaintiff).

52. *See, e.g.*, *Took v. Glascock* (1666) 85 Eng. Rep. 298, 305–06 & n.8; 1 Wms. Saun. 250, 259 & n.8 (“[I]t is a maxim in pleading, that every thing shall be taken most strongly against the pleader.”); *De Symonds v. Shedden* (1800) 126 Eng. Rep. 1209, 1211; 2 Box. & Pul. 153, 155 (“[T]he rule has been established ever since the time of Plowden [sixteenth century] that the intendment is against the party averring.”); *Griswold*, 3 Cow. at 103 (“[E]very pleading is to be taken most strongly against the pleader.”); *see also* 4 BACON, *supra* note 20, at 2; Francis Bacon, *The Maxims of the Law*, in 1 THE WORKS OF LORD BACON 552 (London, William Ball 1838) (“[I]n all imperfections of pleading, whether it be in ambiguity of words and double intendments, or want of certainty and averments, or impropriety of words, or repugnancy and absurdity of words, even the plea shall be strictly and strongly taken against him that pleads.”); LAWES, *supra* note 12, at 52; 1 CHITTY, *supra* note 2, at 241, 520–21 (noting that claims are strongly construed against the pleading party); 2 COKE, *supra* note 13, § 534[p], at 303.b. (“[T]he plea of every man shall be construed strongly against him that pleadeth it, for everie [sic] man is presumed to make the best of his owne [sic] case: *ambiguum placitum interpretari debet contra proferentem*.”); 1 EDMUND PLOWDEN, THE COMMENTARIES OR REPORTS OF EDMUND PLOWDEN 29–30, 46, 103–04 (Samuel Richardson trans., Savoy, Catharine Lintot 1761) (1578) (“[A] plea[.] . . . shall be taken most strongly against him that pleads them”); STEPHEN, *supra* note 12, at 379; 1 SAUNDERS, *supra* note 12, at 416; 1 ESTEE, *supra* note 20, at 159.

The opposite of a rule of construction strictly against the pleader is that a pleading “shall be liberally construed, with a view of substantial justice between the parties.” *Childers v. Verner & Stribling*, 12 S.C. 1, 5 (1878) (internal quotation marks omitted) (citation omitted); *see also* CARLOS C. ALDEN, A HANDBOOK OF PRACTICE UNDER THE CIVIL PRACTICE ACT OF NEW YORK 62–63 (1921) (“At common law the rule of strict construction was applied, against the pleading. Under the present statute, defects in substance cannot be

In several cases, this superstition was taken to the extreme: the incomplete claim could not be amended and would be dismissed for failure to state a claim, or a jury verdict favorable to the plaintiff would be set aside on appeal.⁵³ The times were indeed hostile to common sense. A party risked losing a substantive right because of a technically defective pleading. Common-law judges were known for treating trivial procedural and formal errors as fatal to the proceeding;⁵⁴ and some of this rigidity was carried over to the nineteenth-century practice of code pleading.⁵⁵

Several courts, however, exercised their discretion to allow plaintiffs and defendants to amend their pleadings, within a certain time, to add the omitted information in a count or defense, generally with payment of costs. This was true even during the more formalistic common-law pleading.⁵⁶ Despite its formalism and contrary to general misconception, amendments were generously

overlooked or omissions supplied" (citations omitted)); EDWIN BAYLIES, *THE RULES OF PLEADING UNDER THE CODE* 68–69 (Rochester, N.Y., Williamson Law Book Co. 1890); 1 RUMSEY, *supra* note 50, at 269–70.

53. *See, e.g., Stiles*, 103 Eng. Rep. at 194, 196 (motion to amend denied in the peculiarity of the situation); *Crawford v. N.J. R.R. & Transp. Co.*, 28 N.J.L. 479, 484 (1860) (insufficient claim and motion to amend denied).

54. *See* 4 BACON, *supra* note 20, at B (noting that "many Miscarriages of Causes [depend] upon small and trivial Objections . . .").

55. *See* JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 91 (1950).

56. *See, e.g., Nelson*, 13 Johns. at 485 (allowing the plaintiff to amend his declaration); *Shook v. Fulton*, 4 Cow. 424, 425 (N.Y. Sup. Ct. 1825); *Sayre v. Jewett*, 12 Wend. 135, 136 (same) (N.Y. Sup. Ct. 1834); *see also* ANTHON, *supra* note 19, § 5, at 39–40 (discussing a 1792 English case).

granted at common law.⁵⁷ Amendments for failure to incorporate became even more prevalent with the more flexible code pleading.⁵⁸

57. See, e.g., *Trethewy v. Ellesdon* (1726) 86 Eng. Rep. 356, 357; 2 Vent. 141 (early English case allowing amendment, on an unrelated issue, upon payment of costs); 4 BACON, *supra* note 20, at H3 (“[T]he judges ought to judge upon the Substance, and not upon the Manner or Form of Pleading.”); 1 ROBERT RICHARDSON, *THE ATTORNEY’S PRACTICE IN THE COURT OF KING’S BENCH* 170, 193 (London, His Majesty’s Law-Printers, 6th ed. 1769); 2 WILLIAM TIDD, *THE PRACTICE OF THE COURTS OF KING’S BENCH AND COMMON PLEAS IN PERSONAL ACTIONS AND EJECTMENT* 632–33 (London, A. Strahan 1799); STEPHEN, *supra* note 12, at 97–98 (“[U]ntil the judgment is signed, . . . either party is, in general, at liberty to amend his pleading as at common law; the leave to do which, is granted as of course, upon proper and reasonable terms, including the payment of the costs of the application, and sometimes the whole costs of the cause up to that time. And, even after the judgment is signed, and up to the latest period of the action, amendment is, in most cases, allowable at the discretion of the Court” (emphasis and footnotes omitted)); ABRAHAM CARUTHERS, *HISTORY OF A LAW SUIT* § 36, at 27 (Nashville, Tenn., W. F. Bang & Co., 2d ed. 1856) (“If upon demurrer . . . or at any other time before or afterwards, at any stage in the progress of the suit, the plaintiff discovers any defect in his declaration, writ or any other proceeding, he may apply to the Court for leave to amend it. . . . [and] any defect in fine, whether of form or substance, may be amended.”); WILLIAMS, *supra* note 18, at 93–96; FRANKLIN FISKE HEARD, *PRECEDENTS OF PLEADINGS IN PERSONAL ACTIONS IN THE SUPERIOR COURTS OF COMMON LAW* 30–31 (Boston, Little, Brown & Co. 1886) (“There is no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party. The present rule, which follows previous legislation on the subject, is that ‘All such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.’ As soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right.”).

Amendments were common at early common law, especially when the pleadings were oral. With written pleadings, amendments became more restricted and had to be expanded by the statutes of jeofails, not by common-law precedents. See *Townsend v. Jemison*, 48 U.S. (7 How.) 706, 718 (1849) (discussing the statute of jeofails). The level of flexibility, therefore, varied over the centuries and according to the phase of the proceeding.

58. See, e.g., *Landau v. Levy*, 1 Abb. Pr. 376, 380 (N.Y. Sup. Ct. 1855); *Sinclair v. Fitch*, 3 E.D. Smith 677, 691 (N.Y. Ct. Com. P. 1857); *Xenia Branch Bank v. Lee*, 7 Abb. Pr. 372, 388, 398 (N.Y. Sup. Ct. 1858); *Simmons v. Fairchild*, 42 Barb. 404, 411 (N.Y. Gen. Term 1864); *Baldwin v. U.S. Tel. Co.*, 54 Barb. 505, 519 (N.Y. Sup. Ct. 1867); *Stewart v. Balderston*, 10 Kan. 131, 149 (1872); *Silvers v. Junction R.R. Co.*, 43 Ind. 435, 447 (1873); *McCarman v. Cochran*, 57 Ind. 166, 169–70 (1877); *Anderson v. Speers*, 8 Abb. N. Cas. 382, 383 (N.Y. 1879); *Reiners v. Brandhorst*, 59 How. Pr. 91, 92 (N.Y. Sup. Ct. 1879); *Haskell v. Haskell*, 54 Cal. 262, 265 (1880); *Ronnie v. Ryder*, 8 N.Y.S. 5, 6 (City Ct. 1889); *Weber v. Squier*, 51 Mo. App. 601, 605 (1892); *McKay v. McDougal*, 48 P. 988, 992 (Mont. 1897); *Hopkins v. Contra Costa Cty.*, 39 P. 933, 935 (Cal. 1895); *Cooper v. Robert Portner Brewing Co.*, 38 S.E. 91, 93 (Ga. 1901) (“The motion to dismiss should have been sustained as to the second and third counts, unless these counts were amended so as to set forth a complete cause of action”); *Wallace v. Jones*, 74 N.Y.S. 116, 116–17 (App. Div. 1902); *Marietta v. Cleveland, Cincinnati, Chi. & St. Louis Ry. Co.*, 100 N.Y.S. 1027, 1028 (Sup. Ct. 1906); *Dedrick v. Mallery*, 143 A.D. 819, 821 (N.Y. App. Div. 1911); *Schrade v. Camillus Cutlery Co.*, 242 F. 523, 526 (N.D.N.Y. 1917); *Liebster v. Friedman*, 180 N.Y.S. 322, 323 (App. Div. 1920); *Smith v. Phila., Balt. & Wash. R.R. Co.*, 115 A. 416, 418 (Del. 1921); *James Rees & Sons Co. v. Angel*, 211 N.Y.S. 817, 819 (1925); *Levine v. Schaffzin*, 99 N.Y.S.2d 254, 255 (1950); *Latman v. Kalmor Builders, Inc.*, 137 N.Y.S.2d 240, 241 (Sup. Ct. 1954); *Latman v. Kalmor Builders, Inc.*, 138 N.Y.S.2d 145, 147 (App. Div. 1955); see also N.Y. CODE PROC. §§ 172–74 (1848) (providing flexible amendment rules); N.Y. THROOP CODE CIV. PROC. §§ 497, 542, 723–24, 783 (1877) (same); N.Y. R. CIV. P. § 244 (1920) (same); 1 HENRY WHITTAKER, *PRACTICE AND PLEADING UNDER THE CODE* § 126 (New York, E.O. Jenkins 2d rev. ed. 1854); 1 RUMSEY, *supra* note 50, at 282–89; 1 KINKEAD, *supra* note 16, § 126, at 119; CLARK, *supra* note 4, at § 113 (discussing flexible amendment rules in code pleading “at any time in furtherance of justice and on such terms as may be proper”).

Indeed, both in common-law and in code pleading, many pleading battles were mostly paper battles. They would not have happened if the plaintiff (or defendant) had simply amended his or her complaint (or defense) instead of fighting the opponent's challenge. For example, a 1908 court excoriated an intervener:

It may pertinently be suggested that the respondent intervener might have saved himself some trouble and expense if, when the motion was made to strike out his second cause of action or defense, he had amended said second count by inserting therein averments covering the point upon which we feel constrained to reverse the judgment.⁵⁹

An 1889 case about an imperfect reference held that a trial court could disregard immaterial errors that did not surprise or prejudice a party and could allow amendment of the complaint.⁶⁰

With time, failure to comply with the dogma of complete counts was not dealt with by a motion to dismiss anymore, but by a "motion to correct," or a "motion to make a pleading more definite and certain" or a "motion to separately state and number."⁶¹ Moreover, starting around the end of the nineteenth century, if the opposing party did not object to an incomplete count the defect was waived.⁶²

59. *Cameron v. Ah Quong*, 96 P. 1025, 1027 (Cal. Ct. App. 1908); *see also* *Aull Sav. Bank v. City of Lexington*, 74 Mo. 104, 105–06 (1881) (plaintiff refused to amend and final judgment was rendered for the defendant, later reversed); *Gardner v. McWilliams*, 69 P. 915, 915 (Or. 1902) (defendant declined to amend his answer and the second count was stricken); *Dailey v. O'Brien*, 96 S.W. 521, 522 (Ky. Ct. App. 1906) (plaintiffs were granted leave to amend but preferred to stand by their petition and lost the case).

60. *Ronnie*, 8 N.Y.S. at 6 (1889). *Ronnie* cited § 723 of the 1877 NY Throop Code of Civil Procedure, which provides in part,

The court may . . . at any other stage of the action, before or after judgment, in furtherance of justice, and on such terms as it deems just, amend any . . . pleading . . . by correcting a mistake in any other respect, or by inserting an allegation material to the case; or, where the amendment does not change substantially the claim or defence [sic], by conforming the pleading . . . to the facts proved. And, in every stage of the action, the court must disregard an error or defect, in the pleadings or other proceedings, which does not affect the substantial rights of the adverse party.

See N.Y. CODE CIV. PROC. § 723. A similar provision existed in the Field Code. *See* N.Y. CODE PROC. §§ 173, 176; *see also* *Orr v. Russell*, 231 S.W. 275, 276 (1921) ("The court shall, in every stage of the action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party" (internal quotation marks omitted) (citation omitted)); MONTGOMERY H. THROOP, THE CODE OF CIVIL PROCEDURE 309 (1892) ("The only limit to the power to amend pleadings upon the trial is that a new cause of action must not be introduced.").

61. *See, e.g.*, *Leavenworth, N. & S. Ry. Co. v. Wilkins*, 26 P. 16, 16–17 (Kan. 1891) (motion to separately state and number); *see also* POMEROY, *supra* note 20, § 716, at 737 & n.1 (motion to correct); 1 RUMSEY, *supra* note 50, at 257, 384 (not ground for demurrer); 1 NICHOLS, *supra* note 23, at 926–27 (motion to make more definite and certain, not demurrer).

62. *See Orr*, 231 S.W. at 276 ("The court shall, in every stage of the action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party" (internal quotation marks omitted) (citation omitted)); *Shook v. Fulton*, 4 Cow. 424, 425 (N.Y. Sup. Ct. 1825) (explaining that a party cannot entrap the opponent and that if the party considered a pleading in bad form, it should have challenged it earlier when the opponent still could have amended the pleading); *Truitt v. Baird*, 12 Kan. 420, 423–24 (1874); *St. Louis Gas Light Co. v. City of St. Louis*, 86 Mo. 495, 498 (1885); *Eaton v. Or. Ry. &*

With time, therefore, the violation of the dogma became more an inconvenience to the parties than sanctionable conduct and had no serious adverse consequences for the merits of the claim. In some cases, it was merely a pleading battle between the attorneys.

Little has changed in the past century. It is unthinkable that a contemporary judge would strike or dismiss a claim (or that a court of appeals would reverse a favorable verdict) solely because a count did not incorporate facts previously stated in the same pleading. First, the proper procedural remedy for a failure to incorporate is not a motion to dismiss, but a motion for a more definite statement.⁶³ The motion will be granted only if the pleading is “so vague or ambiguous that the party cannot reasonably prepare a response.”⁶⁴ Second, amendment is widely available for failure to incorporate.⁶⁵ Third, if a party does not object to an opponent’s failure to incorporate, that defense is waived.⁶⁶ Finally, no pleading imperfection may affect the substantive rights of the parties absent prejudice to the opponent.⁶⁷

A prestigious federal practice treatise argues, wrongly, that “when appropriate, an objection to an incorporation by reference can be made by a motion to strike, a motion for a more definite statement, or a motion to dismiss

Navigation Co., 24 P. 415, 415 (1890) (“Defects of this character should be pointed out before answering and going to trial; otherwise, when the defects complained of are supplied by the answer, and the defendant is content to go to trial, he will be precluded from raising them.”); *Cleveland, Cincinnati, Chi. & St. Louis Ry. Co. v. Rice*, 48 Ill. App. 51, 55 (1891); *Aulbach v. Dahler*, 43 P. 322, 324 (Idaho 1896) (discussing nonprejudicial errors); see also POMEROY, *supra* note 20, § 716, at 737 & n.1; WILLIAM MCKINNEY, 16 THE ENCYCLOPAEDIA OF PLEADING AND PRACTICE 562 note 1. See generally 1 WHITTAKER, *supra* note 58, § 113, at 334 (formal defects are waivable); PHILLIPS, *supra* note 12, §§ 287–88 (same); 1 NICHOLS, *supra* note 23, at 342 (Supp. 1914) (“The objection that separate causes of actions are not separately stated and numbered is waived unless presented before trial of the action.”).

63. See *Anderson v. Dist. Bd. of Trs. of Cent. Fla. Cmty. Coll.*, 77 F.3d 364, 366–67 & n.5 (11th Cir. 1996) (holding that a defendant faced with “shotgun pleading” is expected to move for more definite statement, but “the [trial] court, acting sua sponte, should have struck the plaintiff’s complaint, and the defendants’ answer, and instructed plaintiff’s counsel to file a more definite statement”).

64. FED. R. CIV. P. 12(e) (amended 1948) (“A party may move for a more definite statement of a pleading to which a responsive pleading is allowed *but which is so vague or ambiguous that the party cannot reasonably prepare a response.*” (emphasis added)). See generally 5A WRIGHT & MILLER, *supra* note 4, § 1322 (“Because the motion to direct a party to paragraph a pleading properly often is employed only as a dilatory tactic, a district court should direct a pleader to paragraph only when the existing form of the pleading is prejudicial or renders the framing of an appropriate response extremely difficult or would be of assistance to the district judge.”).

65. See 5A WRIGHT & MILLER, *supra* note 4, § 1326 (2018) (“Leave to amend the pleading to correct a defective incorporation should be granted liberally.”); see also FED. R. CIV. P. 15(a)(2) (“The court should freely give leave [to amend] when justice so requires.”).

66. See generally 5 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE: CPLR ¶ 3014.02 (David L. Ferstendig ed., 2019) (“Service of a responsive pleading normally waives any defects in form in the earlier pleading.”); *id.* ¶ 3014.10 (“If a responsive pleading has been served, the party serving it normally should be considered to have waived his right to object to failure to state and number separately.”); 5A WRIGHT & MILLER, *supra* note 4, § 1322 (“A failure to object to improper paragraphing promptly—normally before interposing a responsive pleading—properly has been deemed a waiver of the defect by at least one court of appeals.”).

67. See, e.g., *O’Donnell v. Elgin, Joliet & E. Ry. Co.*, 338 U.S. 384, 392 (1949) (“We no longer insist upon technical rules of pleading . . .”).

for failure to state a claim upon which relief can be granted.”⁶⁸ The magic phrase “when appropriate” makes every assertion right twice a day, like a broken clock: of course cases will be dismissed “when appropriate.” Still, it is wrong to say that motions to strike or to dismiss are available to challenge a defective incorporation.⁶⁹

This text is a leftover from the first edition of the treatise.⁷⁰ But it was wrong in the first edition as well because the authors cited three cases that directly contradicted their contention. Two cases expressly rejected the possibility of a motion to dismiss for failure to incorporate⁷¹ and the other case was dismissed (with leave to amend) because the whole complaint was confusing and a count was insufficient despite the incorporation.⁷² This comment, in such a prestigious treatise, scared four generations of lawyers into complying with a ghost obligation.

III. THE EXCEPTION TO THE DOGMA (PERMISSION TO INCORPORATE BY REFERENCE)

A. INCORPORATION BY REFERENCE IN COMMON-LAW AND CODE PLEADING

But the dogma could not be strictly applied in practice. Demanding pleaders to repeat all relevant facts and elements in each count would lead to unnecessarily repetitive pleadings. This repetition would violate the traditional principle of common-law pleading in England and in the United States, which encouraged conciseness and shunned repetition.⁷³ This principle was codified in all state codes of civil procedure enacted in the United States after 1848.⁷⁴ For example, all New York codes of civil procedure contained express language

68. 5A WRIGHT & MILLER, *supra* note 4, § 1326 (2018).

69. *See, e.g.*, *Magluta v. Samples*, 256 F.3d 1282, 1284–85 (11th Cir. 2001) (the appropriate disposition of a complaint that disregarded pleading rules is not to dismiss the claim for failure to state a claim).

70. 5A WRIGHT & MILLER, *supra* note 4, § 1326 (1969).

71. *Rosenberg v. Cohen*, 9 F.R.D. 328, 329 (E.D. Pa. 1949) (rejecting a motion to dismiss for failure to incorporate and arguing that “[i]t is by now a familiar rule that a complaint cannot be dismissed ‘except where it appears to a certainty that the plaintiff would not be entitled to relief under any state of facts which could be proved in support of the claim’” (quoting *Cont’l Collieries, Inc. v. Shober*, 130 F.2d 631, 635 (3d Cir. 1942)); *Heintz & Co., Inc. v. Provident Tradesmens Bank & Trust Co.*, 29 F.R.D. 144, 145, 146 (1961) (rejecting a motion to dismiss despite a “fatally obscure” complaint because the failure could be cured by amendment and a more definite statement).

72. *Baird v. Dassau*, 1 F.R.D. 275, 277 (S.D.N.Y. 1940) (“The sixth cause of action does not set forth a single new fact, but merely incorporates eleven paragraphs previously pleaded in the other causes of action, many of which contain the same defects hereinabove discussed.”).

73. *See, e.g.*, LAWES, *supra* note 12, at 60 (“As nothing is more desirable to the court than precision, nothing is more so for the parties than brevity.”); 1 CHITTY, *supra* note 2, at 330 (“[F]or it is a general rule in pleading, that where any matter tends to great prolixity, a concise manner of pleading it may be admitted”); 1 SAUNDERS, *supra* note 12, at 417; 1 TIDD, *supra* note 57, at 536 (“[I]f a declaration be unnecessarily long, the court will expunge the superfluous matter”).

74. *See, e.g.*, BLISS, *supra* note 13, § 318, at 365; PHILLIPS, *supra* note 12, § 193, at 174; 1 WILLIAM A. SUTHERLAND, A TREATISE ON CODE PLEADING AND PRACTICE § 91, at 75 (1910).

requiring the statements of facts on a pleading to be concise, without unnecessary repetition.⁷⁵

To avoid repetition, therefore, the old English common-law pleading developed an exception to the dogma requiring that all counts contain a complete statement of the cause of action: a pleader could incorporate previous allegations from one count to another.

Incorporation by reference has enjoyed unbroken authority in common-law and code pleadings for more than four centuries. It is a mistake, therefore, to say that it is a recent technique designed to avoid the repetition and redundancy characteristic of the old common-law pleading. In 1938, for example, after the Federal Rules were enacted, James Moore welcomed Rule 10(c) and incorporation by reference, stating that “the older point of view reflected the common law notion that [incorporation by] reference is not effective.”⁷⁶ Moore’s error continued in the 1993 edition: “[incorporation by reference] eliminates the repetition and redundancy which prevailed under the common-law practice where such references were not permitted.”⁷⁷ This is just one of the several misconceptions related to common-law pleading.

B. INCORPORATION BY REFERENCE IN ENGLAND

The earliest known precedent of incorporation by reference in England is *Barnes v. May*, an action of assumpsit from the courts of the Queen’s Bench decided around 1591.⁷⁸ The conflict was about the sale of two packs of wool. On the first count, about the first pack, the plaintiff alleged that the defendant had not paid the purchase price on a specific day and place. On the second count, about the second pack, the plaintiff failed to allege the day and place of payment but referred to the first count. Although the day and place of payment was an essential element of the second count, the court held that the reference to the first count was sufficient.⁷⁹ This precedent, now forgotten, was widely cited throughout the nineteenth century.⁸⁰

75. N.Y. CODE PROC. § 120(2) (1848) (amended 1851) (“The complaint shall contain . . . A statement of the facts constituting the cause of action, in ordinary and concise language, without repetition, . . .”); *id.* § 142(2) (amended 1851) (“The complaint shall contain . . . [a] plain and concise statement of the facts constituting a cause of action without unnecessary repetition.”); N.Y. CODE CIV. PROC. § 481(2) (1877) (“The complaint must contain . . . [a] plain and concise statement of the facts, constituting each cause of action, without unnecessary repetition.” (emphasis omitted)); N.Y. CIV. PRAC. ACT § 241 (1920) (“Every pleading shall contain a plain and concise statement of the material facts, without unnecessary repetition . . .”).

76. 1 JAMES W. MOORE & JOSEPH FRIEDMAN, MOORE’S FEDERAL PRACTICE § 10.03 (1938); *see also* Hester v. Barnett, 723 S.W.2d 544, 561 (Mo. Ct. App. 1987) (“The adoption by reference technique is designed to avoid the repetition and redundancy characteristic of the common law system of pleading.”).

77. 2A JAMES W. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 10.05 (2d ed. 1993).

78. (1591) 78 Eng. Rep. 496; Cro. Eliz. 240.

79. *Id.* at 496.

80. Joseph Chitty seems to have been the first who cited *Barnes*. *See* 1 CHITTY, *supra* note 2, at 397. He was presumably aided by the publication of the fourth edition of the Croke’s Reports in 1790 (Cro. Eliz.), a couple of decades before the first edition of his celebrated treatise.

The exception, then, seems to have been born together with the dogma. One can find no earlier case stating the dogma without the exception. The dogma can only be found on cases allowing its exception. This may be an indication that the dogma of complete counts was born a mistake.

Barnes was pleaded and recorded in Latin, handwritten on a roll of parchment, during Queen Elizabeth I's reign.⁸¹ It was then selected and reported (in summary) in Law French by Sir George Croke for his personal use. Croke's Report was published posthumously in 1657, seventy years after *Barnes* was decided, translated into English by Sir Harbottle Grimston, his son-in-law. For this Article, I used the third edition of Croke's Report, of 1683.⁸² Below is the full content of Croke's summary:

Barnes versus May

Assumpsit. That whereas he sold to the Defendant a pack of wooll [sic] for twenty pound, to be paid at a day certain, and *licèt requisitus*, viz. at such a day and place, etc. he had not paid it; and that he sold to the Defendant another Pack of Wooll [sic] for ten pound to be paid when required, *Et licèt similiter requisitus*, &c. without alledging [sic] day and place, yet adjudged good, for it shall refer to the first day and place of request.⁸³

The summary is cryptic because it was written for Judge Croke's personal use, not for publication. The original record certainly contains the pleadings and a full decision, and may reveal more information about the case.

A professional researcher was hired to locate the full text of *Barnes* but failed,⁸⁴ likely because the old English law reports are unreliable (it is still disappointing because the Croke Reports are authoritative).⁸⁵ To show the antiquity of this pleading tradition, the text of a contemporaneous case⁸⁶ and the cover page of the Queen's Bench roll starting regnal year 1591, with a stylized colored image of Queen Elizabeth I, is attached.⁸⁷

81. After a 1731 statute, pleadings and court records in England were written in English. See 12 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 213–14, 359 (1938).

82. THE REPORTS OF SIR GEORGE CROKE (Sir Harbottle Grimston trans., 3d ed. 1683) (1657) [hereinafter REPORTS OF SIR GEORGE CROKE] (published in three volumes).

83. *Id.* at 240.

84. Duncan Harrington searched the whole regnal year representing Term 33 Elizabeth of the Queen's Bench (KB 27/1316-1319) using the docket books. Further searches were then made in the docket books for Hilary and Trinity 32 Elizabeth. See *Historical Research*, HIST. RES., <http://www.historyresearch.co.uk> (last visited Apr. 16, 2019).

85. See, e.g., JOHN WILLIAM WALLACE, THE REPORTERS, CHRONOLOGICALLY ARRANGED: WITH OCCASIONAL REMARKS UPON THEIR RESPECTIVE MERITS 143–49 (Philadelphia, T. & J. W. Johnson, 3d ed. rev. 1855); Van Vechten Veeder, *The English Reports, 1292–1865*, 15 HARV. L. REV. 1, 13–14 (1901).

86. *Elsden v. Barnes*, 78 Eng. Rep. 495, 495 (1591). *Elsden* was summarized on the same page of the Croke Report as *Barnes v. May*, allegedly decided on the same year and by the same court. 1 REPORTS OF SIR GEORGE CROKE, *supra* note 82, at 240.

87. Translation by Duncan Harrington: "Pleas before the Lady Queen at Westminster Hilary Term the thirty second year of the reign of our Lady Elizabeth, by the grace of God of England France and Ireland Queen, defender of the faith etc."



Someone with Latin and paleographical skills may extend the research through the millions of original plea rolls in The National Archives near London, which contains about seventy million cases, and find earlier or contemporaneous cases on incorporation by reference.⁸⁸ The research might hit a wall around the late fifteenth century, as earlier pleading practice was oral.⁸⁹ The research may lead all the way back a millennium to Roman law, when a plaintiff could not join claims, but the court could consolidate proceedings.⁹⁰

No other case was found in the English Reports dealing with incorporation by reference in the century and a half after *Barnes*. Yet it is reasonable to assume that the practice continued uninterrupted in English common-law pleading. A handful of cases were decided towards the end of the eighteenth century.⁹¹ And the literature of the early nineteenth century confirmed the practice.⁹²

As discussed below, however, England abandoned the dogma of complete counts and abolished incorporation by reference in 1852.⁹³

C. INCORPORATION BY REFERENCE IN THE UNITED STATES

From the old continent, the practice of incorporation by reference naturally spread to the United States where it was common practice from the eighteenth to the twentieth centuries. The evidence in the United States is even more robust than in England because the practice was abolished in England in 1852,⁹⁴ whereas in the United States it continued uninterrupted well into modern procedure. Incorporation by reference was common in the United States for two centuries of common-law pleading.

There is no American case on incorporation by reference from the eighteenth century because most court decisions at the time were delivered orally: there were no published colonial reports and few in the first decades after independence.⁹⁵ But it is reasonable to infer that the practice was also common

88. See ANGLO-AMERICAN LEGAL TRADITION, <http://aalt.law.uh.edu/> (last visited Apr. 16, 2019) (containing the photos of millions original plea rolls from the National Archives).

89. See 3 WILLIAM BLACKSTONE, COMMENTARIES OF THE LAWS OF ENGLAND 293 (Oxford, Eng., Clarendon Press 1768) (stating that in the past the pleadings were put by the lawyers orally in court and then minuted down by the clerks or protonotaries); THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 339–407 (5th ed. 1956).

90. See Robert Wyness Millar, *Joinder of Actions in Continental Civil Procedure*, 28 ILL. L. REV. 26, 31–34 (1933).

91. See *Tindall v. Moore* (1760) 95 Eng. Rep. 716; 2 Wils. KB 114; *Baldwin v. Elphinston* (1775) 96 Eng. Rep. 610; 2 Black W. 1037; *Phillips v. Fielding* (1792) 126 Eng. Rep. 464; 2 H. Bl. 123; *Mors v. Thacker* (1793) 83 Eng. Rep. 514; 2 Lev. 193; 83 ER 514; *Stiles v. Nokes* (1806) 103 Eng. Rep. 191, 194; 7 East 493, 502, 506.

92. See, e.g., 1 CHITTY, *supra* note 2, at 396; 1 SAUNDERS, *supra* note 12, at 417.

93. See *infra* Subpart IV.A.

94. See *infra* Subpart IV.A.

95. See generally Alan V. Briceland, *Ephraim Kirby: Pioneer of American Law Reporting, 1789*, 16 AM. J. LEGAL HIST. 297 (1972) (discussing the creation of the first law report in the United States in 1789 Connecticut); Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 MICH. L. REV. 1291 (1985) (discussing the creation of the Supreme Court Reports); see

in the 1700s in the United States. In an 1824 New York case, the attorney argued that repeating facts without the aid of incorporation by reference would violate the court's policy and jurisprudence of encouraging concision to save expense.⁹⁶ The attorney added, "[t]his form is according to the practice of the best pleaders among the profession."⁹⁷

The earliest reported American case dealing with incorporation by reference is a Maryland action of *assumpsit* from 1810.⁹⁸ Incorporation by reference was standard practice in common-law pleading in the United States in most state courts in the decades that followed this case.⁹⁹ It was also widely taught in professional textbooks published in the United States.¹⁰⁰

American commentators legitimized the practice and courts often grounded their decisions by citing English authorities, both case law and treatises.¹⁰¹ Particularly influential was Joseph Chitty's *Treatise on Pleading*, the foremost authority on pleading in the United States for the whole nineteenth century.¹⁰² This reliance on English law was common at the time because

also John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 571–75 (1993) (discussing Chancellor Kent's role in creating the first written law reports in New York after 1798).

96. *Griswold v. Nat'l Ins. Co.*, 3 Cow. 96, 105 (N.Y. Sup. Ct. 1824).

97. *Id.*

98. *See Dent's Adm'r v. Scott*, 3 H. & J. 28, 28, 32 (Md. Ct. App. 1810).

99. *See Nelson v. Swan*, 13 Johns. 483, 485 (N.Y. Sup. Ct. 1816); *Crookshank v. Gray*, 20 Johns. 344, 344–48 (N.Y. Sup. Ct. 1823); *Griswold*, 3 Cow. at 116; *Loomis v. Swick*, 3 Wend. 205, 205–07 (N.Y. Sup. Ct. 1829); *Rathbun v. Emigh*, 6 Wend. 407, 409 (N.Y. Sup. Ct. 1831); *Porter & Clark v. Cumings*, 7 Wend. 172, 174 (N.Y. Sup. Ct. 1831); *Canterbury v. Hill*, 4 Stew. & P. 224, 228 (Ala. 1833); *Receivers of the Bank of New Brunswick v. Neilson*, 15 N.J.L. 337, 338 (1836); *Shultz v. Chambers*, 8 Watts 300, 303 (Pa. 1839); *Nestle v. Van Slyck*, 2 Hill 282, 286 (N.Y. Sup. Ct. 1842); *Hitchcock v. Munger*, 15 N.H. 97, 101–02 (Super. Ct. 1844); *Mardis' Adm'rs v. Shackelford*, 6 Ala. 433, 436 (1844); *Morrison v. Spears*, 8 Ala. 93, 94 (1845); *Freeland v. McCullough*, 1 Denio 414, 425 (N.Y. Sup. Ct. 1845); *Curtis v. Belknap*, 21 Vt. 426, 433 (1849); *Jones v. Vanzandt*, 13 F. Cas. 1057, 1057–58 (Ohio Cir. Ct. 1851); *Richardson v. Lanning*, 26 N.J.L. 130, 131 (1856); *State v. Lea*, 41 Tenn. 175, 177 (1860).

100. *See ANTHON*, *supra* note 19, at 312; 1 CHITTY, *supra* note 2, at 391–92 (2d ed. 1812); 2 JAMES M. KERR, *A TREATISE ON THE LAW OF PLEADING AND PRACTICE UNDER THE PROCEDURAL CODES* § 730, at 1001 (1919); 1 KINKEAD, *supra* note 16, § 20; 1 JOHN LEWSON, *ANNOTATED FORMS OF PLEADING AND PRACTICE AT COMMON LAW AS MODIFIED BY STATUTES* §§ 980, 1024, 1048, 1082 (1914); SAUNDERS, *supra* note 12, at 417; SHIPMAN, *supra* note 12, § 254.

101. *See Hitchcock*, 15 N.H. at 97. This was a case of rare sophistication for the time, in which Justice Gilchrist fluently discussed several English cases and treatises including 1 CHITTY, *supra* note 2, at 391–92 (2d ed. 1812); *Barnes v. May* (1591) 78 Eng. Rep. 496; *Tindall v. Moore* (1760) 95 Eng. Rep. 716; *Phillips v. Fielding* (1792) 126 Eng. Rep. 464; *Stiles v. Nokes* (1806) 103 Eng. Rep. 191. *But see Mardis*, 6 Ala. at 436. *Mardis* is another well-researched case, in which Chief Justice Collier discussed English treatises like STEPHEN, *supra* note 12 and 1 SAUNDERS, *supra* note 12, but also American cases, like *Dent's Adm'r*, 3 H. & J. 28.

102. Joseph Chitty (1775–1899) was a prominent English pleader, author of numerous professional books. The first edition of his treatise on pleading was published in 1809, simultaneously in London and New York. *See* 1 CHITTY, *supra* note 2. The last edition was probably published in 1883: the sixteenth American edition (adapted to American law by J.C. Perkins) based on the seventh English edition (corrected and enlarged by Henry Greening). For almost a century, his treatise on pleading was one of the most respected in the United States, followed by lawyers, cited by academics, and relied by judges. For Abraham Lincoln, the “cheapest, quickest, and best way” to become a lawyer was to “read Blackstone's Commentaries, Chitty's Pleadings, . . . and Story's Equity Pleadings.” ABRAHAM LINCOLN, LETTERS AND TELEGRAMS: MEREDITH TO

English precedents enacted before the Declaration of Independence were binding in most state courts.¹⁰³

By 1848, New York had enacted its first Code of Procedure, known as the Field Code,¹⁰⁴ and more than half the states followed suit. The state codes created a pleading system known as code pleading, as opposed to the old common-law pleading. Despite not being specifically prescribed in any state procedural code,¹⁰⁵ incorporation by reference thrived in code pleading, both in federal courts and in almost all states.¹⁰⁶ The higher number of cases in the

YATES 254 (1907); *see also* C.S., *Chitty's Pleadings*, 11 AM. JURIST & L. MAG. 320, 320 (1834) (book review) ("This is an improved and enlarged edition of a work extensively used by the profession.")

103. *See generally, e.g.*, Frederick G. McKean, Jr., *British Statutes in American Jurisdictions*, 78 U. PA. L. REV. 195 (1929) (discussing the definition of the binding "common law of England" according to the statutes and precedents in the courts of several states); *see also* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 928 (1987) ("After 1776, several states passed reception statutes that adopted the 'common law.' Although exactly what had been received is not clear, English common law procedures continued in force.") (footnote omitted).

104. N.Y. CODE P. (1848).

105. *See infra* Subpart III.G.

106. *See* *Benedict v. Seymour*, 6 How. Pr. 298, 303 (N.Y. Sup. Ct. 1852); *Williams v. Richmond*, 9 How. Pr. 522, 523 (N.Y. Sup. Ct. 1854); *Xenia Branch Bank v. Lee*, 7 Abb. Pr. 372, 386–87 (N.Y. Sup. Ct. 1858); *Crawford v. N.J. R.R. & Transp. Co.*, 28 N.J.L. 479, 481–82 (1860); *Curtis v. Moore*, 15 Wis. 134, 137–38 (1862); *Dorr v. McKinney*, 9 Mass. 359, 361 (1864); *Baldwin v. U.S. Tel. Co.*, 54 Barb. 505, 519 (N.Y. Sup. Ct. 1867); *Beckwith v. Mollohan*, 2 W. Va. 477, 481–82 (1868); *Abendroth v. Boardley*, 27 Wis. 555, 556 (1871); *Stewart v. Balderston*, 10 Kan. 131, 145 (1872); *Anderson v. Speers*, 8 Abb. N. Cas. 382, 383 (N.Y. 1879); *Reiners v. Brandhorst*, 59 How. Pr. 91, 92 (N.Y. 1879); *Jones v. Marshall*, 10 Ky. Op. 598, 599 (Ct. App. 1880); *Bricker v. Mo. Pac. Ry. Co.*, 83 Mo. 391, 393 (1884); *Bogardus v. N.Y. Life Ins. Co.*, 4 N.E. 522, 523–24 (N.Y. 1886); *Treweek v. Howard*, 39 P. 20, 22 (Cal. 1895); *St. Louis Gas Light Co. v. City of St. Louis*, 86 Mo. 495, 498 (1885); *Bowler v. Bd. of Immigration*, 7 Haw. 563, 567 (1889); *Eaton v. Or. Ry. & Navigation Co.*, 24 P. 415, 415 (Or. 1890); *Eldridge v. Hargreaves*, 46 N.W. 923, 924 (Neb. 1890); *Leavenworth, N. & S. Ry. Co. v. Wilkins*, 26 P. 16, 17–18 (Kan. 1891); *Dexter v. Alfred*, 19 N.Y.S. 770, 771 (1892); *Yost v. Commercial Bank of Santa Ana*, 29 P. 858, 859 (Cal. 1892); *Columbian Accident Co. v. Sanford*, 50 Ill. App. 424, 425 (1893); *Hutson v. King*, 22 S.E. 615, 616 (Ga. 1895); *Hopkins v. Contra Costa County*, 39 P. 933, 934 (Cal. 1895); *Aulbach v. Dahler*, 43 P. 322, 323 (Idaho 1896); *Yong Den v. Hitchcock*, 11 Haw. 270, 271 (1898); *Ramsey v. Johnson*, 52 P. 1084, 1085 (Wyo. 1898); *Realty Revenue Guar. Co. v. Farm, Stock & Home Publ'g Co.*, 82 N.W. 857, 858 (Minn. 1900); *Gilmore v. Christ Hosp.*, 52 A. 241 (N.J. 1902); *Sly v. Palo Alto Gold Min. Co.*, 68 P. 871, 871 (Wash. 1902); *Wilson v. Hoffman*, 123 F. 984, 986–87 (C.C.D.N.J. 1903); *Bryant v. So. Ry. Co.*, 34 So. 562 (Ala. 1903); *Bigelow v. Drummond*, 98 A.D. 499, 501 (N.Y. App. Div. 1904); *Fellows v. Chipman*, 58 A. 663, 664 (R.I. 1904); *Wolf v. Smith*, 42 So. 824, 826 (Ala. 1906); *Schlieder v. Wells*, 114 A.D. 417, 419 (N.Y. App. Div. 1906); *Moniteau County ex rel. Bechtel v. Lewis*, 123 Mo. App. 673, 676 (1907); *Byrne Mill Co. v. Robertson*, 42 So. 1008, 1010 (Ala. 1907); *Chesapeake & N. Ry. Co. v. Crews*, 99 S.W. 368, 370 (Tenn. 1907); *Cameron v. Ah Quong*, 96 P. 1025, 1027 (Cal. Ct. App. 1908); *Mattingly v. Houston*, 52 So. 78, 80 (Ala. 1909); *Maxwell Steel Vault Co. v. Nat'l Casket Co.*, 205 F. 515, 522 (N.D.N.Y. 1913); *Gardner v. W. Union Tel. Co.*, 81 S.E. 259, 260 (Ga. Ct. App. 1914); *Schrade v. Camillus Cutlery Co.*, 242 F. 523, 526 (N.D.N.Y. 1917); *Clark v. Berlin Realty Co.*, 164 P. 333, 334–35 (Cal. Ct. App. 1917); *Ross v. Chi. & Alton R.R. Co.*, 225 Ill. App. 633, 638 (1922); *Purcell v. Wash. & Old Dominion Ry., Inc.*, 111 S.E. 300, 301 (Va. 1922); *McCahon v. Quick Serv. Laundry Co.*, 263 S.W. 238, 241 (Mo. Ct. App. 1924); *Piepmeier v. Meck*, 153 N.E. 523, 524 (Ohio Ct. App. 1925); *Sivalls Motor Co. v. Chastain*, 5 S.W.2d 185, 187 (Tex. Ct. App. 1928); *Tristram v. Marques*, 3 P.2d 947, 950 (Cal. Ct. App. 1931); *City of Princeton v. Baker*, 35 S.W.2d 524, 528 (Ky. Ct. App. 1931); *Bausman v. Feeser*, 17 Ohio Law Abs. 662, 663 (1934); *Moore v. Rice*, 80 S.W.2d 451, 453 (Tex. Civ. App. 1935); *Saxton v. Tucker*, 134 S.W.2d 590, 594 (Ky. Ct. App. 1939); *Wilson v. Moudy*, 123 S.W.2d 828, 838 (Tenn. Ct. App. 1938); *Evatt v. Willard D. Martin, Inc.*, 19 N.E.2d 729, 731 (Mass. 1939);

nineteenth century is a reflex of the dissemination of written decisions and law reports in the United States, nonexistent in the previous century.¹⁰⁷ The practice was also widely taught in professional textbooks and formbooks.¹⁰⁸

Even the U.S. Supreme Court has dealt with the issue of incorporation by reference, but only in cases related to criminal indictments.¹⁰⁹

The reference to a previous count that contained the missing information was valid even if the previous count was withdrawn, stricken, or dismissed.¹¹⁰

Latman v. Kalmor Builders, Inc., 138 N.Y.S.2d 145, 146 (App. Div. 1955); Olson v. Johnson, 66 N.W.2d 346, 349–50 (Wis. 1954). *But see* Sinclair v. Fitch, 3 E.D. Smith 677, 691 (N.Y. Ct. Com. P. 1857). This early New York case did not allow the *first* count to be aided by information contained in the *second*, probably without reference, despite the plaintiff's protestation that the violation did not prejudice the defendant and that pleadings should be liberally construed to achieve substantial justice between the parties.

107. See JOHN H. LANGBEIN ET AL., HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 832 (2009) (“By 1822, about 140 volumes of American reports had been published, a striking contrast to the handful extant in 1804 By 1839 there were more than 500 volumes of American reports; by 1882, the number stood at 2,944” (footnotes omitted)).

108. See 1 ESTEE, *supra* note 20, at 210; VAN SANTVOORD, *supra* note 21, at 149; 1 BENJAMIN VAUGHAN ABBOTT & AUSTIN ABBOTT, A COLLECTION OF FORMS OF PRACTICE AND PLEADING 114 (New York, Baker, Voorhis & Co. 1875); 1 CHITTY, *supra* note 2, at 428–29; POMEROY, *supra* note 20, § 442; *id.* § 336, at 450–51 (Thomas A. Bogle ed., 4th ed. 1904); RUMSEY, *supra* note 50, at 257; BAYLIES, *supra* note 52, at 47–50, 70–71; EDWIN E. BRYANT, THE LAW OF PLEADING UNDER THE CODES OF CIVIL PROCEDURE § 137, at 174 (Boston, Mass., Little, Brown & Co. 1894); SHIPMAN, *supra* note 12, §§ 252–54; PHILLIPS *supra* note 12, §§ 123, 202–04; *id.* §§ 320–21, at 339–42 (Percival W. Viesselman ed., 2d ed. 1932); 1 ABBOTT & ALDEN, *supra* note 23, at 7; PATTISON, *supra* note 23, § 234, at 137; 1 ABBOTT, *supra* note 22, at 33–36; 1 JOHN B. WINSLOW, WINSLOW'S FORMS OF PLEADING & PRACTICE UNDER THE CODE § 490, at 276 (1906); 1 NICHOLS, *supra* note 23, at 926–27; JAMES BARR AMES, A SELECTION OF CASES ON PLEADING 16–17 (1905); 2 HARRY B. BRADBURY, BRADBURY'S FORMS OF PLEADING IN LEGAL & EQUITABLE ACTIONS 1136, 1217, 1778 (1908); GOULD, *supra* note 13, at 357 (George Gould ed., 4th ed., Franklin Fiske Heard ed., 5th ed., Arthur P. Will ed., 6th ed. 1909); 1 SUTHERLAND, *supra* note 74, § 193, at 128–29; 1 WILLIAM S. CAMPBELL, FORMS OF CODE PLEADING 11–13 (1912); 4 WAIT'S PRACTICE AT LAW, IN EQUITY AND IN SPECIAL PROCEEDINGS 3650 (David Hopkins Hunt ed., 2d ed. 1913); W. S. SIMKINS, A FEDERAL EQUITY SUIT 279 (3d ed. 1916); SHIPMAN, *supra* note 12, §§ 78–79, at 200–01 (Henry Winthrop Ballantine ed., 3d ed. 1923); CLARK, *supra* note 4, § 70, at 312–16; 3 FRANCIS X. CARMODY & B. G. BONOMI, A TREATISE ON PLEADING AND PRACTICE IN NEW YORK § 893, at 1700–05 (2d ed. 1931); CHARLES WALTER GARLAND, FORMS OF PLEADING IN ACTIONS FOR LEGAL OR EQUITABLE RELIEF §§ 59, 60, 1424 (1935); 3 FRANCIS X. CARMODY ET AL., CARMODY-WAIT'S CYCLOPEDIA OF NEW YORK PRACTICE § 20, at 449–50 (1953); 12 NICHOLS-CAHILL'S ANNOTATED NYCP ACTS 204–06 (1956 & Supp. 1962); KOFFLER & REPPY, *supra* note 26, § 24, at 94–96. Compare POMEROY, *supra* note 20, § 575, at 626 (disallowing incorporation by reference in complaints), with *id.* § 716, at 736–37 (allowing incorporation by reference in defenses).

109. See, e.g., *Blitz v. United States*, 153 U.S. 308, 315–17 (1894); *Crain v. United States*, 162 U.S. 625, 633–34 (1896); *Selvester v. United States*, 170 U.S. 262, 267 (1897); *Joplin Mercantile Co. v. United States*, 236 U.S. 531, 534 (1915); see also Subpart III.H.

110. See *Phillips v. Fielding* (1792) 126 Eng. Rep. 464, 469; *Nelson v. Swan*, 13 Johns. 483, 485 (N.Y. Sup. Ct. 1816); *Crookshank v. Gray*, 20 Johns. 344, 344–48 (N.Y. Sup. Ct. 1823) (dismissing the first two counts, but keeping the third count because it made reference to the first); *Morrison v. Spears*, 8 Ala. 93, 94 (1845); *Jones v. Vanzandt*, F. Cas. 1057, 1058 (Ohio C.C. 1851) (holding that while the first and second counts were abandoned, they were not considered stricken from the record and could be referred to); *Robinson v. Drummond*, 24 Ala. 174, 178 (1854) (concluding that second count was not isolated from the abandoned first count); *Curtis v. Moore*, 15 Wis. 134, 137–38 (1862); *Cleveland, Cincinnati, Chi. & St. Louis Ry. Co. v. Rice*, 48 Ill. App. 51, 56 (1891) (“The withdrawal of the first count . . . did not take it out of being, as a subject of reference. It could not thereafter operate *per se* as an averment of anything in this suit, but it was still in existence and a part of the same paper with the second count.”); *Blitz*, 153 U.S. at 315–17; *Crain*, 162 U.S. at 633 (criminal case) (“[I]f the

And, in criminal proceedings, even if the defendant was acquitted on the first count.¹¹¹

Despite similarities in the general rule statement, however, the practice of incorporation by reference was complex and defied uniform interpretation. It varied considerably in time and space: it varied in the different courts, among the different states, and in the four centuries it remained in use. In addition, it varied to fit the peculiarities of the old procedural practices, the context of specific situations, and the needs of substantive laws. Moreover, some decisions were badly written or poorly researched, the matter was treated cursorily, the analysis was wrong, or the text was ambiguous. Some nuances may now be lost.

Until the first quarter of the 1900s, the dogma that each count must contain all facts entitling the plaintiff to relief (or the defendant to a defense) was widely known by lawyers and even taught in casebooks and textbooks in the United States. For example, a 1916 casebook, part of West's American Casebook Series, contained a subchapter entitled "Incorporation by Reference," transcribing a well-researched case from the Supreme Court of Alabama.¹¹² A 1928 book from the West's Hornbook Series also made reference to

previous count be defective or is rejected, that circumstance will not vitiate the remaining counts, if the reference be sufficiently full to incorporate the matter going before with that in the count in which the reference is made."); *Anniston Elec. & Gas Co. v. Elwell*, 42 So. 45, 48 (Ala. 1905); *Shaughnessy v. Holt*, 86 N.E. 256, 257 (Ill. 1908) (striking out a count is "a mere figure of speech"—it still remains on file as part of the record); *McCahon v. Quick Serv. Laundry Co.*, 263 S.W. 238, 241 (Mo. Ct. App. 1924); *McCord v. Rogers*, 99 So. 794, 795 (Ala. 1924); *Barnard v. United States*, 16 F.2d 451, 453 (9th Cir. 1926) (criminal case); *Parker v. United States*, 252 F.2d 680, 681 (6th Cir. 1958) (criminal case) ("[T]he dismissal of a count does not necessarily vitiate later counts making reference to it, if the reference is sufficiently full to incorporate the matter in the later counts."); *see also* ANTHON, *supra* note 19, § 5, at 40 ("The [first] count struck out was considered as in existence, and as a part of the record, for the purpose of making the new count and judgment on it good."). *But see* *Richardson v. Lanning*, 26 N.J.L. 130, 132 (1856) ("[I]f the special count . . . be stricken out, the common count, standing alone, would be insufficient, for it requires a reference to the special count to make it intelligible."); *Gilmore v. Christ Hosp.*, 52 A. 241, 242 (N.J. 1902); *Fraternal Tribunes v. Hanes*, 100 Ill. App. 1, 3 (1902) ("[W]hen one count has been held bad on demurrer, it can not [sic] be resorted to for the purpose of helping and aiding another count."); 2 KERR, *supra* note 100, § 730, at 1001 ("[I]f stuck out on demurrer, the subsequent part of the pleading adopting and incorporating by reference the stricken part will be defective . . .").

111. *See* *Commonwealth v. Clapp*, 82 Mass. 237, 237 (1860) ("In the most approved books of forms, ancient and modern, it is found, almost invariably, when an indictment contains more than one count, that all the counts, after the first, omit the description of the defendant which is contained and is necessary in the first, and describe him only as 'the said [defendant].'"); *State v. Lea*, 41 Tenn. 175, 178 (1860); *see also* *Phillips*, 126 Eng. Rep. at 469 (referring to a criminal case where the grand jury rejected the first three counts, but the remaining counts were sufficient because they had referred to the first one); 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 169 (Philadelphia, William Brown 1819) ("[T]hough the first count should be defective, or be rejected by the grand jury, this circumstance will not vitiate the residue . . ."); 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF CRIMINAL PROCEDURE § 182, at 132 (Boston, Little, Brown & Co. 1866).

112. *See* WHITTIER & MORGAN, *supra* note 26, at 436–37 (containing an edited version of the excellent *Mardis' Admr's v. Shackelford*, 6 Ala. 433 (1844)); *see also* WILLIAM H. LOYD, CASES ON CIVIL PROCEDURE 317 (1916) (containing an edited and annotated version of the excellent *Hitchcock v. Munger*, 15 N.H. 97 (1844)); SUNDERLAND, *supra* note 26, at 452–56 (containing both *Mardis*, 6 Ala. 433, and *Hitchcock*, 15 N.H. 97).

incorporation by reference.¹¹³ After that, the old dogma that each count must be complete disappeared from the Civil Procedure discourse and was forgotten. No modern law professor teaches or even has a clue about the dogma. Yet the empty teaching of incorporation by reference remains, detached from its original objective, and sometimes merely in passing.¹¹⁴

So, American lawyers kept the exception to the dogma long after the dogma was gone. The result is that incorporation by reference is now an empty ritualistic practice in the United States in federal and state courts in civil and criminal litigation.

D. SOME STATES DID NOT ALLOW INCORPORATION BY REFERENCE

Against centuries of common-law tradition, however, Indiana consistently demanded all counts in a complaint to be complete—it did not allow incorporation of facts in one count by reference to a previous one. Without the possibility of incorporating allegations previously made, the pleader had to repeat them at each count.¹¹⁵

113. See CLARK, *supra* note 4, § 70, at 312–16. This book was republished after the enactment of the Federal Rules, with no changes to this section, certainly by inertia. See CLARK, *supra* note 4, § 70 (1947). Charles Edward Clark was the chief drafter of the 1938 Federal Rules of Civil Procedure. See generally Michael E. Smith, *Judge Charles E. Clark and The Federal Rules of Civil Procedure*, 85 YALE L.J. 914 (1976).

114. See, e.g., TEPLY & WHITTEN, *supra* note 6, at 556 (mentioning incorporation by reference in passing); HAZARD, LEUBSDORF & BASSETT, *supra* note 6, § 4.7 (teaching incorporation by reference, but not the dogma); FREER, *supra* note 6, § 7.3.1 (same); BAICKER-MCKEE & JANSSEN, *supra* note 6, at 186 (same); see also sources and text accompanying *supra* notes 5–8. The exception is FRIEDENTHAL, KANE & MILLER, *supra* note 6, § 5.13, a modern book that teaches the dogma, albeit indirectly and ambiguously, citing cases from 1860, 1879, 1895, 1899, 1916, 1940, and 1961 (the last case was not on point). The practice of teaching incorporation by reference detached from the dogma is not recent. The empty teaching of incorporation by reference were common also in older books. See, e.g., DAVID W. LOUISELL & GEOFFREY C. HAZARD, JR., *CASES AND MATERIALS ON PLEADING AND PROCEDURE: STATE AND FEDERAL* 187 (1962) (transcribing a pleading with a clause of incorporation by reference, but not teaching that each count must be complete); 1 MOORE & FRIEDMAN, *supra* note 76, § 10.03 (same).

115. See, e.g., *Leabo v. Detrick*, 18 Ind. 414, 415 (1862); *Day v. Vallette*, 25 Ind. 42, 43 (1865) (“Our code is not liberal enough to warrant us in sustaining [an incomplete count].”); *Mason v. Weston*, 29 Ind. 561, 563 (1868) (requiring the second paragraph of the pleading to re-state facts in the first paragraph); *Clarke v. Featherston*, 32 Ind. 142, 144 (1869); *Potter v. Earnest*, 45 Ind. 416, 418 (1873); *Silvers v. Junction R.R. Co.*, 43 Ind. 435, 446 (1873) (“Each paragraph must be perfect and complete within itself, and defective allegations in one paragraph can not [sic] be aided by reference to another”); *McCaman v. Cochran*, 57 Ind. 166, 169–70 (1877); *Smith v. Little*, 67 Ind. 549, 553 (1879); *Field v. Burton*, 71 Ind. 380, 387–89 (1880); *Entsminger v. Jackson*, 73 Ind. 144, 145, 147 (1880) (on the second count, the plaintiff described the property as “the property mentioned in the first paragraph of this complaint,” but the court did not allow this); *Lynn v. Crim*, 96 Ind. 89, 92 (1884) (ironically following the dogma despite using the principle of harmless error in another matter); *Ludlow v. Ludlow*, 9 N.E. 769, 770 (Ind. 1887) (“[E]ach paragraph of a pleading, whether of complaint, answer or reply, must be perfect and complete within itself, and can not [sic] be aided by reference to another paragraph.”); *Farris v. Jones*, 14 N.E. 484, 487 (Ind. 1887); *Little v. Bd. of Comm’rs*, 34 N.E. 499, 500 (Ind. Ct. App. 1893) (“It has been so often decided, as to require no citation of authorities, that the allegations of one paragraph of a pleading can not [sic] be aided by reference to the allegations of another paragraph. Each pleading must be complete in itself.”); *Corbey v. Rogers*, 52 N.E. 748, 750 (Ind. 1899); see also BLISS, *supra* note 13, § 121, at 162. *But see* *Lowry v. Dutton*, 28 Ind. 473, 475 (1867) (allowing prefatory matters without repetition or reference); *Thompson v. Edwards*, 85 Ind. 414, 417 (1882) (holding that names of parties need not be

Indiana, then, had the distinction of adopting an irrational dogma, without adopting the silly exception that made the dogma manageable. As one of the few states that did not allow incorporation by reference, Indiana was a dangerous place for lawyers who trusted the books and formbooks, most of which considered incorporation by reference as a fundamental feature of common-law or code pleading.

No cases were found from the time when Indiana was a common-law pleading state, that is, before the enactment of the Indiana Rules of Practice. One could assume that the rule at common law was also against incorporation by reference. But the issue is not so simple. Georgia, for example, allowed incorporation by reference when it was a common-law pleading state, but curiously stopped allowing it, without reason, when it became a code state.¹¹⁶

The Indiana practice was expressly repudiated by other state courts. An 1881 Missouri decision, for example, stated:

[W]e are unable to perceive any reason, either of policy or convenience, [in favor of the Indiana practice] . . . We prefer the common-law rule, which permitted the pleader to save the repeating of matter contained in a preceding count, by making express reference to the preceding count . . . This, so far as we know, has been the practice of good pleaders in this State.¹¹⁷

Despite the obvious inconvenience, Indiana upheld this rule as late as 1912.¹¹⁸ At a certain point, however, it was inevitable that Indiana would start allowing incorporation by reference. It is surprising that it took so long. Incorporation by reference was first authorized in Indiana by a 1917 statute,¹¹⁹ then maintained in the 1933 Indiana Rules of Procedure.¹²⁰ The current Indiana

repeated); *Carver v. Carver*, 97 Ind. 497, 503 (1884) (same); *McCarnan v. Cochran*, 57 Ind. 166, 169–70 (1877) (allowing amendment).

116. Compare *Hutson v. King*, 22 S.E. 615, 617 (Ga. 1895) (allowing incorporation by reference while Georgia was a common-law pleading state), with *Cooper v. Robert Portner Brewing Co.*, 38 S.E. 91, 93 (Ga. 1901) (disallowing incorporation by reference after Georgia became a code pleading state). But, as shown, other code pleading decisions from Georgia allowed incorporation by reference. See sources cited *supra* note 106.

117. *Boeckler v. Mo. Pac. Ry. Co.*, 10 Mo. App. 448, 451 (1881); see also *St. Louis Gas Light Co. v. City of St. Louis*, 86 Mo. 495, 499 (1885); *Green v. Clifford*, 29 P. 331, 331–32 (Cal. 1892).

118. See *Lake Erie & W. R.R. Co. v. Moore*, 81 N.E. 85, 87 (Ind. Ct. App. 1907); *Citizens' Tel. Co. v. Ft. Wayne & S. Ry. Co.*, 100 N.E. 309, 310 (Ind. Ct. App. 1912).

119. See Act of Feb. 24, 1917, ch. 27, 1917 Ind. Laws 68 (“An Act regulating pleadings, in the courts of the state of Indiana, so as to avoid unnecessary repetition of allegations in the several and respective paragraphs of such pleadings.”).

120. IND. CODE ANN. § 2-1006 (Burns & Watson 1933) (“[T]o avoid needless repetition, such parties [joining claims] . . . may, by proper reference and identification, incorporate any clause or clauses in one [1] paragraph thereof into any other paragraph thereof, without repetition of the language employed in the first instance. And all matters thus incorporated in the subsequent paragraphs of pleading shall be treated and deemed as part of such subsequent paragraphs of the respective pleadings as if fully and completely repeated at length therein.”); see also *Daugherty v. Daugherty*, 57 N.E.2d 599, 601 (Ind. Ct. App. 1944) (“[State law] authorizes the incorporation in a pleading of parts of a prior paragraph by reference and identification without repetition of the language employed in the first instance.”).

law, enacted in 1970, and modeled after the Federal Rules, also authorizes it.¹²¹ And Indiana formbooks encourage the formula.¹²² Incorporation by reference is now widespread in Indiana.

A few other states also disallowed incorporation by reference. Although some decisions take an unequivocal approach, others are ambiguous, violate other state precedents, are applicable only in special circumstances, or are not well reasoned.¹²³

South Carolina is another state that unambiguously disallowed incorporation by reference:

At first it would seem to be harsh, rigid and extremely technical, and in conflict with the liberal tendencies of the code; but, upon consideration, it will be found based on correct principles and consonant with the true theory of pleadings. The code makes a considerable stride when it permits two or more different causes of action to be joined in the same complaint, and unless these different causes are kept separate and distinct, much confusion and complication must be the result. To prevent this, an orderly system of pleadings should be adopted, and to this end each action should be stated in a single and independent division, so that defendant might meet it without confusion with others, and each should contain all the averments necessary to raise the issues upon which the case is to be tried.¹²⁴

In other states, such as Montana and Oregon, incorporation by reference was limited to introductory allegations (also called prefatory or inducement). Essential elements constituting the cause of action, however, needed to be fully repeated at each count.¹²⁵ This was a misinterpretation of the pleading tradition

121. IND. R. TRIAL P. 10(c) (“Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion.”).

122. *See, e.g.*, 23 TRACEY BATEMAN & THOMAS MUSKUS, INDIANA LAW ENCYCLOPEDIA: PLEADING, DISCOVERY, AND PRETRIAL PRACTICE § 21 (updated Jan. 2019); 21 STEPHEN E. ARTHUR, INDIANA PRACTICE SERIES: TRIAL PRACTICE § 13.19 (2d ed., updated June 2018); 9 STEPHEN E. ARTHUR, INDIANA PRACTICE SERIES: PROCEDURAL FORMS WITH PRACTICE COMMENTARY §§ 21.5, 50.5 (3d ed., updated Dec. 2018); 24 GEORGE T. PATTON, JR., INDIANA PRACTICE SERIES: APPELLATE PROCEDURE § 12.1 (3d ed., updated Dec. 2018).

123. *See* *Eureka Fire & Marine Ins. Co. v. Baldwin*, 57 N.E. 57, 60 (Ohio 1900); *Cooper v. Robert Portner Brewing Co.*, 38 S.E. 91, 93 (Ga. 1901); *Dailey v. O’Brien*, 96 S.W. 521, 522 (Ky. Ct. App. 1906) (quoting *Black v. Holloway*, 41 S.W. 576 (Ky. Ct. App. 1897)); *Long v. Bowersox*, 19 Ohio Dec. 494, 501, 504 (Ct. Com. P. 1909); *Train v. Emerson*, 74 S.E. 241, 241 (Ga. 1912); *Smith v. Phila., Balt. & Wash. R.R. Co.*, 115 A. 416, 419 (Del. Super. Ct. 1921); *Reid v. Bryant*, 66 S.E.2d 826, 827 (Ga. 1951); *see also* 1 MOORE & FRIEDMAN, *supra* note 76, § 10.03 (citing cases in several states where incorporation by reference was [apparently] not allowed).

The California Supreme Court consistently allowed incorporation by reference. But in *Pennie v. Hildreth* it issued an inexplicable dicta, calling it “a slovenly mode of pleading, only convenient to the attorney who writes the pleading, and very inconvenient to opposing counsel and the courts, and should not be tolerated.” 22 P. 398, 399–400 (Cal. 1889).

124. *Hammond v. Port Royal & Augusta Ry. Co.*, 15 S.C. 10, 28 (1881); *see also* *Latimer v. Sullivan*, 8 S.E. 639, 640 (S.C. 1889); *Wright v. Willoughby*, 60 S.E. 971, 972 (S.C. 1908) (“For no principle of pleading is better settled than that each cause of action must stand or fall on its own allegations, without reference to the allegations to be found in the statement of another cause of action.”).

125. *See* *McKay v. McDougal*, 48 P. 988, 992 (Mont. 1897) (“Inasmuch as the cause must be remanded to the district court, we advise the plaintiff to follow the general rule that each separate division or count of the complaint must be complete in itself . . .”); *Hefferlin v. Karlman*, 74 P. 201, 204 (Mont. 1903) (per curiam);

and the rule regarding introductory allegations.¹²⁶ Today Montana and Oregon allow incorporation by reference, as do all fifty states and the federal courts.¹²⁷

These states' refusal to allow incorporation by reference is perplexing because there is no English common-law precedent for this position, and none was ever cited. Some cases cite Pomeroy's classic treatise on Code Remedies, but the author is contradictory and wrong.¹²⁸ Other cases cite Philemon Bliss's treatise on pleading, which mistakenly stated that New York did not allow incorporation by reference.¹²⁹ Pomeroy and Bliss are American books, both published under code pleading. The peculiar rule in these states disregarded the practice at common law and in the rest of the country and was largely ignored in mainstream cases and textbooks.

On the other side of the spectrum, an isolated 1893 New York case displayed remarkably modern reasoning. The court allowed omissions in the first and second counts to be cured by statements in the third count, even without specific reference.¹³⁰ The court reasoned that "[t]he defendants' contention is

Murray v. City of Butte, 88 P. 789, 792 (Mont. 1907); T.C. Power & Bro. v. Turner, 97 P. 950, 955 (Mont. 1908); see also Waechter v. St. Louis & Meramec River R.R. Co., 88 S.W. 147, 148-49 (Mo. Ct. App. 1905) (finding that the separate causes of action were stated "separately . . . in such manner as to be intelligibly distinguished"); Graves v. St. Louis, Memphis & Se. Ry. Co., 112 S.W. 736, 739 (Mo. Ct. App. 1908). Compare Gardner v. McWilliams, 69 P. 915, 915 (Or. 1902) (disallowing incorporation by reference because the fact was not a matter of inducement), with Smith v. Martin, 185 P. 236, 238 (Or. 1919) (allowing incorporation by reference because the fact was a matter of inducement).

126. See sources and text accompanying *supra* note 23 (discussing that in most states introductory or prefatory information could be stated once at the beginning of the pleading and need not be referred to in each count).

127. MONT. CODE ANN. tit. 25, ch. 20, R. 10(c) ("A statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion.") (Laws 2017); OR. R. CIV. P. 16(D) ("Statements in a pleading may be adopted by reference in a different part of the same pleading.")

128. Compare POMEROY, *supra* note 20, § 575, at 626 (disallowing incorporation by reference in complaints), with § 716, at 736 (allowing incorporation by reference in defenses). The same contradiction exists in the 1883 and 1904 editions. See POMEROY, *supra* note 20, §§ 575, 716 (2d ed. 1883); *id.* § 336, at 450-51 (Thomas A. Bogle ed., 4th ed. 1904).

129. BLISS, *supra* note 13, § 121, at 162. Bliss cited two early New York cases: *Landau v. Levy*, 1 Abb. Pr. 376 (N.Y. Sup. Ct. 1855) and *Sinclair v. Fitch*, 3 E.D. Smith 677, 689 (N.Y. Ct. Com. P. 1857). But these cases do not support his position that New York did not allow incorporation by reference. *Landau* was about improper joinder of legal and equitable claims. 1 Abb. Pr. at 379. *Sinclair* did not allow the first count be completed by information contained on the second (not the other way around) probably without reference. 3 E.D. Smith at 689. Dozens of New York cases at the time Bliss wrote the first edition of his treatise allowed incorporation by reference. See, e.g., *Xenia Branch Bank v. Lee*, 7 Abb. 372, 386-87 (N.Y. Sup. Ct. 1858) (addressing *Landau* and citing several English and New York common-law cases: *Barnes*, *Tindall*, *Phillips*, *Crookshank*, and *Freeland*); see also *supra* note 106.

130. *Smith v. Sage*, 25 N.Y.S. 103, 105 (Sup. Ct. 1893); see also *Rider v. Robbins*, 13 Mass. 284 (1816) (allowing an omission on the second count to be cured by a verdict, or supplied by the first count, without incorporation by reference); *United Sur. Co. v. Summers*, 72 A. 775, 780 (Md. Ct. App. 1909) (allowing subsequent counts not to mention the contract); *Louisville & Nashville R.R. Co. v. Adams*, 147 S.W. 384, 386 (Ky. 1912) (allowing a first count, without a prayer for relief, because the second count contained it and noting that "it would be very technical" to rule otherwise); *Tristram v. Marques*, 3 P.2d 947, 949-950 (Cal. Ct. App. 1931) (allowing incorporation by reference that was "neither apt nor express" because the defendant was not prejudiced nor misled by the failure).

too technical, and not in accordance with the requirements of substantial justice. Pleadings should be liberally construed, with a view to substantial justice between the parties.”¹³¹

One needs to wait a century to find another case adopting a similarly enlightened approach. In 1981, a Louisiana court refused to dismiss a complaint against the defendant’s argument that some paragraphs did not incorporate other paragraphs by reference.¹³² The court argued that agreeing with the defendant’s technical argument that the plaintiff “somehow” failed to state a cause of action would be contrary to the requirement that “every pleading shall be so construed as to do substantial justice.”¹³³

E. THE EVOLUTION OF THE FORMULA—SAID AND AFORESAID

Originally, in order to incorporate by reference previously stated facts, lawyers did not write a full sentence or paragraph as they do now. Pleadings simply started the new count with an introductory formula like *and whereas also*, or *and for a second count*, or *and for a further cause of action*. That would keep the counts separate, as required by common-law and code pleading.

In addition, the plaintiff had to pepper the text with pointing words like *said*, *same*, *as above stated*, *aforesaid*, or *meaning* attached to every previously stated fact.¹³⁴ This would work as a valid incorporation of previous facts, as long

131. *Smith*, 25 N.Y.S. at 105 (citing N.Y. CODE CIV. PROC. § 519 (1877)); *Ramsey v. Johnson*, 58 P. 755, 757 (Wyo. 1899) (referring to “error or defect in the pleadings or proceedings, which does not affect the substantial rights of the adverse party,” but demanding express reference to the previous count).

132. *Carmouche v. Oubre*, 394 So. 2d 805, 807 (La. Ct. App. 1981).

133. *Id.*

134. See 1 CHITTY, *supra* note 2, at 397; EDWARD LAWES, A PRACTICAL TREATISE ON PLEADING IN ASSUMPSIT 94–95 (London, M. & S. Broke 1810); VAN SANTVOORD, *supra* note 21, at 149; 1 CHITTY, *supra* note 2, at 429 (Henry Greening & J.C. Perkins eds., Springfield, Mass., G & C Merriam, 7th Eng. ed. & 16th Am. ed. 1876); PHILLIPS, *supra* note 12, § 203, at 181–82; *Barnes v. May* (1591) 78 Eng. Rep. 496; *Cro. Eliz.* 240; *Baldwin v. Elphinston* (1775) 96 Eng. Rep. 610; *Dent’s Adm’r v. Scott*, 3 H. & J. 28, 28–29 (Md. Ct. App. 1810); *Nelson v. Swan*, 13 Johns. 483, 483 (N.Y. Sup. Ct. 1816); *Frazier v. Felton*, 1 Hawks 231, 231 (N.C. 1820) (criminal case); *Crookshank v. Gray*, 20 Johns. 344, 344–48 (N.Y. Sup. Ct. 1823); *Griswold v. Nat’l Ins. Co.*, 3 Cow 96, 98 n.a (N.Y. Sup. Ct. 1824); *Loomis v. Swick*, 3 Wend. 205, 207 (N.Y. Sup. Ct. 1829); *Porter v. Cumings*, 7 Wend. 172, 174 (N.Y. Sup. Ct. 1831); *Canterbury v. Hill*, 4 Stew. & P. 224, 229 (Ala. 1833); *Nestle v. Van Slyck*, 2 Hill 282, 286 (N.Y. Sup. Ct. 1842); *Hitchcock v. Munger*, 15 N.H. 97, 102 (1844); *Freeland v. McCullough*, 1 Denio 414, 425 (N.Y. Sup. Ct. 1845); *Jones v. Vanzandt*, 13 F. Cas. 1057, 1058 (C.C. Ohio 1851); *Benedict v. Seymour*, 6 How. Pr. 298, 299 (N.Y. 1852); *Williams v. Richmond*, 9 How. 522, 523 (N.Y. 1854); *Beckwith v. Mollohan*, 2 W. Va. 477, 478 (1868); *Bowler v. Bd. of Immigration*, 7 Haw. 563, 565 (1889); *Aulbach v. Dahler*, 43 P. 322, 322 (Idaho 1896); *Ramsey v. Johnson*, 58 P. 755, 757 (Wyo. 1899); *Wilson v. Hoffman*, 123 F. 984, 987 (C.C.N.J. 1903); *Birmingham Ry., Light & Power Co. v. Wilcox*, 61 So. 908, 909 (Ala. 1913); see also the forms in JOHN WENTWORTH, A COMPLETE SYSTEM OF PLEADING (London, G.G. & J. Robinson 1797–98) (ten volumes); LAWES, *supra* note 12, at 60; ANTHON, *supra* note 19, at 312; 2 CHITTY, *supra* note 2, at 260 n.t.; STEPHEN, *supra* note 12, at 282; BENJAMIN L. OLIVER, JR., FORMS OF PRACTICE 57, 73, 80, 105 (Boston, Hilliard, Gray, Little & Wilkins 1828); ANTHON, *supra* note 19, at 342, 345 (West Brookfield, Mass., Merriam & Chapin, 4th ed. 1848); P. B. WILCOX, PRACTICAL FORMS IN ACTIONS, PERSONAL AND REAL 76, 91, 270 (Columbus, Ohio, Isaac N. Whiting, 2d ed. 1848); STEPHEN, *supra* note 12, at 256 (Samuel Tyler ed., Washington, D.C., William H. Morrison, 3d Am. ed. 1882); 2 CHITTY, *supra* note 2 (Henry Greening & J.C. Perkins eds., Springfield, Mass., G & C Merriam, 7th Eng. ed. & 16th Am. ed. 1883); 1 W.H. MICHAEL

as the incorporation was express and the matter referred to was definite, certain, and clearly identified.¹³⁵

In 1894, for example, the U.S. Supreme Court was satisfied that the expression “said election” in the third count referred to the election mentioned in the second count of the same indictment:

The only question that could arise upon the third count is whether the words of the first count, referring to the election had and held on the 8th day of November, 1892, for Representative in Congress, can be drawn through the second count into the third count by the words, “at the said election.” As the election named in the first count is the only one specifically described in the indictment, there can be no doubt that the words “at said election” in the third count refer to the election described in the first count.¹³⁶

Below is a typical second count of a complaint in the United States in the early 1800s:

SECOND COUNT. *And the said [defendant] further saith, that the said [plaintiff] further contriving and intending as aforesaid, heretofore, to wit, on, &c. aforesaid, at &c. aforesaid, falsely, wickedly, and maliciously did publish a certain other false, scandalous, malicious, and defamatory libel, of and concerning the said [defendant] and of and concerning the said action, which had been so depending as aforesaid, and of and concerning the evidence by him, the said [defendant] given on the said trial as such witness as aforesaid, containing, amongst other things, the false, scandalous, malicious, defamatory, and libelous matter, of and concerning the said [defendant], and of and concerning the said action, and of and concerning the evidence given by him, the said [defendant] on the said trial, as such witness as aforesaid, that is to say . . .*¹³⁷

Ten *said*s and six *aforesaid*s clutter a paragraph constructed of a single breathlessly long sentence, as was common at the time.

& WILLIAM MACK, *ENCYCLOPEDIA OF FORMS AND PRECEDENTS* (Long Island, N.Y., James Cockcroft 1896); CARUTHERS, *supra* note 57, at 582 (Andrew B. Martin ed., 4th ed. 1903).

135. See *Stiles v. Nokes* (1806) 103 Eng. Rep. 191, 194–96; 7 East 493, 502, 506–07 (holding that the reference must be clearly identified); *Crookshank*, 20 Johns. at 344–48 (same); *Simmons v. Fairchild*, 42 Barb. 404, 409 (N.Y. 1864); see also *Receivers of Bank of New Brunswick v. Neilson*, 15 N.J.L. 337, 337–38 (1836) (holding that the reference was not clearly identified); *Holton v. Muzzy*, 30 Vt. 365, 366 (1858) (same); *Jones v. Marshall*, 10 Ky. Op. 598, 599 (Ct. App. 1880) (holding that the reference was not clearly identified when the plaintiff merely said, “making such facts in the first paragraph as are necessary to the cause of action in the second paragraph”); *Ramsey v. Johnson*, 52 P. 1084, 1085 (Wyo. 1898); *Ramsey v. Johnson*, 58 P. 755, 757 (Wyo. 1899); *Gilmore v. Christ Hosp.*, 53 A. 241, 242 (N.J. 1902); see also POMEROY, *supra* note 20, § 716, at 736–37; 1 MOORE & FRIEDMAN, *supra* note 76, § 10.03. Compare *Opdycke v. Easton & Amboy R.R. Co.*, 68 N.J.L. 12, 13 (1902) (determining that “on the day aforesaid” was not sufficiently specific because the preceding count mentioned several different days), with *Taylor v. N.J. Title Guarantee & Trust Co.*, 56 A. 152, 153 (N.J. 1903) (concluding that “on the day and year aforesaid” was sufficiently specific because only one day was mentioned in the preceding count).

136. *Blitz v. United States*, 153 U.S. 308, 316 (1894) (criminal case); see also *Sampson v. Commonwealth*, 5 Watts & Serg. 385, 387–88 (Pa. 1843) (criminal case) (discussing the meaning of “said”); FRANCIS WHARTON, *A TREATISE ON CRIMINAL PLEADING AND PRACTICE* § 298, at 200 (Philadelphia, Kay & Bro., 8th ed. 1880) (discussing the meaning of “said”).

137. ANTHON, *supra* note 19, at 312–13 (emphasis added) (footnotes omitted) (“[I]f the second count commence—‘*And whereas also,*’ &c, it will nevertheless be sufficient.”).

This practice explains, in part, the legal profession's addiction to these words that now sound stilted. Legal writers and general stylists have protested for decades the legalese and archaism of *said*, *same*, and *aforsaid*. Even the most learned scholars, however, mistakenly think that the objective of these words was merely to give precision to the text.¹³⁸ Although it is true that these words were used with the objective of giving precision to a term,¹³⁹ that is not the origin of the habit. Most scholars ignore that these words once had a specific role in common-law and code pleading: from time immemorial it was important to make an explicit reference to “said farm,” “said merchant,” “said defendant,” or even “said John Smith” to incorporate facts previously mentioned in a pleading.

A perceived lack of iron-clad precision in pleading technique, as capriciously decided by the trial judge, or even by the court of appeals after a favorable verdict for the plaintiff, could make the count improper. For example, if, by mistake, the pleader referred a second time to *a* promissory note, instead of *the said* promissory note, the court might never really know for sure whether the pleader was referring to the same note previously mentioned or another one.¹⁴⁰ Or, if the plaintiff referred to the contract described in the first count as “said contract,” the court may find it “impossible to tell to what contract the plaintiff refers” because the plaintiff did not state the particulars of the contract, like date, consideration, and subject matter.¹⁴¹

These were the types of nightmares that kept pleaders awake at night, at a time when all counts had to be complete. On the one hand, if a pleading was repetitive, it could violate the rule of concision. Yet, at the same time, each count

138. See, e.g., *Said*, H. W. FOWLER, A DICTIONARY OF MODERN ENGLISH LANGUAGE USAGE 533 (Sir Ernest Gowers ed., 2d ed. 1965) (“In legal documents . . . are traditional precautions against any possible ambiguity . . .”); DAVID MELLINKOFF, THE LANGUAGE OF THE LAW 305, 318, 405 (1963); GARNER’S DICTIONARY OF LEGAL USAGE 37, 793–94, 796 (2011) (“The usage had its origins in loan translation.”); *Said*, GARNER’S MODERN ENGLISH USAGE 804–05 (4th ed. 2016) (“Legal writers formerly used this word as a supposedly more precise equivalent of *the*, *this*, *that*, *these*, or *those*.”); ANNE ENQUIST ET AL., JUST WRITING: GRAMMAR, PUNCTUATION, AND STYLE FOR THE LEGAL WRITER 120, 125 (5th ed. 2017). But see ANTONIO GIDI & HENRY WEIHOFFEN, LEGAL WRITING STYLE 53–54, 91–95 (3d ed. 2018) (discussing the use of *said*, *aforsaid*, and *same* in the historical context of incorporation by reference).

139. See, e.g., U.S. PATENT & TRADEMARK OFFICE, MANUAL OF PATENT EXAMINING PROCEDURE § 2173.05(d) (9th ed. rev. 2018), <https://mpep.uspto.gov/RDMS/MPEP/current#/current/d0e18.html> (stating that a claim may be indefinite if it lacks antecedent basis); see also ROBERT C. FABER, FABER ON MECHANICS OF PATENT CLAIM DRAFTING § 3:14 (7th ed. 2018) (discussing use of indefinite article *a* when an element is first mentioned on a patent claim and the use of definite articles *the* or *said* to refer to previously mentioned elements).

140. *Nestle v. Van Slyck*, 2 Hill 282, 286 (N.Y. Sup. Ct. 1842) (“[I]nstead of an *innuendo* pointing to ‘*the*’ note already mentioned, the *innuendo* speaks of ‘*a*’ note which may or may not be the same one that is mentioned in the inducement.” (emphasis added)); see also *Gertler v. Linscott*, 1 N.W. 579, 580 (Minn. 1879) (“We might conjecture that the ‘mills’ mentioned in the second are the same as the mill or mills mentioned in the first . . . even if it were permitted to indulge in conjecture . . .”).

141. *Weber v. Squier*, 51 Mo. App. 601, 603–05 (1892). But see *Ramsey v. Johnson*, 8 Wyo. 476 (1899) (holding that the expression “said contract” in the second count was an unmistakable reference to the contract referred to in the first count, no other).

had to contain every legal element of the cause of action. If a pleader struck the wrong balance between concision and completeness, the error could be fatal.

F. THE EVOLUTION OF THE FORMULA—REPEAT AND REALLEGE

The *said/aforsaid* formula worked in common-law and code pleading, undisturbed, for at least three centuries. The current *repeat, reiterate, and reallege* formula, transcribed above,¹⁴² was a fruit of the American ingenuity. It was conceived towards the end of the nineteenth century under code pleading. Although it is impossible to determine the moment when lawyers started using the formula in their pleadings, one can get a glimpse through the cases.

In a New York case decided in 1886, a complaint contained a primitive version of the formula:

[T]he plaintiff . . . “repeats and reiterates all the allegations hereinbefore contained, and makes them a part of this her second cause of action.”¹⁴³

Although this is the earliest recorded example of the current formula, the language was brewed in the practice of the previous decades, as risk-averse lawyers struggled to make sure that judges would approve of their incorporation by reference. The plaintiff in the case above, however, did not think that a boilerplate reference to the allegations in the first cause of action was enough: he still used *said* and *aforsaid* several times in the statement of facts for the second count to make sure all facts were tied up with the first. So, the first generation of the new formula was added to the old, in a belt-and-suspenders strategy.

A few years later, in 1892, however, the formula suffered a major setback when a North Dakota court did not accept it:

For a third cause of action plaintiff makes part thereof each and every allegation contained in the first and second causes of action herein, so far as the same set forth the promises and agreements made by and between plaintiff and defendant, and the obligations arising therefrom; and further alleges . . .¹⁴⁴

The court found no authority to support this formula as a proper way to incorporate facts by reference to the preceding parts of the complaint. For the court, the reference was too vague and ineffectual to identify specific facts, leaving the court, and the opposing party, to aimlessly explore the complaint in search of them.¹⁴⁵ The pleader probably had not used *said* and *aforsaid* enough. If the pleader had used these magic “pointing words,” the court would not have found the references so vague.

142. *See supra* Subpart I.

143. *Bogardus v. N.Y. Life Ins. Co.*, 4 N.E. 522, 527 (N.Y. 1886).

144. *Jasper v. Hazen*, 51 N.W. 583, 583 (N.D. 1892) (internal quotation marks omitted) (quoting the plaintiff’s complaint).

145. *Id.*

Despite this setback, the formula survived. And in 1898, in the first edition of their formbook, Austin Abbott and Carlos Alden proposed this simple version:

The plaintiff repeats and realleges as part of this cause of action, all the allegations contained in paragraphs __of the first cause of action.¹⁴⁶

The formula was followed by a light selection of *said*s and *aforesaid*s, but much less, compared to the previous tradition.

After this boilerplate was included in formbooks, practitioners throughout the country started using it.¹⁴⁷ Eventually, it was expressly sanctioned by the courts.¹⁴⁸ Lawyers never looked back.

By the second edition of Abbott & Alden's formbook, published in 1918, the formula had mushroomed to something closer to the current version:

The [plaintiff] repeats and realleges as part of this [cause of action], each and all of the allegations contained in paragraphs __of the [first cause of action,] with like effect as if herein fully realleged, and incorporates herein all the facts therein set forth [and the denials therein contained].¹⁴⁹

Eventually, the bizarre formula was fully established in the practice of code pleading.¹⁵⁰ The formula probably did not make sense even then, but no one ever noticed or challenged it. And the formula has endured, substantially unaltered,

146. 1 AUSTIN ABBOTT & CARLOS ALDEN, FORMS OF PLEADING IN ACTIONS FOR LEGAL OR EQUITABLE RELIEF 4, 451 (New York, Baker, Voorhis & Co. 1898). The formbook, however, was not consistent. *See id.* at 458, 504 (not using the formula in a complaint with more than one claim).

147. On the definition of boilerplate, see generally Steven S. Gensler & Lee H. Rosenthal, *Breaking the Boilerplate Habit in Civil Discovery*, 51 AKRON L. REV. 683, 684–98 (2017) (“Something becomes boilerplate not because it is used repeatedly but because it is used thoughtlessly.”).

148. *See, e.g.*, *Green v. Clifford*, 29 P. 331, 331–32 (Cal. 1892) (“Plaintiff hereby refers to paragraph I. of the first cause of action, hereinbefore set forth, and expressly makes said paragraph a part of this cause of action, as if incorporated herein.”); *Treweek v. Howard*, 39 P. 20, 21 (Cal. 1895) (“The plaintiff here repeats and alleges all the matters and things set forth and alleged in the subdivisions of this second amended complaint, numbered 1, 2, 3, 4, and prays that the same be taken and deemed a part of this cause of action, the same as though herein set out at length.”); *Bigelow v. Drummond*, 90 N.Y.S. 913, 916 (App. Div. 1904) (“Plaintiffs repeat and reallege all the statements contained in paragraphs 1 and 2 of the first cause of action”); *Fla. Cent. & P.R. Co. v. Foxworth*, 25 So. 338, 340 (Fla. 1899) (“And for a fourth count the plaintiff avers each and every allegation of the first count, and further alleges that”); *Realty Revenue Guar. Co. v. Farm, Stock & Home Publ'g Co.*, 82 N.W. 857, 857 (Minn. 1900) (“Plaintiff realleges and reaffirms all the allegations of paragraphs 1, 2, and 3 of plaintiff's first cause of action.”); *Marietta v. Cleveland, Cincinnati, Chi. & St. Louis Ry. Co.*, 100 N.Y.S. 1027, 1028 (Sup. Ct. 1906) (“The plaintiff repeats, reiterates, and alleges each and every allegation contained in paragraphs first and second of the complaint with the same force and effect as if here set forth in full.”); *West v. Bank of LaHoma*, 86 P. 59, 59 (1906) (“And for a second cause of action, plaintiff repeats the general allegations preceding his first cause of action, and makes the same a part of this second cause of action, just as though the same was herein set out again in the same words.”).

149. 1 ABBOTT & ALDEN, *supra* note 23, at 5–6 (assuring readers that “this is a proper method of allegation,” and citing, as authority, *Bigelow*, 90 N.Y.S. at 916).

150. *See, e.g.*, CAMPBELL, *supra* note 108, at 11–13 (offering three similar versions of the formula, each based on a different case); *see also* formbooks cited *supra* note 108.

for more than a century, passing along from generation to generation until today.¹⁵¹

With time, the formula became a safe and sufficient method to incorporate previously alleged facts into a subsequent count, and lawyers slowly stopped feeling the need to pepper their complaints with *same, said* and *aforsaid* after every word previously mentioned. These words slowly lost their purpose in pleadings and became useless; no one remembered why they used them in the past. And they disappeared.

But the change from “pointing words” to a formula was painful for pleaders. Initially, the formula was not uniformly accepted: it took a while to gain favor with judges that had forged their careers in the old tradition. Some courts found the use of the *repeat and reallege* formula “obviously unnecessary and highly objectionable” where a pleader failed to narrow the scope of the referenced allegations, and unintentionally incorporated an irrelevant allegation from a previous count.¹⁵² Several courts did not accept the formula for one reason or another.¹⁵³ If the reference to a preceding count was definite and certain, however, courts had no objection to it.¹⁵⁴

If this artificial and meaningless *repeat and reallege* formula is at all necessary, and if it is sufficient, maybe it is time to start another phase in this evolution. Maybe pleaders could get away with writing the formula only once in each pleading, instead of once in each count. At the beginning or end of each pleading, the party could simply write, “every paragraph in this complaint (or defense) is incorporated in each count.”

In 1964, a smart and impatient lawyer from Colorado tried to do this in federal court. The first paragraph of the complaint stated:

1. Each statement and allegation in each count of this Complaint shall be considered as repeated and realleged and incorporated by this reference into any other count of this Complaint where such incorporation shall be or appear necessary to the validity of the cause of action or claim for relief therein stated.¹⁵⁵

The court did not accept this formula, not because it was not suitable, but because the incorporation was not explicit. The court, as several courts before and after, was troubled by the expression “where such incorporation shall be or appear necessary.”¹⁵⁶ The court wondered “shall appear necessary to whom?” and said that “[t]his prayer could even be interpreted as an attempt by the

151. This proves that boilerplate “has a toughness and resilience worthy of the steel plate from which it takes its name.” See Gensler & Rosenthal, *supra* note 147, at 684–85.

152. See, e.g., *Bogardus v. N.Y. Life Ins. Co.*, 4 N.E. 522, 528 (N.Y. 1886).

153. See, e.g., *Wallace v. Jones*, 74 N.Y.S. 116, 116 (App. Div. 1902) (not accepting the following language: “Making the first six sections therein a part thereof.”); *Clinckett v. Casseres*, 200 N.Y.S. 178, 183 (App. Div. 1923) (not accepting the formula, without explanation, and striking out three defenses, possibly because they were not sufficiently specific).

154. See, e.g., *Treweek v. Howard*, 39 P. 20, 22 (Cal. 1895).

155. *Trussell v. United Underwriters, Ltd.*, 228 F. Supp. 757, 773 (D. Colo. 1964) (internal quotation marks omitted) (quoting the plaintiffs’ complaint).

156. *Id.*

plaintiffs to incorporate every allegation of every claim into every other claim. We cannot give effect to this attempted cross-incorporation.”¹⁵⁷ The case, however, was not dismissed: the court granted a motion for more definite statement and for separate statements.¹⁵⁸ The stunt was probably never tried again.

But the current practice is exactly to mechanically incorporate everything into everything. The practice of “shotgun pleading” is what lawyers do every day.¹⁵⁹ Had the plaintiff directly incorporated everything into everything, as pleaders customarily do now, instead of being hesitant to reserve the incorporation to whatever appears necessary, there would probably have been no objection.

If this Article is unsuccessful in banishing incorporation by reference altogether from our pleadings, at least it may convince lawyers to include the formula only once in a pleading.

G. STATUTORY PROVISION OF INCORPORATION BY REFERENCE

As we have seen, incorporation by reference has been a feature of common-law pleading for centuries. It was later adopted by the practice of code pleading, even without express statutory permission.

The first written statute to expressly allow incorporation by reference was the New York Rules of Civil Practice enacted in 1920:

The allegations contained in a separately numbered paragraph of one cause of action, counterclaim or defense may be incorporated as a whole in another cause of action, counterclaim or defense in the same pleading by reference without otherwise repeating them.¹⁶⁰

The rule was born outdated. As we will see below, England had abolished the practice of incorporation by reference seventy years earlier.¹⁶¹

H. INCORPORATION BY REFERENCE IN CRIMINAL PROCEDURE

The dogma of complete counts also operated in criminal procedure: “Each count in an indictment is regarded as if it was a separate indictment.”¹⁶² Each count in an indictment had to be complete—it had to stand by itself and the omissions of fact in one count could not be aided by another, absent express reference.¹⁶³

157. *Id.*

158. *Id.* at 774.

159. See 5A WRIGHT & MILLER, *supra* note 4, § 1326 (discussing courts’ displeasure with shotgun pleading).

160. N.Y. CODE CIV. PRAC. § 90 (1921).

161. See Subpart IV.A.

162. See *Dunn v. United States*, 284 U.S. 390, 393 (1932); see also *Selvester v. United States*, 170 U.S. 262, 267 (1898) (“Each count is in fact and theory a separate indictment . . .”).

163. See, e.g., *King v. Westly* (1725) 93 Eng. Rep. 154; Sess. Cas. 152; *Phillips v. Fielding* (1792) 126 Eng. Rep. 464, 469; 2 H. Bl. 123, 131 (referring to an earlier criminal case); *Frazier v. Felton*, 8 N.C. (1 Hawks) 231

Therefore, a similar practice of incorporation by reference existed in the past and still exists in criminal proceedings.¹⁶⁴ The formula is ubiquitous in formbooks.¹⁶⁵ Despite not adopting the dogma of complete counts, the Federal Rules of Criminal Procedure, enacted in 1944, specifically provided for incorporation by reference: “A count may incorporate by reference an allegation made in another count.”¹⁶⁶

IV. THE MODERN PERSPECTIVE (NO NEED TO REALLEGE FACTS IN EACH COUNT)

A. ENGLAND ABOLISHED THE DOGMA IN 1852

The dogma of complete counts with incorporation by reference made sense in the legal mindset of the sixteenth to eighteenth centuries, but it sounds primitive to a twenty-first century lawyer.

It sounded primitive in the nineteenth century as well. Indeed, the old practice ended in England in the mid-nineteenth century with the enactment of

(1820); *Sampson v. Commonwealth*, 5 Watts & Serg. 385 (Pa. 1843); *Commonwealth v. Clapp*, 82 Mass. (16 Gray) 237 (1860); *People v. Graves*, 5 Park. 134, 140 (N.Y. Gen. Term 1860) (“It is the constant practice in criminal pleading, in one count of an indictment to refer to matters in a previous count, and it has been decided that this is proper”); *State v. Lea*, 41 Tenn. (1 Cold.) 175 (1860); *People v. Danahy*, 18 N.Y.S. 467 (Gen. Term 1892); *Blitz v. United States*, 153 U.S. 308 (1894); *Crain v. United States*, 162 U.S. 625, 633 (1896); *Joplin Mercantile Co. v. United States*, 236 U.S. 531, 534 (1915); *United States v. Segelman*, 86 F. Supp. 114, 126 (W.D. Pa. 1949) (“It would be a travesty on justice if the defendant were exonerated from the penalties of the federal law for technical reasons.”); *United States v. Apex Distrib. Co.*, 148 F. Supp. 365, 370 (D.R.I. 1957); *United States v. Knox Coal Co.*, 347 F.2d 33, 38 (3d Cir. 1965) (“Of course, unless the charging part of a conspiracy count specifically refers to or incorporates by reference allegations which appear under the heading of the overt acts, resort to those allegations may not be had to supply the insufficiency in the charging language itself.”); *United States v. Knowles*, 29 F.3d 947, 952 (5th Cir. 1994) (“While it is true that an allegation made in one count of an indictment may be incorporated by reference in another count of the indictment, . . . any such incorporation must be expressly done.” (citation omitted)); see also 1 CHITTY, *supra* note 111, at 169 (1819) (“[T]hough every count should appear upon the face of it, to charge the defendant with a different offence, yet one count may refer to matter in any other count so as to avoid unnecessary repetition.”); 2 JOSEPH GABBETT, A TREATISE ON THE CRIMINAL LAW 248 (Dublin, J. Cumming 1835); 1 BISHOP, *supra* note 111, § 182 (1866); WHARTON, *supra* note 136, §§ 298–99 (1880); see also the forms in FRANCIS WHARTON, PRECEDENTS OF INDICTMENTS AND PLEAS 10, 38, 50, 54 (Philadelphia, James Kay, Jun. & Brother 1849); FRANK O. LOVELAND, FORMS OF FEDERAL PROCEDURE (1894).

164. See 1 WRIGHT & MILLER, *supra* note 4, § 123, nn.8–9 (4th ed. 2018) (“Although allegations made in one count may be incorporated by reference into other counts, each count must be evaluated separately.”). In previous editions, this book contained a more rigid statement: “[E]ach count is considered as if it were a separate indictment and must be sufficient without reference to other counts unless they are expressly incorporated by reference.” See 1 CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 123, at 349 (4th ed. 1982) (footnote omitted).

165. See, e.g., 3 F. LEE BAILEY & KENNETH J. FISHMAN, COMPLETE MANUAL OF CRIMINAL FORMS § 114:13 (3d ed. 2018) (“16. [The claimant] repeats and reavers Paragraphs 1 through 15 of his Answer to Complaint for Forfeiture as if expressly rewritten and set forth herein.” (alteration in original)); 8 WISCONSIN PLEADING AND PRACTICE FORMS § 73:15 (5th ed. 2018) (“[D]efendant here repeats and restates all the matters alleged in the previous defense”).

166. FED. R. CRIM. P. 7(c).

the Common Law Procedure Act of 1852, which abolished the forms of action¹⁶⁷ and made joinder of claims flexible.¹⁶⁸ The English procedural reforms at the time were part of the same intellectual environment that led to code pleading in the United States after 1848, although the English reforms were more successful in simplifying the rules of pleading and joinder.¹⁶⁹

By 1876, English judges had realized something that Americans had not: that the dogma of complete counts was just an annoyance, and that it led to an attack on the way the pleading was written, not on the merits of the case.¹⁷⁰ A legal publication of the time transcribed an amusing dialogue between judges on the Queen's Bench Division calling this practice "niggling demurrers" and "ridiculous."¹⁷¹

The dogma, together with incorporation by reference, was formally interred in England by two cases from 1875 and 1876, one about a complaint and the other about an answer. In *Watson v. Hawkins*, the court held that a plaintiff need not assign a specific fact to a specific count; it was enough that any paragraph in a pleading supported one or more claims.¹⁷² A plaintiff needed merely to state all material facts and then ask for relief.¹⁷³ In *Nathan v.*

167. Common Law Procedure Act 1852, 15 & 16 Vict. c. 76, § 3 (Eng.) ("It shall not be necessary to mention any form or cause of action in any writ of summons, or in any notice of writ of summons [], issued under the authority of this Act.")

168. *Id.* § 41 ("Causes of action, of whatever kind, provided they be by and against the same parties [] and in the same rights, may be joined in the same suit . . . but the court or a judge shall have power to prevent the trial of different causes of action together, if such trial would be inexpedient, and in such case such court or judge may order separate records to be made up, and separate trials to be had.")

169. See HEPBURN, *supra* note 25, at 173–283 (extensively discussing the English procedural reforms of 1852, 1854, 1860, 1873, and 1875, how they were influenced by code pleading, and how they later influenced procedural reform in the United States).

170. See *Watson v. Hawkins* (1875) 24 WLR 884 (Eng.); *Queen's Bench Division*, LAW TIMES, May 27, 1876, at 67 (Eng.). This was not a novel idea even at the time. On an unrelated matter, more than a century earlier, Matthew Bacon had said, "the judge[s] ought to judge upon the substance, and not upon the manner or form of pleading." See 4 BACON, *supra* note 20, at H3.

171. See *Queen's Bench Division*, *supra* note 170, at 67. This dialogue may have occurred during the deliberation of *Nathan v. Batchelor* [1876] QB 164, 165 (Eng.).

172. *Watson*, 24 WLR at 884 ("If the facts stated in any paragraph demurred to can by any construction be considered as supporting any one of the various reliefs claimed in the pleadings, the paragraph must be held good."); see also L.G. Gordon Robbins, *Quarterly Digest of All Reported Cases*, 4 LAW MAG. & REV. 727, 749 (1876) (Eng.); CHARLES BURNEY ET AL., WILSON'S PRACTICE OF THE SUPREME COURT OF JUDICATURE 217 (London, Stevens & Sons, Ltd. 7th ed. 1888) (Eng.); M.D. CHALMERS & HERBERT LUSH-WILSON, WILSON'S SUPREME COURT OF JUDICATURE ACTS 254, 279 (London, Stevens & Sons, Ltd. 3d ed. 1882) (Eng.); WILLIAM THOS. CHARLEY, THE NEW SYSTEM OF PRACTICE AND PLEADING UNDER THE SUPREME COURT OF JUDICATURE ACTS, 1873 & 1875, at 549–50 (London, Waterlow & Sons 1875) (Eng.); JOHN CUNNINGHAM & MILES WALKER MATTINSON, A SELECTION OF PRECEDENTS OF PLEADING 39–40 (London, Stevens & Haynes 1878) (Eng.); cf. *Anderson v. Dist. Bd. of Tr. of Cent. Fla. Cmty. Coll.*, 77 F.3d 364, 366 (11th Cir. 1996) (stating that with imprecise incorporation by reference, "it is virtually impossible to know which allegations of fact are intended to support which claim(s) for relief"). The American perspective, demanding a party to assign a specific fact to a specific count, is the exact opposite of the 1875 English decision, 120 years earlier.

173. *Watson*, 24 WLR at 884; cf. *Stewart v. Balderston*, 10 Kan. 131, 133–34 (1872) (a contemporaneous American case concluding that the lawyer was not allowed to allege the general facts initially without stating separately in each count which fact constituted each cause of action).

Batchelor, the court held that a plaintiff could not challenge an isolated paragraph if the answer, taken together, presented a good defense.¹⁷⁴ Both decisions justified their conclusions on the Common Law Procedure Act of 1852, although the Act itself was silent on the issue.

As William Charley noticed in 1877, “This decision [*Nathan*] is clearly in accordance with common sense. Order XIX, Rule 4, requires that ‘every pleading shall be divided into paragraphs.’ It would be absurd if the opposite party were allowed to pick out any particular paragraph and say, ‘This paragraph, standing alone, is insufficient in law.’”¹⁷⁵ Almost 150 years have passed, and this common sense is still lacking in the United States.

The dogma and incorporation by reference, therefore, have not existed in England for almost two centuries.¹⁷⁶ The United States badly need their own *Watson* and *Nathan*.¹⁷⁷

Ireland¹⁷⁸ and Ontario¹⁷⁹ soon followed the new English precedent. The United States did not pay attention to it, even though *Watson v. Hawkins* was

174. *Nathan*, [1876] QB at 164; see also FRANK EVANS, THE PRACTICE OF THE CHANCERY DIVISION OF THE HIGH COURT OF JUSTICE 720 (London, Horace Cox 1881).

175. CHARLEY, *supra* note 172, at 549 (emphasis omitted). According to Order XIX, Rule 4 of the Rules of Court, every pleading had to be “divided into paragraphs numbered consecutively, and each paragraph containing, as nearly as may be, a separate allegation.” *Id.* at 491. This is a familiar rule for American lawyers.

176. See NEIL ANDREWS, ENGLISH CIVIL PROCEDURE: FUNDAMENTALS OF THE NEW CIVIL JUSTICE SYSTEM §§ 10.54–10.89 (2003) (Eng.); BULLEN & LEAKE & JACOB’S PRECEDENTS OF PLEADINGS (William Blair et al. eds., 18th ed. 2016) (Eng.); ADRIAN ZUCKERMAN, ZUCKERMAN ON CIVIL PROCEDURE: PRINCIPLES OF PRACTICE §§ 7.16–7.20 (3d ed. 2013) (Eng.). See generally ATKIN’S ENCYCLOPEDIA OF COURT FORMS IN CIVIL PROCEEDINGS, LexisNexis UK (Judge Philip Waller et al. eds., 2011) (comprising over eighty volumes). None of these books refer to *Watson*, *Nathan*, or to incorporation by reference. For further commentary on the nonexistence of the dogma and incorporation by reference in England, see Email from Peter Susman, QC, Barrister, Henderson Chambers, to Antonio Gidi, Professor of Law, Syracuse University (Jan. 9, 2019) (on file with author) (“In 50 years of practice at the English Bar, I have never seen a pleading in a civil case divided into counts, or repeating in the same terms earlier allegations of fact in relation to further alleged causes of action. Indeed, I remember that when I spent 18 months as an associate with [a law firm] in New York City in 1970–[7]1, I was surprised at what I regarded as the excessive formality, prolixity and repetitiveness of the pleadings I saw.”).

177. See generally MILLAR, *supra* note 12, at 175 (“The American codes have not succeeded as well as the English Rules in reducing pleading to that purely ancillary position which it ought to occupy in the procedural scheme. There is commonly too strong an insistence upon the exactness of statement in the allegation of cause of action and defense The test of prejudice worked to the opponent of the party at fault is too apt to be overridden by considerations of the regularity of the record [I]t is still possible for a judgment to be reversed by an appellate court because of a fault in the pleadings alone, without regard to the evidence or to the question of prejudice *vel non* to the opposite party. The English system, in contrast, has virtually attained the position that a fault in pleading, however substantial, will not be permitted to affect the result if it has produced no actual injury Hence, if a party’s claim or defense is supported by the evidence, he has little to fear from slips in his pleadings, for in practical effect everything depends on the case made at the trial.”).

178. See *O’Grady v. Warden* [1878] 12 Ir. LTR 150 (Ir.); L. S. EIFFE ET AL., THE JUDICATURE ACTS (IRELAND), 1877 AND 1878, at 350 (Dublin, E. Ponsonby 1881).

179. See GEORGE SMITH HOLMESTED & THOMAS LANGTON, THE JUDICATURE ACT OF ONTARIO AND THE CONSOLIDATED RULES OF PRACTICE AND PROCEDURE 434, 456, 461–62 (Toronto, Carswell Co. Ltd. 2d ed. 1898); see also GEORGE SMITH HOLMESTED & THOMAS LANGTON, FORMS AND PRECEDENTS OF PROCEEDINGS

known and could have influenced American lawyers to adopt a more enlightened practice.¹⁸⁰

The dogma and incorporation by reference, therefore, do not exist in Canada.¹⁸¹ Current Ontario Rule 25.02, for example, requires pleadings to be divided into consecutively numbered paragraphs, with each allegation contained in a separate paragraph.¹⁸² This is similar to American rules and practice. But it does not require each count to be complete.¹⁸³ Nowhere in the Ontario Rules is incorporation by reference mentioned. The same is true in Canadian federal courts.¹⁸⁴

The practice does not exist in New Zealand or Australia either.¹⁸⁵ A judge of the Supreme Court of Tasmania, probably exasperated by American lawyers or local lawyers consulting American legal forms on the Internet, offers the following advice:

Don't use the expression the plaintiff or the defendant "relies on and repeats the facts pleaded at paragraphs 2–10." Your pleading needs to set out the material facts, and once they are pleaded there is no need to plead them again. And you actually never will, quite literally, wish them repeated.¹⁸⁶

An exception might be the common-law systems directly derived from the American legal tradition or heavily influenced by American lawyers. For example, although the Rules of Court of the Philippines do not mention incorporation by reference, lawyers in the Philippines repeat and reallege at each count. This practice, however, is fading away with each new generation of lawyers.¹⁸⁷

IN THE SUPREME COURT OF JUDICATURE FOR ONTARIO AND THE SUPREME COURT OF CANADA 52–262 (1904) (formbook showing that the practice had stopped in Ontario).

180. See AMES, *supra* note 108, at 33 (citing *Watson v. Hawkins* (1875) 24 WLR 884 (Eng.), but making no comment on the issue of incorporation by reference). This forgotten English precedent is still cited in at least one common-law country. See JOSEPH MBAH-NDAM, *A TEXTBOOK ON PRACTICE AND PROCEDURE IN CIVIL AND COMMERCIAL LITIGATION IN THE HIGH COURTS OF THE NORTH-WEST AND SOUTH-WEST PROVINCES OF CAMEROON* 317 & n.70 (2003).

181. See GARY D. WATSON & MICHAEL MCGOWAN, *WATSON & MCGOWAN'S ONTARIO CIVIL PRACTICE: 2019* (2018) (making no reference to incorporation by reference); see also Email from Janet Walker, Professor & Chartered Arbitrator, Osgoode Hall Law Sch., to Antonio Gidi (Jan. 4, 2019) (on file with author) (“You are right that incorporation by reference is something that is not done in Canada and is a particularly unattractive feature of U.S. procedure. It’s been gone for so long that there is no reference in the standard commentaries . . . on the history of its elimination. . . . But rest assured, the practice ended a very long time ago.”).

182. Rules of Civil Procedure, R.R.O. 1990, r 25.02 (Can.).

183. See *id.*

184. See Federal Courts Rules, SOR/98-106, c 173 (Can.) (requiring only that “[p]leadings shall be divided into consecutively numbered paragraphs”).

185. The New Zealand High Court Rules of 2016 do not mention incorporation by reference. See High Court Rules 2016, pt 5 (N.Z.).

186. See Hon. Stephen Estcourt, *Pleadings Tips and Tricks*, SUP. CT. TAS. (June 29, 2015), https://www.supremecourt.tas.gov.au/publications/speeches/estcourt_j/pleading_tips_and_tricks.

187. See Email from Vanessa Joyce Monge, CEO & Legal Counsel, Inceptigon Pty. Ltd., to Antonio Gidi, Professor of Law, Syracuse University (Feb. 12, 2019, 8:57 AM) (on file with author).

It is impossible to know the pleading practice of all countries of the civil-law tradition (derived from Roman Law and later adopted in all Continental Europe and Latin America and most of Africa and Asia). But the dogma and incorporation by reference do not exist in Germany, France, Italy, Spain, Brazil, Argentina, Japan, Mexico, Colombia, or any other country with a similar tradition.¹⁸⁸ This unpleasant feature is strictly American.

Although this fossilized technique has no place in modern pleadings, American lawyers continue to parrot it, blindly complying with a ghost dogma that has not existed for almost a century in the United States. This is no surprise. As Sunderland said a century ago, on an unrelated matter:

It is safe to say that if a new method of treating cancer were discovered and successfully employed in England; every intelligent doctor in the world would almost immediately know about it and attempt to take advantage of it. But it is equally safe to say that if a new and successful method of treating some procedural problem were discovered in England, American lawyers as a class would remain in substantial ignorance of it for at least two generations, and would probably treat it with scornful indifference for a generation or two more. There are no state lines for progressive doctors, dentists, engineers, architects, manufacturers or business men. But not one lawyer in a hundred knows or cares what reforms are being employed by his profession on the other side of the political boundary. The American lawyer is satisfied with things as they are. As long as clients continue to come and the machinery of the law continues to move¹⁸⁹

In retrospect, Sunderland was charitable. Here we are, twelve generations after incorporation by reference was abolished in England, and nothing has changed in the United States. This Article is not exactly about the cure for cancer, but the need to end incorporation by reference is something on which all lawyers can agree.

B. NEW YORK ABOLISHED INCORPORATION BY REFERENCE IN 1962, BUT IT SURVIVED

Only in 1962, more than a century after the practice was abolished in England and in other common-law countries, New York expressly released pleaders from the ancient burden of pleading complete counts:

Prior statements in a pleading shall be deemed repeated or adopted subsequently in the same pleading whenever express repetition or adoption is unnecessary for a clear presentation of the subsequent matters.¹⁹⁰

188. See generally UGO MATTEI, TEEMU RUSKOLA & ANTONIO GIDI, SCHLESINGER'S COMPARATIVE LAW 489–563, 684–862 (2009) (discussing comparative civil procedure).

189. Sunderland, *supra* note 12, at 572, 579 (stating that with the end of the forms of actions the restrictions on joinder of claims should have ended as well, but “the framers of the code were still unable to free themselves from the common law tradition”).

190. See N.Y. C.P.L.R. 3014 (McKinney 2018); see also 5 WEINSTEIN, KORN & MILLER, *supra* note 62, ¶¶ 3014.04–.07; 3B LISA A. ZAKOLSKI & JUDITH NICHTER MORRIS, CARMODY-WAIT 2D NEW YORK PRACTICE WITH FORMS § 27:44 (2019).

The New York rule just *deemed* previous statements repeated or adopted, so it abolished incorporation by reference while at least implicitly keeping the dogma. Instead of deeming the statements repeated, however, the rule should have abolished the dogma, providing that there was no need to repeat statements. Moreover, the previous sentence undercuts the release from the burden by stating, “Reference to and incorporation of allegations may subsequently be by number.”¹⁹¹

Although imperfect, this language represented a major evolution of the previous pleading practice of repeating, reiterating, and realleging. The legal profession received the new language with high hope: “[it] eliminates any need for the standard paragraph found in pleadings . . . which stated that the pleader ‘repeats and realleges each and every allegation contained in paragraph.’”¹⁹² If it had been properly interpreted, this rule would have buried the old practice of incorporation by reference half a century ago. Still a century later than England, but good enough.

Less than a year after its enactment, this provision was put to the test in *Hewitt v. Maass*.¹⁹³ The court settled the issue in two sentences: “There is an objection made [by the defendant] to the failure of the complaint to repeat allegations in describing the several causes of action. This essentially formal reaction was recognized as such recently and has been disposed of by [CPLR Rule 3014].”¹⁹⁴ It seemed that the future of that provision was auspicious and that the old practice of *repeating, reiterating, and realleging* would become a mere curiosity, finally archived in the dustbin of the history of impractical rules.

A few years later, however, CPLR Rule 3014 was challenged again in *Nussenblatt v. Nussenblatt*, this time with mixed results.¹⁹⁵ A defendant’s counterclaim failed to reallege essential allegations already made in previous paragraphs of the same pleading. The plaintiff moved to dismiss the incomplete counterclaim because without these allegations the counterclaim did not state a cause of action. The court denied the motion to dismiss, arguing that the new language overruled old cases like *Latman v. Kalmor Builders, Inc.*, decided before the new rules.¹⁹⁶

In *Latman*, the court, although recognizing that the matters were pleaded in the first cause of action, demanded that they be incorporated by reference in the second one and ordered the plaintiff to amend the complaint.¹⁹⁷ *Nussenblatt* also favorably cited commentators who said that the new Rule 3014 made standard paragraphs repeating and realleging unnecessary. Yet *Nussenblatt*

191. N.Y. C.P.L.R. 3014 (McKinney 2018).

192. *Nussenblatt v. Nussenblatt*, 309 N.Y.S.2d 397, 399 (Sup. Ct. 1970) (internal quotation marks omitted) (quoting an earlier version of 3 WEINSTEIN, KORN & MILLER, *supra* note 62, ¶ 3014.07).

193. 246 N.Y.S.2d 670 (Sup. Ct. 1964).

194. *Id.* at 672.

195. *Nussenblatt*, 309 N.Y.S.2d at 397.

196. *Id.* at 399.

197. *Latman v. Kalmor Builders, Inc.*, 137 N.Y.S.2d 240, 241 (Sup. Ct. 1954).

issued the same order as *Latman*: that the defendant amend the answer to repeat and reallege the missing elements “[w]ith regard to clarity and in order to remove any doubt as to the pleading in future proceedings.”¹⁹⁸ It was the classic, “you don’t need to do it, but do it.” And just like that, New York was wrenched back, over 400 years, to the sixteenth century. And it never recovered.

For one commentator, repeating and realleging is still necessary in New York, “in a long pleading in which so much has intervened between the original statement and the new reference that the content would be lost without the repetition.”¹⁹⁹ Another treatise offers a defeating interpretation of CPLR Rule 3014, suggesting that it encourages incorporation by reference in a small complaint with a handful of paragraphs for a “clear presentation.”²⁰⁰

Another treatise, after praising the New York rule, cautioned: “the pleader must exercise judgment in deciding whether an express reference or adoption is necessary. If there is any doubt that prior allegations in the pleadings will be considered repeated or adopted, an express incorporation would be the safest approach.”²⁰¹ They concluded that “[a]s a practical matter, the majority of attorneys still opt to use the obsolete but nonetheless comfortably precise technique of reallegation by reference to prior material in succeeding paragraphs, although this practice is to be discouraged.”²⁰² Except for the word “obsolete,” there’s nothing correct in this statement. Incorporation by reference is neither comfortable nor precise; and it is a tic, not a technique.

Not surprisingly, therefore, despite the express rule relieving pleaders from the burden of repeating and realleging, New York lawyers are still addicted to the practice, routinely incorporating previous statements by reference. There is no incentive for a lawyer to think independently, when the most prestigious commentators say that incorporating by reference is necessary in some cases, the “safest approach” in others, and a “comfortably precise technique.”²⁰³

But the dogma of complete counts is incompatible with a modern system of procedure, with broad amendment rules,²⁰⁴ where “[p]leadings shall be liberally construed,”²⁰⁵ where “[d]efects shall be ignored if a substantial right of

198. *Nussenblatt*, 309 N.Y.S.2d at 398–400.

199. PATRICK M. CONNORS, PRACTICE COMMENTARY, MCKINNEY’S CONSOLIDATED LAWS OF NEW YORK, CPLR C3014:5 (2015).

200. See DAVID D. SIEGEL & PATRICK M. CONNORS, NEW YORK PRACTICE § 213 (6th ed. 2018).

201. 5 WEINSTEIN, KORN & MILLER, *supra* note 62, ¶ 3014.07.

202. *Id.*

203. See *id.*

204. See, e.g., *Card v. Budini*, 285 N.Y.S.2d 734, 737 (App. Div. 1967) (holding that the incorporation of allegations in a complaint in a previous proceeding was improper, but the plaintiff was allowed to amend her complaint).

205. N.Y. C.P.L.R. 3026 (McKinney 2018).

a party is not prejudiced,”²⁰⁶ and where objections of form are waivable.²⁰⁷ This all happened in New York in 2019, almost two centuries after it was abolished in England.

Old practices die hard. American lawyers may not be ready to let go of this ritual.

This practice had a similarly disappointing evolution in Illinois, which is the only other state that has a peculiar rule on incorporation by reference, that is not a copy of Federal Rule 10(c). The Illinois Code provides that

[i]f facts are adequately stated in one part of a pleading, or in any one pleading, they need not be repeated elsewhere in the pleading, or in the pleadings, and may be incorporated by reference elsewhere or in other pleadings.²⁰⁸

The language of the Illinois rule is confusing but, well interpreted, might address the issue adequately, abolishing incorporation by reference. Properly interpreted, it is superior to the New York rule because it rejects the fiction that the facts are “deemed repeated” in the subsequent count. Obviously, if the facts are adequately stated in one part of a pleading, there is no reason to repeat them elsewhere in the same pleading. But what the precision of the first sentence gives, the ambiguity of the second takes away. Although the second sentence refers to other pleadings and documents, its ambiguous language encourages the practice that the first sentence had considered unnecessary. The result is that lawyers in Illinois continue to employ the useless formula in all their pleadings, and the formbooks do not allow them to evolve.²⁰⁹

Several courts have noticed something strange with incorporation by reference, but they are incapable of seeing exactly what is wrong with it. Courts dislike, for example, “chain letters” or “shotgun pleadings” that cumulatively incorporate by reference all facts in previous claims, whether relevant or not: by count ten, count one was alleged nine times.²¹⁰ The dissatisfaction, however, is

206. *Id.* According to the Advisory Committee Note, this rule is intended to “discourage useless pleading attacks by placing the burden on the attacker to show prejudice.” *Id.* advisory committee note. The same rule existed in all other New York procedural statutes. This principle has been a constant feature of New York and American law for at least a century. *See* N.Y. CODE PROC. § 136 (1848) (“In the construction of a pleading, for the purpose of determining its effect, its allegation shall be liberally construed, with a view to substantial justice between the parties.”); N.Y. CODE CIV. PROC. § 519 (1877) (“The allegations of a pleading must be liberally construed, with a view to substantial justice between the parties.”); N.Y. R. CIV. PRAC. § 275 (1920) (“Pleadings must be liberally construed with a view to substantial justice between the parties.”). Other states had similar rules. *See* 1 ESTEE, *supra* note 20, at 153–54 (citing the codes of California, Nevada, Idaho, and Arizona, as well as case law in several other states); *see also* Dempsey v. Willett, 23 Hun. 264, 265 (N.Y. Gen. Term 1878).

207. *See* 5 WEINSTEIN, KORN & MILLER, *supra* note 62, ¶ 3014.10 (“If a responsive pleading has been served, the party serving it normally should be considered to have waived his right to object to a failure to state and number separately. This follows naturally from the premise that the prime justification for the requirement is to enable the opposing party to respond intelligently.”).

208. ILL. COMP. STAT. CT. R. 134 (2018).

209. *See, e.g.*, 3A ILLINOIS CIVIL PRACTICE FORMS § 64:4 (2018); 5A *id.* § 112:21; 5 ILLINOIS REAL PROPERTY SERVICE § 33:124 (2018).

210. *See, e.g.*, Uhrich v. State Farm Fire & Cas. Co., 135 Cal. Rptr. 2d 131, 135–36 (Ct. App. 2003); Kelly v. Gen. Tel. Co., 186 Cal. Rptr. 184, 187 (Ct. App. 1982); Frugoli v. Winn-Dixie Stores, Inc., 464 So. 2d 1292,

only manifested in complex cases, when the pleading is ambiguous or incomplete despite multiple amendments; the dissatisfaction is not caused merely by imperfect incorporation by reference. Courts have shown their displeasure with tough words and no action.²¹¹

American lawyers are stuck in a revolving door, unable to modernize on their own. One reason why American law is vulnerable to this kind of hopeless situation is the tradition, both in academia and in practice, of citing only the most recent case or authority and ignoring the original one.²¹² A rule appears more current than it is when one cites a recent case. If American jurisprudence preserved the origin of their precedents, it would be easier to know why a rule exists.

C. THE FEDERAL RULES DID NOT ADOPT THE DOGMA IN 1938, BUT KEPT THE EXCEPTION

Federal procedure has not caught up with New York's 1962 innovation. In a pointless provision that has survived unamended since 1938, Rule 10(c) condones the practice of incorporation by reference: "A statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion."²¹³

Rule 10(c) allows but does not require incorporation by reference. The Federal Rules, then, mindlessly adopted the exception (incorporation by

1293 (Fla. Dist. Ct. App. 1985); *see also* *Alpert v. Hein*, 166 N.Y.S.2d 851, 853 (Sup. Ct. 1957); *Rubinstein v. Rubinstein*, 61 N.Y.S.2d 44, 45 (Sup. Ct. 1946) (same); *Stoll v. Long Islander Publ'g Co.*, 40 N.Y.S.2d 412, 413 (Sup. Ct. 1942) (striking out irrelevant incorporation by reference).

211. *See, e.g.*, *Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1356 n.9 (11th Cir. 2002), *abrogated by* *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008); *Weiland v. Palm Beach Cty. Sheriff's Office*, 792 F.3d 1313, 1320–21 (11th Cir. 2015); *see also* 5A *WRIGHT & MILLER, supra* note 4, § 1326 (2018) (discussing courts' displeasure with shotgun pleading). *But see* *Degirmenci v. Sapphire-Fort Lauderdale, LLLP*, 693 F. Supp. 2d 1325 (S.D. Fla. 2010) (dismissing sua sponte a confusing shotgun pleading after a fourth amended complaint did not follow the court order to clearly state the facts of each violation and separate counts for each violation, violating Rule 8(a)(2)'s short and plain statement requirement, yet allowing the plaintiff to amend and plead a sixth time); *Strategic Income Fund, LLC v. Spear, Leeds & Kellogg Corp.*, 305 F.3d 1293, 1296 (11th Cir. 2002) ("Instead of requiring the plaintiffs to replead, the [trial] court attempted—and admirably so—to ascertain exactly which facts formed the basis of the plaintiffs' federal law claims. We have read Count IV—including all that it incorporates by reference—several times; yet, we must confess that we are at a loss to explain what allegedly transpired"); *Byrne v. Nezhat*, 261 F.3d 1075, 1128–31 (11th Cir. 2001), *abrogation recognized by* *Jackson v. Bank of Am.*, 898 F.3d 1348 (11th Cir. 2018).

212. *See, e.g.*, *ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* 54 (2008) ("The more recent the citation the better. The judge wants to know whether the judgment you seek will be affirmed by the current court, not whether it would have been affirmed 30 years ago."); *MICHAEL D. MURRAY & CHRISTY H. DESANCTIS, LEGAL WRITING AND ANALYSIS* 107 (2009) ("Recent authorities are better."); *RICHARD K. NEUMANN, JR. & KRISTEN KONRAD TISCIONE, LEGAL REASONING AND LEGAL WRITING* 278 (7th ed. 2013) ("If an idea is undisputed and routine . . . it should be enough to cite, with little or no explanation, the most recent decision"); *see also* *THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION* R. 1.4, at 61–62 (20th ed. 2015) (stating that, generally, cases should be cited in reverse chronological order).

213. *FED. R. CIV. P.* 10(c); *see also* *FED. R. CRIM. P.* 7(c)(1) (adopted in 1944) ("A count may incorporate by reference an allegation made in another count.").

reference)²¹⁴ without ever having adopted the dogma (each count must contain all facts and elements of the claim).²¹⁵

This rule was born outdated, inconsistent with a modern procedural system of notice pleading that discouraged pleading battles, with the attendant reduced importance of pleadings,²¹⁶ judicial discretion, liberal construction of pleadings,²¹⁷ flexible amendments,²¹⁸ search for substantial justice, and liberal joinder of claims.²¹⁹ Most important, it was incompatible with a system that did not adopt the old common-law or code pleading dogma requiring each count to be complete and independent under penalty of dismissal.²²⁰

By the 1940s, the dogma had practically disappeared in federal courts: the few cases that mentioned incorporation by reference did not mention the dogma of complete counts.²²¹ No case has expressly abolished the dogma, but this is the wrong perspective. No case expressly adopted it; no case forced a plaintiff to amend a complaint to repeat allegations or dismissed a claim for failure to incorporate.

Moreover, Rule 10(b) does not require joint claims to be “separately stated.”²²² A party may do so if it “would promote clarity.”²²³ As stated in a treatise,

Unfortunately, no easy rule can be extracted from the cases to advise a pleader as to when separate paragraphs—or how many—will be necessary. A reliance on common sense and a conscientious effort to produce a pleading that is readily comprehensible to the opposing litigant and the district court are the best guides for a pleader to follow. Separate paragraphing is particularly useful when Even if separate counts for each ground are not required under the circumstances under the third sentence of Rule 10(b), the clarity of the pleadings will be enhanced by the use of separate paragraphs.²²⁴

214. *See supra* Part III.

215. *See supra* Part II.

216. *See* FED. R. CIV. P. 8(d) (“No technical form [of pleading] is required.”).

217. *See* FED. R. CIV. P. 8(e) (“Pleadings must be construed so as to do justice.”).

218. *See* 5A WRIGHT & MILLER, *supra* note 4, § 1326 (“Leave to amend the pleading to correct a defective incorporation should be granted liberally.”).

219. *Compare* FED. R. CIV. P. 18(a) (“A party . . . may join . . . as many claims as it has against an opposing party.”), with *Sunderland*, *supra* note 12, at 572 (discussing arcane rules of common-law joinder of claims, and the severe consequences for misjoinder).

220. *Cf. Sutton v. United States*, 157 F.2d 661, 663 (5th Cir. 1946) (stating, on an unrelated criminal matter, that “[i]t is no longer necessary in the federal courts to follow the old common-law rules of criminal pleadings”).

221. *See, e.g., Aktiebolaget Stille-Werner v. Stille-Scanlan, Inc.*, 1 F.R.D. 395 (S.D.N.Y. 1940) (ordering the defendant to state with particularity which of the allegations in the answer were to be incorporated into the counterclaim, without saying why it was necessary); *Rosenberg v. Cohen*, 9 F.R.D. 328 (E.D. Pa. 1949).

222. *See* Subpart II.A (discussing the meaning of “separately stated” as an obligation to allege all elements of the cause of action in each count).

223. FED. R. CIV. P. 10(b) (“If doing so would promote clarity, each claim founded on a separate transaction or occurrence—and each defense other than a denial—must be stated in a separate count or defense.”).

224. 5A WRIGHT & MILLER, *supra* note 4, § 1322 (“Because the motion to direct a party to paragraph a pleading properly often is employed only as a dilatory tactic, a district court should direct a pleader to paragraph only when the existing form of the pleading is prejudicial or renders the framing of an appropriate response

Without the dogma of complete counts, incorporation by reference became a ghost obligation in federal courts: an exception without a rule.

The intellectual environment in the years leading to the adoption of the Federal Rules of Civil Procedure in 1938 was the second wasted opportunity in the United States to abolish incorporation by reference.²²⁵ The first had occurred almost a century earlier, with the enactment of the NY Code of Procedure in 1848. In fact, the 1938 Federal Rules were an even greater departure from the technicalities of common-law pleading than code pleading could ever be.²²⁶ Yet, although rare, some recent cases still mention incorporation by reference, but always without mentioning the dogma of complete counts. This Article starts the third opportunity to abolish incorporation by reference.

Only one (reasonably) recent federal court case took the dogma of complete counts seriously, with tragic consequences for the plaintiff. In 1960, 60 years ago, a federal district court judge in New Jersey paid careful attention to which allegations were and which were not being incorporated in each count. He held that because the plaintiff incorporated certain earlier allegations into a count, the non-incorporation of other allegations demonstrated an intent not to make them a part of it.²²⁷ The judge then granted a motion to dismiss for failure to state a claim upon which relief could be granted.²²⁸

This was probably the last decision where incorporation by reference was seriously considered, albeit indirectly. Although this decision is from 1960, the judge had graduated from law school in 1919 and was in private practice from 1919 to 1932, when he was nominated to the federal bench by President Herbert Hoover.²²⁹ Clearly, he was an old-school judge.

Another recent federal court decision also paid indirect attention to the issue. Although not referring to the dogma of complete counts, and although stating that Rule 10(c) *permits* incorporation by reference, *Zuzul* seems to consider that a plaintiff *must* do so if she wants to allege the same fact in a

extremely difficult or would be of assistance to the district judge. Even when a failure to comply with Rule 10(b) is shown, leave to amend ought to be made available to the offending pleader since the defect does not go to the merits of the action. A failure to object to improper paragraphing promptly—normally before interposing a responsive pleading—properly has been deemed a waiver of the defect by at least one court of appeals. Fortunately, practice under this technical aspect of Rule 10(b) has not been the subject of significant litigation, especially in recent decades.”); *see also id.* § 1324 (discussing when separate statements are required); *Lowe v. Consol. Edison Co.*, 1 F.R.D. 559 (S.D.N.Y. 1940) (holding that separate counts were not required because they were not necessary to clear presentation or to enable defendants to plead).

225. *See, e.g.*, Subrin, *supra* note 103 (discussing the movement of flexibilization of the common law pleading towards equity pleading in the Federal Rules).

226. *See id.* at 974 (“The Federal Rules were the antithesis of the common law . . .”).

227. *Reliable Volkswagen Sales & Serv. Co. v. World-Wide Auto. Corp.*, 182 F. Supp. 412, 425 (D.N.J. 1960).

228. *Id.* at 428.

229. *Judges: Forman, Phillip*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/forman-phillip> (last visited Apr. 16, 2019). A curiosity, if not irony, is that Judge Phillip Forman granted Albert Einstein his American citizenship in 1940.

different count.²³⁰ With no context or explanation, the court stated, “For one, these allegations arise in [the plaintiff’s] defamation count and are not incorporated into her counts for race or gender retaliation.”²³¹ Although dictum, this comment reveals a dangerously wrong interpretation of Rule 10(c).

Federal Rule 10(c) was mimicked in almost all state procedural rules, replicating the error throughout the country. Only New York and Illinois adopted different rules, as discussed above.²³² Forty-three states adopted provisions similar to Rule 10(c), with minimal variation. The most common language is “Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion.” A few states were more creative in departing from Rule 10(c) and used “document” or “paper” instead of “pleading,” clarified that it must be “in the same action,” or added a reference to “exhibits” or “other paper of record.” Only five states (Virginia, New Hampshire, Iowa, Connecticut, and California) did not adopt the rule in their codes of civil procedure but allow incorporation by reference through precedents.²³³

No state has expressly adopted the dogma of complete counts in modern procedural law.²³⁴ One would have to go back more than half a century, to the 1960s and 1950s to find a handful of isolated cases clearly stating the dogma of complete counts, maybe by inertia.²³⁵ One would be hard-pressed to find any reference to the dogma after that. Cases before 1950, and especially before 1940, state the dogma unequivocally.²³⁶ So, by following the federal lead, the states also adopted the exception to a dogma that they had abandoned.²³⁷

230. *Zuzul v. McDonald*, 98 F. Supp. 3d 852, 869 n.15 (M.D.N.C. 2015).

231. *Id.*; *see also Heying v. Simonaitis*, 466 N.E.2d 1137, 1142 (Ill. App. Ct. 1984) (not allowing, without explanation, allegations in one count that were not expressly incorporated in another).

232. *See supra* Subpart IV.B.

233. *See Pine Terrace Apartments, L.P. v. Windscape, LLC*, 87 Cal. Rptr. 3d 630, 641 (Ct. App. 2009); *Melfi v. City of Danbury*, 800 A.2d 582 (Conn. App. Ct. 2002); *Vawter v. McKissick*, 159 N.W.2d 538, 541 (Iowa 1968); *Signal Aviation Servs., Inc. v. City of Lebanon*, 144 A.3d 869, 879–80 (N.H. 2016); *Hechler Chevrolet, Inc. v. Gen. Motors Corp.*, 337 S.E.2d 744, 746 (Va. 1985).

234. *See, e.g.*, 1 RONALD S. LONGHOFER, MICHIGAN COURT RULES PRACTICE § 2113.4 (6th ed. 2018) (“[I]ncorporation by reference was formerly required when identical facts were relied upon in separate counts or defenses of the same pleading. Although that is still permitted under MCR 2.113, it is no longer required.”). The advice is, “You don’t need to do it, but you may.”

235. *See Reliable Volkswagen Sales & Serv. Co. v. World-Wide Auto. Corp.*, 182 F. Supp. 412 (D.N.J. 1960); *Webb v. Litz*, 102 So. 2d 915 (Ala. Ct. App. 1958); *Lambert v. S. Ctys. Gas Co.*, 340 P.2d 608, 611–12 (Cal. 1959) (“Each count or cause of action in a complaint must be complete in itself, and must either contain all the averments necessary to state a cause of action or expressly refer therefor to other counts.” (citations omitted)); *Steiner v. Rowley*, 221 P.2d 9, 12 (Cal. 1950) (en banc); *Tucker v. Tucker*, 143 S.E.2d 639, 644 (Ga. 1965) (“Each count in the petition must be complete in itself and must state a cause of action.”); *S. Land, Timber & Pulp Corp. v. Eunice*, 133 S.E.2d 345, 350 (Ga. 1963); *Latman v. Kalmor Builders, Inc.*, 137 N.Y.S.2d 240 (Sup. Ct. 1954); *Lampert v. Hollis Music, Inc.*, 109 N.Y.S.2d 319 (Sup. Ct. 1951); *Levine v. Schaffzin*, 99 N.Y.S.2d 254 (Sup. Ct. 1950); *Heath v. Kirkman*, 82 S.E.2d 104 (N.C. 1954); *Cherry v. Walker*, 62 S.E.2d 329, (N.C. 1950); *Olson v. Johnson*, 66 N.W.2d 346 (Wis. 1954).

236. *See supra* Subparts II.A, III.A.

237. The practice in New York and Illinois is discussed above. *See supra* Subpart IV.B.

The absence of evolution regarding incorporation by reference is discouraging because, as Robert Wyness Millar stated, “as procedure develops the advance is from rigidity to flexibility.”²³⁸ Against all odds, and against reason and common sense, the practice is as prevalent today as it was four centuries ago. But at least it made sense in the context of primitive procedural superstitions.

D. BEYOND INCORPORATION BY REFERENCE

Some modern courts may be going in a direction beyond the need to incorporate by reference. These courts are influenced by the empty existence of the practice of incorporation by reference; they are not reinstating the rule that all counts must be complete. The result is futile pleading battles and unnecessary repetition, fueled by naturally risk-averse lawyers who would adopt a belt-and-suspenders approach for fear of an unreasonably formalistic judge.

A 2003 Utah decision, *Coroles v. Sabey*, held that in fraud cases, the requirement to plead with particularity is not satisfied with the incorporation of almost 700 previous paragraphs and the mere recital of the elements of fraud.²³⁹ For the court, it was unacceptable for a lengthy complaint to “dump[] upon the trial court, and now upon [the court of appeals], the burden of sifting through the hundreds of paragraphs of alleged facts to ascertain whether Plaintiffs have ‘allege[d] . . . facts necessary to make all their elements of fraud.’”²⁴⁰

The *Coroles* court was also influenced by the rule that “the mere recitation . . . of the elements of the fraud in a complaint does not satisfy the particularity requirement.”²⁴¹ To facilitate the court’s work, therefore, the plaintiff “should have listed specific paragraphs from their facts section that supported each element of their common law fraud claim.”²⁴² This silly idea could only have crossed the mind of a judge exposed to the practice of incorporation by reference. The case was dismissed without prejudice, and the request for leave to amend was denied merely because a proper motion to amend was not filed: the plaintiffs should have filed a proper motion to amend or filed a new lawsuit complying with the specificity demanded.²⁴³ *Coroles* represents the triumph of form over substance.

238. MILLAR, *supra* note 12, at 5. This statement is true only regarding the recent evolution of civil procedure. Earlier procedure, particularly Roman law, was more flexible and less formalistic than the common law. See, e.g., Millar, *supra* note 90, at 31–43 (demonstrating that the Roman and Canon law rules of joinder of claims were more flexible than the common-law pleading rules).

239. See *Coroles v. Sabey*, 79 P.3d 974, 980 (Utah Ct. App. 2003) (“This method for pleading fraud is unacceptable under rule 9(b), especially in a complaint of such enormous length.”).

240. *Id.* (alteration in original) (quoting *Debry v. Noble*, 889 P.2d 428, 443 (Utah 1995)).

241. *Id.* (alteration in original) (internal quotation marks omitted) (quoting *Armed Forces Ins. Exch. v. Harrison*, 70 P.3d 35, 40 (Utah 2003)).

242. *Id.* at 981 n.13.

243. See *id.* at 986.

A 2012 decision, also from Utah, reported plaintiffs following *Coroles*: on a 260-page complaint, each count contained not only the traditional formula of incorporation by reference, but also a summary of the facts and cross references to specific paragraphs giving factual detail to support each element of a fraud claim.²⁴⁴ Belt, suspenders, and waistband.

This practice of summarizing facts at each count and making cross references to prior paragraphs might become pervasive even beyond fraud cases, as lawyers and courts struggle with the unintended consequences of the plausibility requirement of *Twombly* and *Iqbal*.²⁴⁵ Unless this is done in rare cases of long pleadings and complex facts under a requirement of pleading with particularity, this practice will prove even more wasteful and pointless than incorporation by reference.²⁴⁶

And all this nonsense could happen only in the United States, and only because the legal profession never got rid of incorporation by reference two centuries ago when it stopped making sense. Instead, we allowed the dogma to lie dormant in our judicial system by blindly complying with its exception. One can now see that it was not a benign practice after all. With the emergence of heightened pleading standards, it is possible that the dogma, like the herpes virus, will come back even more powerful and manifest itself in unpredictable ways.

E. RELATED ISSUES OF INCORPORATION BY REFERENCE

The objective of this Article is to discuss the incorporation of allegations made previously in the same pleading. But incorporation by reference exists in other situations.

One example is the incorporation of allegations and claims made in previous pleadings or motions in the same proceeding.²⁴⁷ This strategy, although unnecessary, is commonly used in complex and multiparty litigation.²⁴⁸ But practical complications may arise when the incorporation refers to a pleading that was amended, abandoned, or superseded.²⁴⁹ This was a valid concern before the electronic age, when parts of a file could be archived in a different physical

244. See *Mower v. Simpson*, 278 P.3d 1076, 1082 (Utah Ct. App. 2012).

245. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

246. It will not escape an attentive reader that this Article contains a series of “incorporations by reference” through footnotes that make cross references to other Parts where related information is developed.

247. See FED. R. CIV. P. 10(b) (“A later pleading may refer by number to a paragraph in an earlier pleading.”).

248. See 5 WEINSTEIN, KORN & MILLER, *supra* note 62, ¶ 3014.05; 5A WRIGHT & MILLER, *supra* note 4, § 1326.05.

249. See 2 PARNES, *supra* note 4, § 10.04; 5A WRIGHT & MILLER, *supra* note 4, § 1326; see also *Hinton v. Trans Union, LLC*, 654 F. Supp. 2d 440 (E.D. Va. 2009) (criticizing incorporation of allegations in a superseding complaint because it was not direct and explicit, stating that “wholesale incorporations—particularly those that seek to incorporate superseded versions of a complaint—must be examined with special care, and dismissing the case after two amendments, making this one of those senseless decisions that hurt people by inappropriately making a legal rule out of a silly baseball metaphor).

location.²⁵⁰ But it lost its force now that previous pleadings are available at the click of a mouse.

A similar complication occurs when an amended pleading supersedes the previous one but fails to refer to or adopt some element contained in the superseded pleading.²⁵¹ It is usually considered that “[w]here an amendment is complete in itself and does not refer to or adopt the prior pleading, the earlier pleading ceases to be a part of the record for most purposes, being in effect abandoned and withdrawn.”²⁵² Although this is the general rule in case law, the rules of only one state explicitly limits the practice to a pleading that has not been superseded.²⁵³ In addition, while most states allow incorporation by reference “in the same pleading or in any *other* pleading or motion,” the rules in three states explicitly limit the practice to the *same* pleading.²⁵⁴

Another related issue is the incorporation of statements made (or documents) in a different lawsuit. Although Rule 10(c) does not contain any limitation, this practice is not allowed, even if the parties are the same and the proceedings are related, because it fails to give the opponent (and the court) adequate notice.²⁵⁵ The rules in a few states expressly limit incorporation by

250. See, e.g., *Oppenheimer v. F. J. Young & Co.*, 3 F.R.D. 220, 226 (S.D.N.Y. 1943) (“[I]t is quite inconvenient to the court to have to send to the Clerk’s office for a file in order to learn the contents of exhibits attached to the discarded pleading.”). The *Oppenheimer* court sua sponte suggested (but did not require) the plaintiff to attach the documents again when drafting the amended complaint.

251. See 5 WEINSTEIN, KORN & MILLER, *supra* note 62, ¶ 3014.05; 5A WRIGHT & MILLER, *supra* note 4, § 1326.

252. See *McDonald v. Lipov*, 13 N.E.3d 179, 191 (Ill. App. Ct. 2014) (internal quotation marks omitted) (quoting *Foxcroft Townhome Owners Ass’n v. Hoffman Rosner Corp.*, 449 N.E.2d 125, 126 (Ill. 1983)); see also *Baker v. Louisville & N. Terminal Co.*, 61 S.W. 1029 (Tenn. 1901). But see *McManus v. Williams*, 519 F. Supp. 2d 1, 5 (D.D.C. 2007) (citing *El-Hadad v. Embassy of the U.A.E.*, 69 F. Supp. 2d 69, 71 n.1 (D.D.C. 1999) (allowing incorporation by reference of a superseded complaint), *rev’d in part* by 216 F.3d 29 (D.C. Cir. 2000)).

253. TEX. R. CIV. P. 58 (“Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion, so long as the pleading containing such statements has not been superseded by an amendment as provided by Rule 65.”).

254. See, e.g., MICH. CT. R. 2.113(D) (“Statements in a pleading may be adopted by reference only in another part of the same pleading.”); *Derderian v. Genesys Health Care Sys.*, 689 N.W.2d 145, 162–63 (Mich. Ct. App. 2004) (not allowing incorporation by reference to another pleading, only the same pleading); 1 LONGHOFFER, *supra* note 234, § 2113.4 (stating that the previous Michigan procedural rules allowed incorporation by reference in other pleadings and motions). The other two states that explicitly do not allow incorporation by reference to another pleading are Mississippi and Oregon.

255. See 71 C.J.S. *Pleading* § 151 (2019); PATRICK M. CONNORS, PRACTICE COMMENTARY, MCKINNEY’S CONSOLIDATED LAWS OF NEW YORK, CPLR C3014 (2015); 2 PARNES, *supra* note 4, § 10.04; 5A WRIGHT & MILLER, *supra* note 4, § 1326; see also, e.g., *Muttathottil v. Gordon H. Mansfield*, 381 F. App’x 454, 457 (5th Cir. 2010); *Gooden v. Crain*, 255 F. App’x 858, 862 (5th Cir. 2007); *Rohde v. Rippy Surveying Co.*, 132 F.3d 1455 (5th Cir. 1997); *Tex. Water Supply Corp. v. R. F. C.*, 204 F.2d 190 (5th Cir. 1953); *Bronstein v. Biava*, 838 P.2d 968 (N.M. 1992); *Hill v. Hill Spinning Co.*, 94 S.E.2d 677 (N.C. 1956). But see 2 KERR, *supra* note 100, § 730 (allowing incorporation of statements in a different lawsuit); *Mass. Mut. Life Ins. Co. v. Residential Funding Co., LLC*, 843 F. Supp. 2d 191, 215 & n.15 (D. Mass. 2012) (considering arguments from joint briefs filed in eight different cases because the court was “familiar with the filings in the other eight cases, which [were] substantially similar to this case, and the usual concerns about inferring arguments from other submissions have less force”).

reference to statements made the same action.²⁵⁶ And one state allows incorporation by reference “in another pleading in the same court.”²⁵⁷

A fourth related issue is the application of this centuries-old trial rule in the appellate context. The United States Court of Appeals for the Tenth Circuit, for example, has listed it among the “disfavored practices: “Incorporating by reference portions of lower court or agency briefs or pleadings is disapproved and does not satisfy the requirements of Federal Rules of Appellate Procedure 28(a) and (b).”²⁵⁸ Incorporation of lower court filings would allow parties to circumvent page limitations on appellate briefs and unnecessarily complicate the task of appellate judges.²⁵⁹ Moreover, the mere repetition of arguments already made in first instance does not explain why the lower court erred in rejecting them.²⁶⁰ As a result, the Tenth Circuit has consistently declined to consider arguments made through incorporation by reference to lower court materials, treating the incorporated arguments as waived, even for pro se litigants.²⁶¹

Yet another related issue is the incorporation of documents by reference.²⁶² At common law, a written instrument could not be part of a pleading by mere attachment and reference.²⁶³ If a document was the foundation of a claim or defense, the pleader had to transcribe it in full (or in part, if allowed) in the body of the pleading.²⁶⁴ Code pleading borrowed incorporation of documents by reference from equity practice so that pleaders would not have to transcribe the contents of documents into pleadings²⁶⁵ and so that the same document could be

256. See N.C. R. CIV. P. 10(c) (“Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion *in the action*.” (emphasis added)); PA. R. CIV. P. 1019(g) (“Any part of a pleading may be incorporated by reference in another part of the same pleading or in another pleading *in the same action*.” (emphasis added)); VT. R. CIV. P. 10(c) (“Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion *in the same action*.” (emphasis added)).

257. See LA. CODE CIV. PROC. ANN. art. 853 (2018) (“A statement in a pleading may be adopted by reference in a different part of the same pleading or in another pleading in the same court.”).

258. 10TH CIR. R. 28.3(b).

259. See *Gaines-Tabb v. ICI Explosives, USA, Inc.*, 160 F.3d 613, 624 (10th Cir. 1998).

260. See *Capital Dev. Affiliates LLC v. Zealand Benjamin Thigpen, III*, 744 F. App’x 594, 596 (10th Cir. 2018).

261. See, e.g., *United States v. Riddle*, 731 F. App’x 771, 783 (10th Cir. 2018); *Rodgers v. Beechcraft Corp.*, No. 17-5045, 2018 WL 6615315, at *20 (10th Cir. Dec. 14, 2018); *United States v. Gordon*, 710 F.3d 1124, 1137 n.15 (10th Cir. 2013); *United States v. Patterson*, 713 F.3d 1237, 1250 (10th Cir. 2013); *Argota v. Miller*, 424 F. App’x 769, 771 (10th Cir. 2011); *Wardell v. Duncan*, 470 F.3d 954, 963–64 (10th Cir. 2006) (“Plaintiff’s pro se status does not except him from such established rules.”).

262. See *BAILEY & FISHMAN*, *supra* note 165, § 29:4.20; 2 *PARNES*, *supra* note 4, § 10.05; 5 *WEINSTEIN, KORN & MILLER*, *supra* note 62, ¶¶ 3014.05, 3014.14; 5A *WRIGHT & MILLER*, *supra* note 4, §§ 1326–27.

263. See *SHIPMAN*, *supra* note 12, § 290 (Henry Winthrop Ballantine ed., 3d ed. 1923) (“It is a technical rule that common-law pleading cannot be done by exhibits.”); *Pearsons v. Lee*, 2 Ill. (1 Scam.) 193, 194–95 (1835) (concluding that the court is not permitted to look at an annexed copy of a contract “with legal eyes” because it is not part of the complaint).

264. See, e.g., *GREEN*, *supra* note 50, §§ 327–33.

265. See *CLARK*, *supra* note 4, § 37. For a more recent example, see *FREER*, *supra* note 6, § 7.3.1 (“These provisions are helpful. If the case involves a dispute over a contract, the plaintiff may simply append a copy of

used in different counts.²⁶⁶ Since 1938, however, “a copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes.”²⁶⁷ There has been dispute, however, over what material constitutes a “written instrument.”²⁶⁸

None of these practices are dealt with in this Article, which is exclusively about incorporation by reference at each count within a pleading. But they too are antiquated and must be updated to the twenty-first century.

CONCLUSION

The practice of blindly following tradition recollects the old story of the new couple making their first dinner together. The husband is troubled because the wife cut off the ends of the roast: “but that’s the best part!”, he says. She answers, confidently: “That’s the way my mother always made it.” The following week, the couple visits the mother, as she prepares the famous recipe. The young bride is sure she must be missing some vital information, so she inquires her mother. The explanation is comforting: “That’s the way my mother always made it.” Grandma’s eyesight was failing, but she could hear a pin drop. She lumbered into the kitchen and finally clarified the situation: “We have always been poor and cutting the ends was the only way it would fit our small oven.”

That the legal profession cannot get rid of such an obviously meaningless formula is a hint about how clueless we may be about other things that really matter. If this could pass undetected for centuries, what else have we been doing that makes no sense?

A treatise proposed relaxing the application of Federal Rule 10(c) along the same lines as the New York rule, but advised that “good pleading practice requires that express incorporations should be used to avoid any ambiguity and any risk.”²⁶⁹

This suggestion is not based on reason or knowledge, but merely a rationalization of a historical accident. The fear that a judge will miss an element of a cause of action merely because it was stated half a dozen or a hundred pages

the contract to the complaint . . . without the make-work of having to retype the entire contract into the complaint.”)

266. See PHILLIPS, *supra* note 12, § 203 (“Where several causes of action are founded upon an instrument, a copy of which is required to be filed with the pleading, and but one copy is filed, each cause of action should refer to the copy as filed with that cause of action.”).

267. See FED. R. CIV. P. 10(c); *see also* N.Y. C.P.L.R. 3014 (McKinney 1962) (“A copy of any writing which is attached to a pleading is a part thereof for all purposes.”).

268. Compare *Occupy Columbia v. Haley*, 738 F.3d 107, 116 (4th Cir. 2013) (citing *Rose v. Bartle*, 871 F.2d 331, 339 n.3 (3d Cir. 1989) (concluding that an affidavit does not constitute a “written instrument”), with *N. Ind. Gun & Outdoor Shows, Inc. v. City of South Bend*, 163 F.3d 449, 453 (7th Cir. 1998) (“[T]he term ‘written instrument’ . . . include[s] . . . affidavits.” (citing *Schnell v. City of Chicago*, 407 F.2d 1084, 1085 (7th Cir. 1969), *overruled on other grounds* by *City of Kenosha v. Bruno*, 412 U.S. 507 (1973))).

269. 5A WRIGHT & MILLER, *supra* note 4, § 1326.

earlier has no place in real life. Not in the twenty-first century, at least. There is no risk of ambiguity if a count does not expressly incorporate facts stated before in the same pleading.

A complaint must be read as a whole. If a plaintiff described an act of violence several pages earlier, the judge will remember it when the plaintiff asks for compensatory and punitive damages at the end of the document. More important, if by the time the plaintiff asks for damages, the plaintiff needs to remind the judge of what happened, abstractly repeating, realleging, and reiterating paragraphs 1 to 45 would not improve the judge's memory of what happened. If information is essential to understanding any part of a text, if its omission will create ambiguity, the plaintiff may want to summarize the information again and make a cross reference to specific paragraphs, containing further details.

American lawyers unquestioningly repeat the old formula, never stopping to think why or even if they have to. "It doesn't hurt and will keep me out of trouble," they may think. But it is a ritualistic recitation, and its omission will not affect the outcome of the case. When lawyers abolish this silly practice, no one will miss these pointless paragraphs cluttering our pleadings.

The most important step now is to recognize that there is no dogma that all counts must be complete within one pleading. Based on this realization, once the mechanical practice stops, one could discuss the peculiar and more complex situations where cross references may be useful.

A national organization, such as The American Law Institute, the American Association of Law Schools, or the American Bar Association could take on the broader charge of identifying useless words in the practice of law. The project could address antiquated terminology, boilerplate, useless words (*come now, by and between, wherefore*), and mysterious formulas (*null and void and of no force or effect, due and payable, give and grant, indemnify and hold harmless*). This work will require extensive research, but will have an immediate impact in the practice of law, freeing lawyers and judges from old formulas and opening our minds to new ideas.

Ideally, lawyers should just stop incorporating by reference. Abolishing incorporation by reference demands a culture change, in which lawyers will write purposefully, not reflexively. But lawyers are risk averse and have little incentive to stop, even if the formula makes no sense. For decades, courts and commentators have sent mixed and ambiguous messages, scaring the profession into complying with this ghost obligation. And lawyers have been doing this for so long that it is now difficult to stop. Without judicial assurance, no lawyer will want to risk the public humiliation of being ordered to amend or having a count dismissed (or whatever mythical consequence happens to lawyers who fail to incorporate).

Therefore, courts must give clear signals that the dogma of complete counts is a thing of the past, and that it is okay to stop repeating and realleging at each

count. Judges could address the issue in dicta, strike these formulas sua sponte, order the parties to amend pleadings to exclude redundant and immaterial paragraphs, or issue standing orders against the practice.

Lawyers can also take the initiative by moving to strike these formulas from each other's pleadings. The motion may not be granted because the surplusage is not prejudicial, but the court will have to address the issue, leaving a trail of precedents. We have to start somewhere. From there, we can rethink legal instruction and rewrite formbooks. Only then can we look back and be deservedly embarrassed by this practice, like we are of our hair in old pictures.

Rule 10(c) does not need to be amended, only correctly interpreted: it merely allows cross references within a pleading, but does not require all counts to be complete. A musician cannot blame the music sheet for a bad performance. A slight change in its first sentence, however, would send a clearer message to the legal profession: instead of saying that statements may be "adopted," it could say that statements may be "referred to." The use of a more informal verb, coupled with a one-sentence Advisory Committee Note, should dissolve any lingering power of the dogma of complete counts.

As this Article has demonstrated, the dogma that each count in a pleading must be complete has been dead and forgotten in the United States for almost a century. And the practice of incorporation by reference is nonexistent in other countries. Yet, because it was not given a proper burial, its ghost continues to haunt the American legal profession. Let this Article be the memorial that forever puts this dogma to rest, and frees American lawyers from a pointless tradition.

Requiescet in pace.
