
Louis Prashker
PLEADING PERFORMANCE OF CONDITIONS

PRECEDENT:

NEW YORK AND FEDERAL RULES

The new Federal Rules of Civil Procedure became effective September 16, 1938. They represent the best experience of the legal profession. The bench, the bar and the law school faculties of this country cooperated in the formulation of a system of civil procedure for the federal courts designed "to secure the just, speedy and inexpensive determination of every action." Primary credit for the preparation of the Rules must be given to the Advisory Committee appointed in 1935 by the United States Supreme Court to prepare a draft system of rules.

1 Proceedings of American Bar Association Institute, Cleveland (1938) 179.

2 Of the development of the new Federal Rules, Hon. William D. Mitchell, Chairman of the Advisory Committee, said: "We should remember the way in which these new federal rules were developed. They are not merely the work of a committee of fifteen lawyers and of the Supreme Court. If there is any one thing for which the Advisory Committee should be commended, it is for calling to its aid the experience and advice of the entire bench and bar of the United States. Twice at an interval of a year drafts of proposed federal rules were printed and distributed to the bench and bar of the nation with invitation for criticisms and suggestions. The response of the profession was instant. Suggestions by the scores and hundreds were received and carefully considered and respected, and had great influence with the Advisory Committee and the Supreme Court in molding the final product. Truly, it may be said that the new federal rules represent the dominant opinion of the profession, not of a single state but of the whole nation." Mitchell, Uniform State and Federal Practice: A New Demand for More Efficient Judicial Procedure (1938) 24 A. B. A. J. 981, 982.


4 The members of the Advisory Committee appointed to serve without compensation were: William D. Mitchell, of New York City, Chairman; Scott M. Loftin, of Jacksonville, Florida, President of the American Bar Association; George W. Wickersham, of New York City, President of the American Law Institute; Wilbur H. Cherry, of Minneapolis, Minnesota, Professor of Law at the University of Minnesota; Charles E. Clark, of New Haven, Connecticut, then Dean of the Law School of Yale University (now Judge of the Circuit Court of Appeals); Armistead M. Dobie, of University, Virginia, Dean of the Law School of the University of Virginia; Robert G. Dodge, of Boston, Massachusetts; George Donworth, of Seattle, Washington; Joseph G. Gamble, of Des Moines, Iowa; Monte M. Lemann, of New Orleans, Louisiana; Edmund M. Morgan, of Cambridge, Massachusetts, Professor of Law at Harvard University; Warren Olney, Jr., of San Francisco, California; Edson R. Sunderland, of Ann Arbor, Michigan, Professor of Law at the University of Michigan; Edgar B. Tolman, of Chicago, Illinois. Dean Clark (now Judge of the Circuit Court of Appeals) was appointed reporter to the Advisory Committee. On February 17, 1936, George Wharton Pepper, of Philadelphia, Pennsylvania,
Since the adoption of the Rules, many legal institutes for the study of the Rules have been held in various parts of the country. The speakers at the institute meetings included many of the members of the Advisory Committee. The American Bar Association conducted a three-day institute in Cleveland prior to the opening of the annual meeting of the Bar Association. Legal institutes were likewise held in Washington and New York City, and were exceptionally well attended. The institute in New York City was conducted jointly by the Association of the Bar of the City of New York and the New York County Lawyers' Association. The joint facilities of the two associations were inadequate to accommodate the large gathering of lawyers, and, almost at the last moment, the institute was moved to the larger auditorium of the College of the City of New York (Twenty-third Street Branch).\(^5\) Never before had the legal profession in this country manifested such interest in the study of procedural problems.

A primary aim underlying the preparation of the Rules was to provide a system of civil procedure which might serve as a model for adoption by all the states,\(^8\) and thus achieve uniformity. Uniformity in civil procedure in the federal courts is directly effected by the Rules. If similar rules were

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\(^5\) The total registration for this institute was approximately 2,000. *Federal Rules Institutes Enjoying Widespread Popularity* (1938) 24 A. B. A. J. 887.

generally adopted in the states, uniformity in the courts of this country would thus be effected. Such uniformity is a great desideratum.

In New York, adoption of many of the Federal Rules should not be difficult. These Rules have, in the main, been based upon the New York law of procedure. Almost a century ago, the State of New York led the way in procedural reform. This pioneering spirit should now manifest itself in the adaptation of the Federal Rules to state practice.

Adaptation must, however, be based upon thorough study. The relative advantages of state and federal rules should be carefully noted and weighed. We must determine for ourselves whether the Federal Rules would meet our local needs.

The Federal Rules are eighty-six in number. Many of them contain a number of subdivisions. Rule 9(c) affects pleading of performance of conditions precedent. While most of the Federal Rules were the subject of careful discussion at the legal institutes, Rule 9(c) was barely men-

7 "The Federal Rules, containing as they do the best experience of the several states in the realm of procedure, will doubtless become the inspiration for the adoption of similar rules in many jurisdictions to the great advantage both of litigants and lawyers." Arthur T. Vanderbilt (Foreword), Proceedings of American Bar Association Institute, Cleveland (1938) iv.

8 "After all, what we have done in these rules is to apply the principles of the Field Code originated in New York in 1848. I think one may properly say that you will find the New York system in our rules, but if I may attempt, perhaps, an Irish bull, I might add, only less so. By this I mean, as I shall indicate, that we have been able to avoid some of the technicalities of the New York system.

"Basically, in other words, I think this is New York practice, but I believe and hope it is really more simple and more flexible than the New York practice has become over the years." Dean Clark, Proceedings of American Bar Association Institute, New York (1938) 235.


10 Mr. Mitchell suggests that in considering the Federal Rules for use in state courts, "the presumption should be in favor of a federal rule, and it should be accepted unless it is altogether clear that it fails to meet local requirements." Mitchell, loc. cit. supra note 2.

11 "Conditions Precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity." Fed. Rules of Civ. Proc. 1938 r. 9(c), 28 U. S. C. A. following § 723c (Supp. 1938).
tioned in passing.\textsuperscript{12} The provision merits full consideration. This article proposes to examine Federal Rule 9(c) in the setting of the corresponding New York provision, Rule 92 of the New York Rules of Civil Practice.\textsuperscript{13}

I. THE NEW YORK RULE.

(a) \textit{New York Civil Practice Rule 92}.

Civil Practice Rule 92 provides: "Conditions precedent; how pleaded. In pleading the performance of a condition precedent in a contract, it is not necessary to state the facts constituting performance, but the party may state in general terms, that he, or the person whom he represents, duly performed all the conditions of such contract on his part."

This Rule, together with the other Rules of Civil Practice, became effective in New York on October 1, 1921. It was derived from a similar statutory provision of the New York Code of Civil Procedure of 1876.\textsuperscript{14} This, in turn, was derived from a similar provision of the Field Code of 1848.\textsuperscript{15}


\textsuperscript{13} "Conditions precedent; how pleaded. In pleading the performance of a condition precedent in a contract, it is not necessary to state the facts constituting performance, but the party may state, generally, that he, or the person whom he represents, duly performed all the conditions on his part. If that allegation is controverted, he must, on the trial, establish performance." N. Y. \textit{Rules of Civ. Prac.} 92.

\textsuperscript{14} "Conditions precedent; how pleaded. In pleading the performance of a condition precedent in a contract, it is not necessary to state the facts constituting performance; but the party may state, generally, that he, or the person whom he represents, duly performed all the conditions on his part. If that allegation is controverted, he must, on the trial, establish performance." N. Y. \textit{Code of Civ. Proc.} (1876) § 533.

\textsuperscript{15} N. Y. Civil Practice Rule 92 differs from § 533 of the Code of Civil Procedure in that (1) the phrase "in general terms" was substituted for the word "generally"; (2) the phrase "of such contract" was inserted after the word "conditions"; and (3) the second sentence of § 533 of the Code of Civil Procedure, "If that allegation is controverted, he must, on the trial, establish performance", is omitted from the Rule.

\textsuperscript{16} "In pleading the performance of conditions precedent in a contract, it shall not be necessary to state the facts showing such performance; but it may be stated generally that the party duly performed all the conditions on his part; and if such allegation be controverted, the party pleading shall be bound to establish on the trial the facts showing such performance." § 162, N. Y. \textit{Code of Proc.} (1848) as am'd 1831.
Under the common law, the party pleading performance of conditions precedent is required to plead the facts constituting performance, and may not plead generally that he performed the conditions. Such a general plea would be a conclusion of law, and consequently objectionable.

(b) Analysis of Rule 92.

Rule 92 modifies the common law rule in that it permits a pleader to allege performance in general terms. The ground of attack that the general allegation is a conclusion of law is thereby removed. Rule 92 does not, however, abrogate the common law right of a pleader to allege performance by stating the facts constituting the same. In this respect, the Rule is permissive and supplemental, and not mandatory and exclusive.

The Rule relates to the method of pleading and not to the method of proof. Proof of performance must still be in accord with common law rules of evidence.

The Rule is limited to the pleading of performance of conditions of a contract. Performance of statutory duties

Section 162 of the Code of Procedure differs from § 533 of the N. Y. Code of Civil Procedure in that (1) "condition precedent" was substituted for "conditions precedent"; (2) "it is not necessary" was substituted for "it shall not be necessary"; (3) "the facts constituting performance" was substituted for "the facts showing performance"; (4) "the party may state, generally" was substituted for "it may be stated generally"; (5) "that he, or the person whom he represents duly performed" was substituted for "that the party duly performed"; (6) "If that allegation is controverted" was substituted for "and, if such allegation be controverted"; (7) "he must on the trial, establish performance" was substituted for "shall be bound to establish on the trial the facts showing such performance." The substitutions are matters of form and not of substance.

The law of contracts makes a further distinction between express and implied conditions. Where the parties expressly state that a particular fact will operate as a condition, the condition thus imposed is said to be express. Williston, Contracts (Rev. ed. 1936) 668. If the parties have not specifically set forth the effect which the fact is to have on the contract, but it may reasonably be inferred that they meant it to operate as a condition, it is regarded as a condition implied in fact. Where a fact operates as a condition merely because of the legal interpretation of its effect without any manifestation of assent on the part of the parties to the contract, it becomes a condition implied in law. Ibid. See Restatement, Contracts (1932) § 253. N. Y. Civil Practice Rule 92 has been held applicable as well to conditions implied in law. 3 Car-
or obligations imposed by law do not properly fall within the scope of the Rule.\(^3\)

The Rule relates to *performance* of conditions, and not to their *breach*. Facts constituting a breach must still be alleged.\(^6\) It does not include conditions *unperformed*, though performance thereof was waived\(^{20}\) or became unnecessary by reason of the defendant's repudiation of the contract,\(^{21}\)


A further distinction created by the law of contracts between performance by a party to the contract and performance by a third party to be selected by either or both of the parties has no practical effect in the operation of Civil Practice Rule 92, since it has been held to apply to both types of conditions. *Ibid.* The stock example of a contract where assent of a third party is a condition precedent to liability of the defendant is the case where an architect's certificate of completion must be supplied before the defendant is liable for the construction work done by the plaintiff. *Weeks v. O'Brien, 141 N. Y. 199, 36 N. E. 185 (1894).* In such a case, even if a party other than the defendant is to certify the completion of the work, the condition of certification is regarded as a condition precedent, and the abbreviated form under Civil Practice Rule 92 would be a proper mode of alleging its performance. *Smith v. Cary, 160 App. Div. 119, 145 N. Y. Supp. 99 (3d Dept. 1914).*

\(\text{But see Wood & Selick v. Ball, 190 N. Y. 217, 83 N. E. 21 (1907). It is doubtful whether the courts today would follow this case in view of the addition of the phrase "of such contract". The prior procurement by a foreign corporation of a certificate of authority to do business is not a condition of the contract. N. Y. GEN. CORP. LAW \(\S\) 218.}\)


\(\text{But a party is sometimes excused from the performance of conditions precedent and, in such cases, need not allege due performance of such conditions. For example, if an anticipatory breach of contract has occurred and the contract is such that suit for breach of contract will be maintainable before the time set for performance, the plaintiff is not required to allege due performance of conditions precedent in his complaint. *Bogardus v. N. Y. Life Ins. Co., 101 N. Y. 398, 4 N. E. 522 (1886); Siegel v. Ward & Co., 177 App. Div. 487, 164 N. Y. Supp. 252 (1st Dept. 1917); Sisskin v. Workmen's Circle, 179 App. Div. 645, 167 N. Y. Supp. 62 (1st Dept. 1917).* See excellent treatment of doctrine of anticipatory repudiation in *Whitney, Law of Contracts* (3d ed. 1937) 267.}\)

In general, an anticipatory repudiation of a contract (one which precedes the time fixed for performance) gives the injured party an option to sue for damages for breach of contract immediately, or to disregard the repudiation until the time set for performance. If he chooses the former remedy and brings suit immediately, he is required to show only that he was ready, willing and able to perform the contract on the date of the repudiation, and he is relieved of the necessity of pleading due performance of acts which would otherwise be conditions precedent to his right to sue for breach of contract.
or the mere lapse of time.22

The Rule relates to the performance of conditions precedent and not to conditions subsequent.23 Whether a condition is precedent or subsequent is often a nice question of interpretation.24 If the condition is held to be a condition subsequent, the non-performance thereof is considered a matter for defense to be set forth in the responsive pleading.25


Instead of treating such a repudiation as final, however, the injured party may waive the breach, and wait for the date of performance but where he does so, and brings suit for breach of contract after the date set for performance he is required to allege due performance of conditions precedent. Where a plaintiff has waived the anticipatory repudiation, he may employ the abbreviated form of pleading. If he brings suit immediately he is relieved of pleading due performance and has no occasion to take advantage of the rule.

The New York courts recognize the right to sue before the date set for performance for anticipatory breach in three classes of contracts, viz.: (1) contracts to marry, (2) contracts for personal service and (3) contracts for the manufacture and sale of goods. "This limitation is purely an arbitrary one and without sound reason to support it." WHITNEY, supra, at 273.


WHITNEY, op. cit. supra note 21, at 242–246; POMEROY, CODE REMEDIES (5th ed. 1929) 778, 779.

For this reason, the courts generally strive to construe conditions as subsequent. CLARK, CODE PLEADING (1928) 192. See also WILLISTON, op. cit. supra note 17, at § 667(a); STEPHEN, PLEADING (Williston's ed. 1895) 183n.

Where the promises made by the parties are independent of each other, in that performance of one is not based on performance of the other, they are regarded as collateral conditions. A plaintiff may sue for breach of such a collateral condition without alleging that he offered to perform his own promise because the two conditions were unrelated. Clegg v. N. Y. Newspaper Union, 72 Hun 395, 25 N. Y. Supp. 565 (1893). It may be readily seen from the nature of a condition precedent that the burden of proof in connection with it would rest on the plaintiff, and that logically, he should be required to allege performance in his complaint. A condition subsequent, however, differs in substance from a condition precedent in that the former arises after the duty of immediate performance occurs, and its operation relieves the party of the necessity of performance after the duty to perform has accrued. WHITNEY, op. cit. supra note 21, at § 91. The obligation, therefore, has already resulted and, applying the test of logic, the burden of proof of such conditions would not rest on the plaintiff, who is only required to set forth the original contract as part of his prima facie case. Since the liability in connection with conditions subsequent depends on some fact or event which takes place after the vesting of the rights under the contract, the test of logic would seem to indicate that the burden of proof of such conditions would rest on the defendant. The allegations in the complaint are, of necessity, required to follow the burden of proof and, therefore, the same rule attaches to pleadings, and a plaintiff need not allege due performance of conditions subsequent in order to maintain an action for breach of contract. Consequently, there is no need for an abbreviated form in connection with pleading such conditions. Under a general denial, a defendant may adduce evidence to controvert what the plaintiff is bound to prove in the first instance. O'TOOLE, EVIDENCE (2d ed. 1937) 79. Since the
The abbreviated form of pleading authorized by the Rule may read “that the plaintiff duly performed all the conditions of such contract on his part.”

(c) Cases Construing Rule.

The courts of New York have held that the Rule must be strictly construed; that the stated words of the abbreviated form are indispensable and not subject to substitution; and that compliance with the Rule must be literal, not substantial.26

This has been the current of authority in New York notwithstanding the statutory mandate that “Pleadings must be liberally construed with a view to substantial justice between the parties.”27 Prior to the enactment of this liberal construction statute, the settled law was to construe doubtful pleadings most strongly against the pleader.28 The courts, however, construed this rule of liberal construction strictly, and held that it extended only to matters of form, and not to matters of substance.29

plaintiff is not required to set forth performance of a condition subsequent as part of his prima facie case, the defendant may not prove breach of such a condition under a general denial. Molloy v. Briarcliff Manor, 217 N. Y. 577, 112 N. E. 429 (1916). The rule is otherwise in connection with breach of conditions precedent and they may be proved under a general denial. Adams v. Lawson, 188 N. Y. 460, 81 N. E. 315 (1907).

26 See cases considered in i-iii of this subdivision (c), infra.

27 N. Y. CIV. PRAC. ACT § 275.

The corresponding provision contained in N. Y. Code of Civil Procedure § 519 (1876) was: “The allegations of a pleading must be liberally construed, with a view to substantial justice between the parties.”

The stated provision was held to be inapplicable to denials. Pullen v. Seaboard Trading Co., 165 App. Div. 117, 150 N. Y. Supp. 719, 721 (1st Dept. 1914). The present provision removes the limitation of affirmative allegations. Section 519 of the Code of Civil Procedure, in turn, was derived from § 159 of N. Y. Code of Procedure (the Field Code), which provided: “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.”

28 Clark v. Dillon, 97 N. Y. 370, 373 (1884); Fry v. Bennett, 5 Sandf. 54 (N. Y. 1851); Pomeroy, CODE REMEDIES (5th ed. 1929) 610, 677.

ated form were held to be matters of substance and not matters of form.

In arriving at these conclusions, the courts seem to have been wholly unaffected by another statutory mandate requiring liberal construction. "The rule of the common law that a statute in derogation of the common law is strictly construed does not apply to this act." This provision is contained in the Civil Practice Act and is derived from the Code of Civil Procedure. Patently, it is inapplicable to practice rules. But even when the law of abbreviated pleading took the form of a statutory provision, the courts construed it strictly, uninfluenced by this statutory mandate.

To broaden the rule of liberal construction, a further provision was inserted in the Civil Practice Act: "This Act shall be liberally construed." This omnibus rule of liberal construction has no equivalent in the prior codes of New York. It is unfortunate that, when drafted, it was not made to include the Rules of Civil Practice. Its enactment has had no effect upon the courts' construction of the rule of abbreviated pleading.

The decisions, construing the Rule, have, mainly, revolved around a construction of the terms (i) duly, (ii) performed and (iii) conditions.
Respecting plaintiff's performance of the contract, the complaint alleged that "plaintiff has performed the same fully and entirely complying with all the conditions on his part to be performed." The defendant attacked the sufficiency of the complaint by motion for judgment on the pleadings. The court held the complaint defective, and granted the defendant's motion, with leave to the plaintiff to serve an amended complaint upon payment of costs. The court emphasized the significance of the omission of "duly" from the allegation of performance, and held that the word "duly" is "one of substance and not one of form." 36

Hilton & Dodge Lumber Co. v. Sizer & Co.37 The complaint contained the following allegation: "Ninth. That plaintiff has performed on its part all the terms, covenants and conditions of said agreement on its part to be performed, and at all the times mentioned herein has been ready and willing, and now is ready and willing to perform all the terms, covenants and conditions of said agreement on its part..."

Rule 92, did not appear in its predecessor provision, N. Y. Code of Civil Procedure § 533. No case has come to the writer's attention involving the effect of the omission of this phrase. There is a passing reference in Ketchum v. Alexander, 168 App. Div. 38, 153 N. Y. Supp. 864, 865 (1st Dept. 1915), infra, to the failure to refer specifically to the contract. When the Ketchum case was decided in 1915, the phrase "of such a contract" was not part of the abbreviated pleading provision. 26

A reviewer of the Minneapolis Law Review made the following comment on this decision: "The code provision in New York is practically identical with those found in the other code states. * * * The rule seems to be well settled in New York that the omission of the word 'duly' is a failure to comply with the statute. The basis of the rule seems to be that but for the statute the plaintiff would have to set out all the facts showing performance on his part. Therefore if he wishes to avoid this and take advantage of the statute he must comply strictly with its terms. * * * Most courts do not apply so strict a rule, holding that an allegation is sufficient which substantially in general terms alleges due performance. Easton v. Quackenbush (1917) 86 Ore. 374, 168 Pac. 631; Wilson Case Lumber Co. v. Mountain Timber Co. (1912) 200 Fed. 181. Minnesota has taken a very liberal view on this question that if the allegation conveys the meaning that the plaintiff has done all that the contract requires of him, it answers the purpose of pleading. Andreas v. Holcombe (1876) 22 Minn. 339. "The New York view introduces into code pleading the strict technicality of the common law pleading and thus defeats the very purpose for which code pleading was instituted." (1921) 5 Minn. L. Rev. 147.
to be performed." The defendant demurred to the complaint. The court sustained the demurrer, and granted leave to the plaintiff to serve an amended complaint on payment of costs. The court said: "The ninth paragraph of the complaint does not assist plaintiff, nor help to set forth a good cause of action for the provisions of Section 533 of the Code of Civil Procedure [now C. P. R. 92] have not been complied with in that the word 'duly' has been omitted. Therefore the inferences which might otherwise be drawn in favor of plaintiff cannot be supplied here." 38

Clemens v. American Fire Ins. Co. of Philadelphia. 39

The plaintiff prosecuted an action upon a policy of insurance to recover for the loss of household furniture destroyed by fire. The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The particular points made were (1) that there was no sufficient allegation of the rendering of proofs of loss to the defendant pursuant to the terms of the policy; (2) that there was no allegation that sixty days had elapsed after the proofs of loss were received by the defendant before the action was commenced. The plaintiff had omitted "duly" from the performance of conditions clause, and had omitted to specifically allege the rendering of proofs of loss, and the lapse of sixty days since receipt of proofs of loss by the defendant prior to the commencement of the action. The court sustained the demurrer. The court said: "The word 'duly' was omitted from the complaint, and there was therefore a failure to comply with the section quoted, 40 and plaintiff was entitled to no benefit thereunder. The word 'duly' in this and other like provisions of the Code has been held to be one of substance, and not of form, merely." 41

38 Id. at 664, 122 N. Y. Supp. at 308.
41 The courts similarly construed "duly" in pleading a judgment of a court of special jurisdiction. Rule 95 of the Rules of Civil Practice (formerly N. Y. Code of Civ. Proc. § 532) provides: "In pleading a judgment or other determination of a court or officer of special jurisdiction, it is not necessary to state the facts conferring jurisdiction, but the judgment or determination may be stated to have been duly given or made." In Hunt v. Dutcher, 13 How. Pr. 538 (N. Y. 1857), the plaintiffs prosecuted an action upon a justice's judgment. In the complaint, the plaintiffs did not show that the justice had either jurisdiction of the person or subject-matter, but alleged that "judgment was entered in
said action by said justice in favor of the plaintiffs" for a stated amount. The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The court sustained the demurrer, and held that the allegation that "judgment was entered in said action" is clearly not equivalent to the words that such judgment has been or was 'duly given or made'." To this, the court added: "It may not be necessary, and probably is not, to use in the pleading the precise language of the statute, but words to the same effect and substance must be used. (7 Barb. 84.) To say that a judgment is entered, is merely to allege the single fact of the entry of the judgment, without including an averment that it was properly or lawfully done. All this is embraced in the language of the Code, that the judgment was 'duly given or made.' The word entered, or perfected, may be equivalent to the word made, or given but the word duly is most essential. It can hardly be dispensed with and satisfy the terms of the statute. I can imagine no single word that will supply its place. The allegation that the judgment was entered, would be proved by simple evidence of the actual rendition of a judgment. But the allegation that the judgment was 'duly given, or made,' could only be proved by establishing, on the trial, the facts conferring jurisdiction upon the justice, and showing that the judgment was, in all respects, lawfully and regularly obtained, or rendered.

"The statute gives a short and simple form of pleading a judgment; and it is safest, if not indispensable, that the statute language be adopted and used when the party seeks to avail himself of this provision of the Code, instead of following the common law forms in such cases."

Rochester Ry. v. Robinson, 133 N. Y. 242, 245, 30 N. E. 1008 (1892). This case involves an abbreviated form of pleading performance of conditions for the institution of condemnation proceedings. The case is interesting because the abbreviated form of pleading provided by statute in such proceedings did not include the words "duly", "performed", or "conditions". The petitioner applied for the appointment of commissioners to condemn lands for railroad purposes. The proceeding was dismissed upon the ground that the petition was fatally defective in not setting forth facts showing performance of conditions precedent. Subd. 7 of § 3360 of the Code of Civil Procedure, affecting condemnation, provided that the petition shall contain: "A statement that it is the intention of the plaintiff, in good faith, to complete the work or improvement for which the property is to be condemned, and that all the preliminary steps required by law have been taken to entitle him to institute the proceeding." The petition included this language. The petition was dismissed by the court below solely because of the omission to set forth the facts showing performance of conditions precedent. Held, upon appeal, petition sustained. The court said: "While the plaintiff might, if he should so elect, set forth the several acts done by him which constitute the preliminary steps referred to, yet he may adopt the language of the statute, and in the concise form there prescribed tender an issue to the defendant upon this branch of his case. The latter cannot be prejudiced by such a practice. What the law requires the plaintiff to do before the commencement of the proceeding is as well known to one party as the other. If the defendant has knowledge that any preliminary step required has not been taken, he can, under § 3365, put the allegation in issue by a specific denial or by including it in a general denial of all averments of the petition, or if he has knowledge or information sufficient to form a belief upon the subject, by a denial in that form, and thus compel the plaintiff to make proof of compliance with all the statutory requirements or fail in this proceeding. * * *

"Pleadings are not now to be strictly construed against the pleader, and averments which sufficiently point out the nature of the pleader’s claim, are sufficient, if under them, upon a trial of the issue, he would be entitled to give all the necessary evidence to establish his claim." (Berney v. Drexel, 33 Hun 34-37.) * * * In providing that the plaintiff may allege in this general way the performance of the necessary statutory conditions precedent, the legislature has
Feuerstein v. German Union Fire Ins. Co.\(^42\) The plaintiff prosecuted an action on a fire insurance policy, of the usual standard form, dated December 4, 1908. He claimed that a fire occurred in April, 1909, and that he had suffered loss therefrom. In his complaint, he alleged "that he complied with each and every one of the terms, conditions, and

not introduced a novel rule of pleading; it has simply followed a declared policy upon this general subject, which first appeared in section 162 of the Code of 1848 and was re-enacted as section 533 of the present Code." After stating the effect of the abbreviated rule of pleading, the court said: "The legislature evidently failed to discover any good reason why it would not be equally safe and proper to permit the performance of statutory conditions precedent to be pleaded in the same way. \(^*\)\(^*\)\(^*\) It works no hardship to the defendant, but really affords him greater latitude of pleading, for if but a single step has been omitted, he can safely deny the general allegation and thus compel the plaintiff to make proof of performance of every essential condition.

\(^*\)\(^*\)\(^*\) The law under consideration does not authorize the taking of the property of anyone. It merely prescribes the method of judicial procedure in those cases where by virtue of the provisions of some other law, the exercise of the right of eminent domain has been conferred for public purposes. \(^*\)*\(^*\)*\(^*\) It is to receive the same liberal construction as the other provisions of the Code, which regulate the practice in actions and proceedings in courts of justice, without regard to the magnitude or value of the property rights which may be involved."

Some other cases involving the construction of the word "duly" are the following: Brownell v. Town of Greenwich, 114 N. Y. 518, 22 N. E. 24 (1889) (allegation that the court "duly adjudged and determined" the jurisdictional facts requisite for the issuance of town bonds was construed to mean that the court adjudged that every step required by law had been taken. "Duly" in legal parlance means according to law. It does not relate to form merely, but includes form and substance both"); Gibson v. People, 5 Hun 542, 543 (N. Y. 1875) (indictment alleging that defendant had been "duly discharged" held to mean discharged "in a proper way, or regularly, or according to law"); Burns v. The People, 59 Barb. 531, 543 (N. Y. 1871) (averment contained in indictment that defendant was "duly sworn and did take his corporal oath" embraces all that is required in the statute); Fryatt v. Lindo, 3 Edw. Ch. 239 (N. Y. 1838) (sufficiency of jurat of answer certifying that defendants were "duly sworn"); People v. Walker, 23 Barb. 304, 305 (N. Y. 1856) (averment in complaint respecting removal from office "at a meeting duly convened" implies that meeting was regularly convened, and if necessary to its regularity that it was an adjourned meeting); Webb v. Bidwell, 15 Minn. 479, 483 (1870) (allegation that taxes were "duly levied and assessed" is a sufficient averment of the assessment of taxes and under this form of allegation, if issue is taken thereon, proof of all the acts constituting the assessment of the tax and essential to its validity, is admissible).

Compare cases in which courts have held that there was an implication of legality and regularity: Mechanics' Banking Ass'n v. Spring Valley L. Co., 25 Barb. 419 (N. Y. 1857) (that a note was indorsed implies its lawful indorsement); Graham v. Machado, 6 Duer 514 (N. Y. 1857) (that a defendant accepted implies a due acceptance); Turner v. McCarthy, 4 E. D. Smith 247 (N. Y. 1855) (entry on land implies lawful entry); Prindle v. Caruthers, 15 N. Y. 425 (1857) (an allegation of the execution or making of an instrument for the payment of money only, is equivalent of an allegation of delivery); Coatsworth v. Lehigh Valley Ry., 156 N. Y. 451, 457, 51 N. E. 301, 303 (1898).

agreements of the said policy on his part to be kept and performed." At the trial, the plaintiff failed to prove the occurrence of the fire and loss therefrom. The trial court directed a verdict for the plaintiff, and denied the defendant's motion for a new trial. The Appellate Division reversed, and granted a new trial on the two-fold ground that the plaintiff had failed to effectively allege performance of conditions precedent, and had also failed to offer any proof thereof upon the trial. The court said: "Under this policy, as is usual, there are enumerated several conditions precedent to be performed by an insured in order to entitle him to recover upon the policy, and his performance, being essential to his cause of action, must be pleaded. Under our practice the pleader may either allege in detail the performance of each condition precedent, or may allege generally that the plaintiff has duly performed all of the conditions on his part. (Code Civ. Proc., § 533.) In the present case the plaintiff did neither. He does allege that he complied with each and every one of the terms, conditions and agreements of the said policy on his part to be kept and performed, but this is not equivalent to an allegation that he duly performed. (Clemens v. Amer. Fire Ins. Co., 70 App. Div. 435; Hilton & Dodge Lumber Co. v. Sizer & Co., 137 id. 661.) A motion to dismiss the complaint upon this ground was made at the opening of the trial and denied. It should have been granted. Not only did the plaintiff fail to effectively allege performance of the conditions precedent, but he failed to offer any proof thereof upon the trial." 43

*Utica Trust & Deposit Co. v. Sutton.* 44 Plaintiffs prosecuted an action to enforce the liability of the defendants as subscribers of a syndicate agreement. Referring to plaintiffs' assignors, the complaint alleged "that said Syndicate Managers have in all respects complied with the terms and conditions and performed all the covenants and agreements upon their part to be performed under said Syndicate Agreement." The defendants moved to dismiss the complaint on the ground that it does not state facts sufficient to constitute a cause of action. The court granted the motion, with leave

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43 Id. at 457.
to the plaintiffs to plead over upon payment of costs. The court said: "Allegations of fulfillment of conditions precedent * * * were essentials of this complaint. Such allegations are lacking. The quoted portions of the complaint which are claimed to meet this obligation present conclusions of law. They do not 'state the facts constituting performance' of conditions precedent, and there is no allegation that plaintiffs' assignors have 'duly performed all the conditions of such contract on [their] part.' Rules of Civil Practice, rule 92. Strict compliance with this rule is necessary." 45

Link v. O-So-White, Inc. 46 The plaintiff prosecuted an action upon a guarantee by the defendant of certain unpaid debts of other persons. The complaint contained an allegation that the plaintiff's assignor "fully performed all of the provisions of said agreement on its part." The defendant contended that the allegation is insufficient. The allegation was held defective. This defective plea was, however, not fatal to the complaint because the facts constituting performance were set forth specifically in the complaint. 47

Gansevoort Bank v. Empire State Surety Co. 48 The plaintiff prosecuted an action upon a bond executed by defendant Surety Company guaranteeing payment to the plaintiff of a loan to be made to a third party (Newman), and to be evidenced by a promissory note of said third party. The complaint alleged that the note at maturity was presented for payment, and was dishonored; that the same was duly protested, and that Newman wholly failed to discharge and pay said indebtedness of $5,000 or any part thereof, except $1,500, and by reason thereof there had been a breach of the condition of the bond prior to the commencement of the action; that before the commencement of the action "every condition was fulfilled and all things happened and all times elapsed necessary to entitle the plaintiff to maintain this action." The defendant demurred to the complaint. The court held that the allegation was not a compliance with the

45 Id. at 98, 246 N. Y. Supp. at 59.
47 For further treatment of the effect of general and specific allegations, see part vi of this subdivision (c), infra.
statute (Code of Civ. Proc., § 533). In as much, however, as the complaint set forth specifically the performance of conditions, irrespective of the abbreviated rule of pleading, the demurrer was overruled.49

Rosenthal v. Rubin.50 Plaintiffs alleged a contract by which the defendant employed them as selling agents for a period of eleven months, beginning February 1, 1910, to sell furs in a certain territory upon a stated commission; that by the terms of the agreement, the plaintiffs at their own cost and expense were to employ salesmen, furnish them with trunks, advance their traveling expenses and also advertise the defendant's goods; that defendant agreed to advance to the plaintiffs the sum of $30,000 on account of future commissions, and to pay that sum in three installments of $10,000 each on the first days of March, May and June following the making of the contract, the amount thus advanced to be deducted from the commissions when earned. The plaintiffs further alleged that "the plaintiffs entered upon the performance of their said contract and performed the same fully and entirely until about the 15th day of June, 1910," when the defendant wrongfully discharged them. The defendant demurred on the ground that performance of the conditions precedent was not sufficiently alleged. The court sustained the demurrer, with leave to the plaintiffs to amend on payment of costs.51

Marcus Contracting Co., Inc. v. Weinbros Real Estate

49 "The court said: 'I am of the opinion that the ninth paragraph of the complaint does not allege performance under the section of the Code referred to. This section of the Code provides that in pleading the performance of a condition precedent in a contract, it is not necessary to state the facts constituting performance, but the party may state generally that he, or the person whom he represents, has duly performed all the conditions on his part. When the ninth paragraph of this complaint is carefully considered, I am unable to discover whether there is any allegation in it that the plaintiff has duly performed all the conditions on its part to be performed; at most there is an allegation of general performance; and this I think insufficient.' Id. at 459, 102 N. Y. Supp. at 545.


51 The court said: "The plaintiffs were not discharged until the 15th day of June. The $30,000 became due prior to that time, viz., June 1. In order therefore to become entitled to the $30,000, it seems to me that plaintiffs had to allege either that they had duly performed the conditions of the contract, or else set out specifically that they did employ salesmen, provide them with the necessary equipment for traveling, pay their expenses and advertise the defendant's goods." 148 App. Div. at 48, 132 N. Y. Supp. at 1053.
The plaintiff prosecuted an action for an amount due under a contract for shoring up a building. In its complaint, the plaintiff alleged that it did "actually" perform and carry out all of the terms, covenants and conditions in said agreement contained on its part. The defendant's motion attacking the complaint was sustained, and leave was granted to the plaintiff to amend its complaint upon payment of costs. The court held that the plaintiff's allegation that it did "actually" perform all the terms, covenants and conditions is not equivalent to an allegation that it "duly" performed.\(^53\)

Hedges v. Pioneer Iron Works.\(^54\) In his complaint, the plaintiff alleged that the defendant did not perform its contract with the plaintiff in that it failed to furnish an asphalt plant of a specified daily capacity at a specified time; that the plant furnished fell short of the specified workmanship, material and construction; that the plaintiff had made part payments therefor as required by the contract and had suffered damages by the said breaches of the defendant. The defendant made a motion for judgment on the pleadings. The court held the plaintiff's allegation that he "has fully and completely performed all the contract duties and obligations and conditions on his part to be performed and done" is not a compliance with the abbreviated rule of pleading. The court concluded: "If the plaintiff chose not to state the facts, then he should have pleaded that he had 'duly' performed all of the conditions on his part. (Code Civ. Proc., § 533)."\(^55\)

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\(^{53}\) The relevant part of the opinion is as follows: "The action is for the amount claimed to be due to plaintiff under a contract for shoring up a building. In such an action it is necessary that plaintiff should allege performance on its part. This it might do either by alleging in detail what it had done under the contract or by adopting the more convenient method authorized by § 533 of the Code of Civ. Proc. of alleging that it had 'duly' performed all the conditions of the contract on its part. In the present case the plaintiff has adopted neither method of pleading performance but has alleged that it did 'actually' perform and carry out all of the terms, covenants and conditions in said agreement contained on its part. This is not equivalent to an allegation that it 'duly' performed. (Rosenthal v. Rubin, 148 App. Div. 44.) The complaint, therefore, contains no sufficient allegation of the performance on plaintiff's part and consequently fails to state a cause of action." Id. at 496, 147 N. Y. Supp. at 576.


\(^{55}\) Id. at 209, 151 N. Y. Supp. at 491.

Except when otherwise noted, italics used in this article are mine.
(ii) Performed.

Rosenthal v. Schaefer.\(^5\) In her complaint, the plaintiff alleged "that the plaintiff herein, the landlord and lessor described in said lease, has duly \textit{complied} with all the terms, covenants and conditions upon her part to be performed in accordance with the terms of the said lease." The defendant moved to dismiss the complaint on the ground of legal insufficiency. The court granted the motion,\(^5\) but in a spirit of fulsome liberalism (?), granted the motion \textit{without costs}, with leave to the plaintiff to amend the complaint.

Hottenroth v. Shelley.\(^5\) The defendant moved to dismiss the complaint on the ground of legal insufficiency. The complaint alleged that the plaintiff "\textit{fulfilled} all the terms and conditions of said agreement," and that he "duly \textit{fulfilled} all the terms and conditions of said agreement." These allegations, said the court, "are not equivalent to an allegation that the plaintiff 'duly performed all the conditions' required by Rule 92 of the Rules of Civil Practice." The defendant's motion to dismiss was granted with costs, with leave to the plaintiff to serve an amended complaint.\(^5\)


\(^6\) The court said: "Rule 92 of the Rules of Civil Practice requires that the pleader allege that he 'duly performed all the conditions of such contract on his part.' It has been very strictly construed. I might say, paraphrasing the language of Presiding Justice Kelly in Berger v. Urban Motion Picture Industries, Inc. (205 App. Div. 379, 383), I am not prepared to say that 'complied with', is not \textit{sic, the word "not" does not appear in the language of Kelly, P.J.} synonymous with 'performed'. 'At any rate,' he continues, 'there is the plain language of the statute; it is easy to comply with it, if a plaintiff desires to take advantage of the rule, and I am not in favor of introducing variations and excuses and unsettling the law as laid down in the authorities.'" \textit{Id.} at 230, 250 N. Y. Supp. at 330.


\(^6\) See Ainsworth v. Acheson Harden Co., 172 App. Div. 723, 158 N. Y. Supp. 630 (2d Dept. 1916). In an action on contract, the plaintiff in an amended complaint alleged: "That plaintiff \textit{complied} with all the terms and conditions of the said agreement on his part to be kept and performed thereunder." The amended complaint was held defective. The court said: "It was the duty of the plaintiff either to plead the facts constituting performance on his part or to avail himself of the privilege accorded under § 533 of the Code of Civil Procedure by pleading that he 'duly performed all the conditions on his part'. ** * It would seem to me that this amended complaint does not plead sufficiently the plaintiff's performance." \textit{Id.} at 724, 158 N. Y. Supp. at 631.
(iii) Conditions.

*Berger v. Urban Motion Picture Industries, Inc.*

Plaintiff sued to recover for breach of an employment contract. In his complaint, plaintiff alleged that "plaintiff duly performed all the terms and obligations of said contract on his part." The defendant moved for judgment on the pleadings on the ground (*inter alios*) that Civil Practice Rule 92 requires that plaintiff plead that he duly performed all the conditions of the contract. The court granted the defendant's motion, with leave to the plaintiff to serve a second amended complaint, upon payment of costs. The court said:

"I am not prepared to say that due performance of the 'terms and obligations' of the contract is synonymous with 'conditions'. At any rate there is the plain language of the statute; it is easy to comply with it if a plaintiff desires to take advantage of the rule, and I am not in favor of introducing variations and excuses and unsettling the law as laid down in the authorities."

Similarly, an allegation "that the plaintiffs have duly performed each and every covenant on their part to be performed under said contract," was admitted to be an insufficient allegation of due performance under Section 533 of the Code of Civil Procedure.*

The courts held likewise insufficient an allegation "that in accordance with the agreement as aforesaid, the plaintiff had duly entered upon the employment of the defendant, and fully performed his duties in accordance with the aforesaid agreement." *

(iv) Specific Allegation of Waiver.

Assume that the plaintiff has not performed all the conditions precedent of the contract because the defendant waived performance thereof. Under such circumstances, the
pleading performance of conditions

plaintiff must allege the conditions which were waived together with the facts and circumstances constituting such waiver. Thus, in Williams v. Fire Association of Philadelphia an action was brought on a fire insurance policy containing a provision that no action on the policy shall be sustainable unless commenced within twelve months after the fire. The complaint contained the due performance clause (Code of Civ. Proc., § 533), and the answer set out a general denial, and alleged affirmatively that the action was not commenced within the stipulated time. At the trial, the plaintiff did not attempt to show that the action was commenced within twelve months after the fire, but proved, over the defendant's objection, facts tending to excuse his failure for commencing the action within the prescribed period. The court held this improper, and said: "If plaintiff expected to show a waiver of performance by the insured, he must plead it. * * * He could not allege due performance with the provisions of the policy, and when this is denied change front on the trial, conceding his averment is untrue, and establish facts excusing the performance. If the plaintiff relies upon a waiver, he should apprise the defendant in his complaint of his position."

The holding in Town of Potsdam v. Aetna Casualty Surety Co. was similar. An action was brought by the plaintiff municipality on a surety company bond given by the principal to guarantee the construction of three bridges. The contractors did not complete the work, and the municipality took over the completion of same. This action was brought to recover damage in consequence of the delay. In

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64 The court held the twelve-month provision to be a condition precedent to the maintenance of the action, and that performance thereof must be alleged in the complaint. The court continued: "Unquestionably the plea of the Statute of Limitations and the Statute of Frauds is ordinarily a defense. The parties to a contract, however, may prescribe that the performance of any requirement is a prerequisite to a recovery, and, in that event, due performance must be alleged in the complaint or adequate excuse for failure be averred. The time when an action is to be brought may as well be regulated by the parties as any other condition contained in their agreement." Id. at 574, 104 N. Y. Supp. at 102.
its amended complaint, the plaintiff alleged: "Plaintiff further alleges that it has duly performed all of the conditions of said contracts and said bonds on its part except as to the provisions thereof which were waived by these defendants." The court held that this was not a sufficient allegation as to performance or waiver. "Performance must be alleged without qualification, or if plaintiff has not performed, for the reason that defendant waived performance, then the conditions waived and the facts and circumstances constituting such waiver must be alleged." 68

(v) Specific Allegation of Tender.

Where, as a condition to default by the defendant, the plaintiff must make a tender, the question has arisen whether an allegation of tender must be specifically made or whether such tender will be covered by the general allegation of due performance of conditions. The cases are in apparent conflict. In Murphy v. Hart 67 an action was brought to recover damages resulting from breach of contract. The complaint alleged the making of a contract with Max Hart for the conveyance of land. To induce the plaintiff to execute the contract with Hart, the defendant executed a guarantee of performance of the contract. In her complaint, the plaintiff alleged that at the time and place fixed for performance by the terms of the contract, the plaintiff was ready, able and willing to carry out each and every one of the terms of the said agreement, but that the said Hart was not prepared or willing, and failed and refused to carry out said contract; that the plaintiff "duly performed each and every one of the terms 68 of the agreement on her part required to be per-

66 Id. at 30, 217 N. Y. Supp. at 643.
69 No objection was made to the substitution of "terms" for conditions, and the court makes no reference to the substitution. Was this a slip? Compare Berger v. Urban Motion Picture Ind., Inc., 206 App. Div. 379, 201 N. Y. Supp. 489 (2d Dept. 1923).
formed.” The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The court overruled the demurrer, and held plaintiff’s allegation of performance “a sufficient allegation of a tender by the plaintiff of the deed.”

Eight years later, a similar case came before the same court. In *Ketchum v. Alexander* an action was brought to recover damages for the breach of contracts to repurchase stocks sold by the defendant to the plaintiff. The complaint alleged that the plaintiff duly performed all conditions on his part to be performed. The defendant demurred to the complaint on the ground that there was no allegation therein that at the time the plaintiff demanded a repurchase, he tendered the stock to the defendant or offered to return it to him. The court sustained the demurrer on the ground that the due performance clause did not include tender of the stock. The court said: “One can invoke the aid of this section only in pleading the performance of conditions precedent specified in a contract. Neither tender nor the attitude of the other party rendering a tender unnecessary is such a condition. They are facts outside of the contract, which must be alleged and proved before a recovery of damages can be had for the breach of a contract.” The court makes no reference to *Murphy v. Hart,* and does not attempt to reconcile the cases.

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69 After citing § 533 of the N. Y. Code of Civil Procedure, the court continued: “Here the condition on the part of the plaintiff to entitle her to recover from Max Hart was that she should tender him a deed of the premises. That was the condition precedent of any liability of Max Hart to the plaintiff, and if the obligation of defendant was a guarantee of performance, I do not see that there is any distinction between the performance of a contract necessary to hold a contracting party and that necessary to hold a guarantor.”


72 Respecting the obligation of the plaintiff to make tender, the court said: “The rule is well settled that the vendor of personal property cannot put the vendee in default, and recover for a breach of contract, without tendering a delivery, and alleging that fact in the complaint, and proving it at the trial. ** To hold otherwise would be to permit the seller to recover, not only the purchase price, but to retain the property sold. ** The action is at law, and before a recovery can be had it must appear that a tender was made, or the same rendered unnecessary because of the attitude of the defendant. This fact must be set out in the complaint, so that proof of it can be offered at the trial. There is no such allegation in any of the causes of action attempted to be set out in the complaint, and therefore each is defective.
The federal courts followed *Ketchum v. Alexander.*

(vi) **General and Specific Allegations of Performance.**

In consequence of the abbreviated rule of pleading, a pleader may, at his option, allege performance of conditions precedent by stating the ultimate facts constituting performance or may avail himself of the abbreviated form of pleading. In the first instance, he alleges performance in specific terms; in the second instance, he alleges performance in general terms.

But suppose that the pleader states his allegations in general terms and in specific terms. What is the effect of such repetitious pleading? The problem may take any one of four forms.

(1) Assume that the complaint alleges performance of conditions precedent (a) by setting forth the ultimate facts showing due performance of all the conditions precedent of the contract, and (b) by employing the abbreviated form of pleading in literal compliance with Civil Practice Rule 92. Repetitious allegations do not subject a complaint to attack on the ground that it does not state facts sufficient to constitute a cause of action. At most, the complaint in the hypothetical case is subject to attack on the ground that it contains repetitious matter.

"The learned justice at Special Term, as appears from his memorandum, was of the opinion that a tender could be inferred from the allegation that 'plaintiff has duly performed all conditions on his part to be performed.' This allegation in each instance is set out as a separate paragraph, and does not, in terms, refer to the contract. But assuming that it does refer to it, it does not aid the plaintiff, notwithstanding the provisions of section 533 of the Code of Civil Procedure."


*Moghabghab v. Sherman & Sons Co.*, 161 App. Div. 135, 146 N. Y. Supp. 392 (1st Dept. 1914). Plaintiff prosecuted an action to recover the purchase price of stock. The defendant demurred to the complaint on the ground that the plaintiff while pleading performance generally pursuant to § 533 of the Code of Civil Procedure, failed to rely upon the provisions of that section, and in addition thereto, alleged the details of performance. The court overruled the demurrer, and said: "Not only does the complaint allege in the language of the statute that the plaintiff's deceased 'duly performed all the conditions on his part', but the facts set forth to show performance support said allegation instead of destroying it."
(2) Assume that the complaint alleges performance of conditions precedent (a) by setting forth the ultimate facts showing due performance of all the conditions precedent of the contract, and (b) by employing the abbreviated form of pleading in a defective manner (e.g., "duly" is omitted). Is the complaint subject to a motion to dismiss on the ground that it does not state facts sufficient to constitute a cause of action? Under such conditions, the courts have uniformly sustained the complaint. The abbreviated plea, though defectively employed, is regarded as mere surplusage, since the facts showing plaintiff's performance are expressly set forth.\(^7\)

(3) Assume that under the terms of the contract, as set forth in the complaint, two conditions precedent are to be performed by the plaintiff. The plaintiff, however, sets forth the ultimate facts showing due performance of one of the conditions, but omits to set forth the ultimate facts showing performance of the other condition; he employs, in addition, the abbreviated form of pleading in literal compliance with Civil Practice Rule 92. Under such conditions, the allegation in the abbreviated form has been held to be inconsistent with the insufficient specific allegation of performance of conditions precedent.\(^6\) Thus, where the complaint alleged that by the terms of the contract, the plaintiff agreed to assign "all the right, title and interest in all inventions and letters patent", and that the plaintiff did duly assign the letters patent, but omitted to allege an assignment of the inventions, the complaint was held demurrable notwithstanding a general allegation of due performance of conditions precedent.\(^7\) The facts, respecting performance, specifically

\(^7\) Dalzell v. Fahys Watch-Case Co., 60 Super. Ct. 293, 17 N. Y. Supp. 365 (1892) ("The general allegation of the performance of conditions precedent are not to be deemed to embrace matter as to which the plaintiff has specifically pleaded, even if the payments of consideration and the transfer are conditions precedent, within the meaning of § 533 of the Code of Civil Procedure.").
alleged in the complaint were inconsistent with and destruc-
tive of the general allegation of due performance.78

(4) Assume that the pleader has attempted to allege
performance of conditions precedent by stating performance
(a) specifically and (b) generally, but that both the specific
and the general allegations have been defectively stated.
Under such conditions, the complaint is clearly insufficient.79

II. THE FEDERAL RULE.

Against this background, we proceed to examine the re-
cently adopted Federal Rule governing the pleading of per-
formance of conditions precedent.

(a) Federal Rule 9(c).

Federal Rule 9(c) provides: "Conditions Precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity."80

The Advisory Committee, under whose direction the Fed-
eral Rules of Procedure were prepared, have not indicated in
their explanatory Notes the source of this Rule. The Note thereto81 makes reference to corresponding provisions con-

80 For other cases construing Rule 92, see annotations in 10 GILBERT-BLISS, CIVIL PRACTICE OF NEW YORK (1927) (Supp. 1938).
81 "Note to Subdivision (c). The codes generally have this or a similar provision. See English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r. 14; 2 MINN. STAT. (Mason, 1927) § 9273; N. Y. CIV. PRAC. RULES (1937) Rule 92; 2 N. D. COMP. LAWS ANN. (1913) § 7461; 2 WASH. REV. STAT. ANN. (Remington, 1932) § 288." Advisory Committee Note to Federal Rule 9(c).
82 For text of English Rule, Minnesota, North Dakota and Washington statutes, see note 82, infra.
Maintained in the English Rules, the Minnesota Statute, the New
York Rule of Civil Practice, the North Dakota Statute and
the Washington Statute. It makes no specific reference to
corresponding provisions in the Florida and New Jersey stat-
utes, though these latter statutes correspond more nearly to
Federal Rule 9(c). This and other corresponding provisions,
with comment therein, are set forth in the footnote.\(^8^2\) We

\(^8^2\) *Comparative Legislation.*—The following statutory provisions and prac-
tice rules have been selected for purposes of comparison with Rule 92 of the
New York Rules of Civil Practice:

**United States.** "Conditions Precedent. In pleading the performance or
occurrence of conditions precedent, it is sufficient to aver generally that all
conditions precedent have been performed or have occurred. A denial of per-
formance or occurrence shall be made specifically and with particularity.”
(Supp. 1938).

**Arizona.** "In pleading the performance of a condition precedent in a con-
tract, the facts showing such performance need not be stated, but it may be
alleged generally that the party duly performed all the conditions on his part;
if such allegation be denied the party pleading shall establish on the trial the
Kingham, 16 Ariz. 440, 146 Pac. 922 (1915).

Comment: Provision is similar to N. Y. Civil Practice Rule 92.

**California.** "Conditions precedent, how to be pleaded. In pleading the
performance of conditions precedent in a contract, it is not necessary to state
the facts showing such performance, but it may be stated generally that the
party duly performed all the conditions on his part, and if such allegation be
controverted, the party pleading must establish, on the trial, the facts showing
such performance." Calif. Code Civ. Proc. (1937) §457; California Steam
Navigation Co. v. Wright, 6 Cal. 258 (1883) (allegation that plaintiff had *fully*
performed on his part all conditions of the contract, is sufficiently explicit);
Barnhart Aircraft, Inc. v. Prestor, 212 Cal. 19, 297 Pac. 20 (1931).

Comment: Provision is similar to N. Y. Civil Practice Rule 92, but
California courts have shown greater liberality in construction.

**Colorado.** "In pleading the performance of conditions precedent in a con-
tract, it shall not be necessary to state facts showing such performance, but it
may be stated generally that the party duly performed all the conditions on his
part; and if such allegations be controverted, the party pleading shall establish
on the trial the facts showing such performance.” Colo. Code (1935) §72;
Great American Ins. Co. v. Scott, 89 Colo. 99, 299 Pac. 1051 (1931) (complaint
which failed to allege that plaintiff "duly" performed all of the conditions of
the contract, but substantially complied with section, held not defective).

Comment: Provision is similar to N. Y. Civil Practice Rule 92, but
Colorado courts have shown greater liberality in construction.

**Florida.** "Either party in an action may aver performance of conditions
precedent generally, and the opposite party shall not deny such averment gen-
ernally, but shall specify in his pleading the condition precedent the performance
of which he intends to contest.” Fla. Comp. Gen. Laws (1927) §4299; Liv-
ingston v. Anderson, 30 Fla. 117, 11 So. 270 (1892); Seaboard Airline Ry. v.
Good, 79 Fla. 589, 84 So. 733 (1920).
Comment: Provision is similar to Federal Rule 9(c). It is not limited to contracts only, and requires defendant to be specific in his pleading.

**Idaho.** "Pleading conditions precedent. In pleading the performance of conditions precedent in a contract, it is not necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part, and if such allegation be controverted, the party pleading must establish on the trial the facts showing such performance." **Idaho Code** (Off. ed. 1932) § 5-807; Dewar v. Taylor, 43 Idaho 111, 249 Pac. 773 (1926).

Comment: Provision is similar to N. Y. Civil Practice Rule 92, but Idaho courts follow the liberal construction of the California courts.

**Illinois.** "Condition Precedent. In pleading the performance of a condition precedent in a contract, it shall be sufficient to allege generally that the party performed all the conditions on his part; if the allegation be denied, the facts must be alleged in connection with such denial showing wherein there was a failure to perform." **Ill. Rev. Stat.** (1937) c. 110, §259.13 (3) (Rules of Practice and Procedure).

Comment: Provision differs from N. Y. Civil Practice Rule 92, in that "duly" is omitted from the section, and the defendant in denying the performance clause must allege facts showing failure to perform.

**Indiana.** "Conditions precedent—Proof. In pleading the performance of a condition precedent in a contract, it shall be sufficient to allege generally that the party performed all the conditions on his part. If the allegation be denied, the facts must be alleged in connection with such denial showing non-performance." **Ind. Stat. (Burns, 1933)** § 2-1039; Aetna Ins. Co. v. Kittles, 81 Ind. 96 (1881) ("fulfilled" is equivalent to "performed").

Comment: Provision differs from N. Y. Civil Practice Rule 92, in that "duly" is omitted from the section. Indiana courts have shown greater liberality in construction.

**Iowa.** "In pleading the performance of conditions precedent in a contract, it is not necessary to state the facts constituting such performance, but the party may state, generally, that he duly performed all the conditions on his part." **Iowa Code** (1935) § 11206; Haferty v. Wilmering, 112 U. S. 713, 55 Sup. Ct. 364 (1885) (omission to state specifically facts showing non-performance constitutes admission).

Comment: Provision is similar to N. Y. Civil Practice Rule 92, except that pursuant to Iowa Code § 11208, defendant must specifically state facts showing non-performance.

**Kansas.** "In pleading the performance of conditions precedent in a contract, it shall be sufficient to state that the party duly performed all the conditions on his part; and if such allegations be controverted, the party pleading must establish, on the trial, the facts showing such performance." **Kan. Gen. Stat. (1935)** § 60-743; Brookings v. American Ins. Co., 134 Kan. 616, 7 P. (2d) 111 (1932) (allegation that "the plaintiffs have done and performed all things required of them in regard to said insurance and performed all conditions precedent required of them" held sufficient allegation).

Comment: Provision is similar to N. Y. Civil Practice Rule 92, but Kansas courts have shown greater liberality in construction.

**Michigan.** "In pleading the performance of a condition precedent in a contract, it shall be sufficient to allege generally that the party performed all the conditions on his part; if the allegation be denied, the facts must be alleged in
(b) Analysis of Rule 9(c).

Rule 9(c) contains two distinct provisions.

The first provision is contained in the first sentence. It is permissive in character. It provides that in pleading the

connection with such denial showing wherein there was a failure to perform.” MICH. COURT RULES (1931) Rule 17, § 4.

Comment: Provision differs from N. Y. Civil Practice Rule 92, in that "duly" is omitted therefrom, and the defendant in denying the performance clause, must allege facts showing failure to perform. Provision is identical with text of Illinois rule.

**Minnesota.** "Conditions precedent. In pleading the performance of conditions precedent in a contract, it shall not be necessary to allege the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part; and if such allegation be denied, the party so pleading must prove the facts showing such performance." MINN. STAT. (Mason, 1927) § 9273; Andreas v. Holcombe, 22 Minn. 339 (1876); Biron v. Bd. of Water Commissioners, 41 Minn. 519, 43 N. W. 482 (1889) (provision inapplicable in action to recover damages for wrongful withdrawal of water from a water-bed).

Comment: Provision is similar to N. Y. Civil Practice Rule 92, but Minnesota courts have shown greater liberality in construction. See note 36, supra.

**Missouri.** "Conditions precedent, how pleaded. In pleading the performance of a condition precedent in a contract, it shall not be necessary to state the facts showing such performance, but it may be stated generally, that the party duly performed all the conditions on his part. * * *" Mo. REv. STAT. (1929) § 807.

Comment: Provision is similar to N. Y. Civil Practice Rule 92.

**New Jersey.** "Performance of Conditions Precedent may be Averred Generally: Specific Pleading by Opposite Party. Either party to an action may aver performance of conditions precedent generally; and the opposite party shall not deny such averment generally, but shall specify in his pleading the condition precedent, the performance of which he intends to contest." N. J. PRAC. ACT (Sheen, 1931) § 117; HARRIS, PLEADING AND PRACTICE IN NEW JERSEY (Rev. ed. 1939) §§ 309, 310.

Comment: Provision is similar to Federal Rule 9(c), and is the same as the Florida statute. It is not limited to contracts only, and requires defendant to be specific in his pleading.

**North Dakota.** "Conditions precedent. In pleading the performance of conditions precedent in a contract, it shall not be necessary to state the facts showing such performance; but it may be stated generally that the party duly performed all the conditions on his part; and if such allegations are controverted, the party pleading shall be bound to establish on the trial the facts showing such performance." N. D. COMP. LAWS (1913) § 7461; Sifton v. Sifton, 5 N. D. 187, 65 N. W. 670 (1895) (allegation that "plaintiff has fully performed all the conditions of said instrument on her part", held sufficient allegation); Sundback v. Gilbert, 8 S. D. 359, 66 N. W. 941 (1896) (allegation that "plaintiff has in all things done and performed his part of said contract to be performed by him", held sufficient allegation); De Ford v. Hyde, 10 S. D. 386, 73 N. W. 265 (1897) (allegation "that this plaintiff has performed every condition of said contract on his part", held sufficient allegation).
performance or occurrence of conditions precedent, an aver-
ment "that all conditions precedent have been performed or
have occurred" is sufficient.

Comment: Provision is similar to N. Y. Civil Practice Rule 92, but North Dakota courts (South Dakota in accord) have shown greater liberality in construction.

Ohio. "In pleading the performance of conditions precedent in a contract, it shall be sufficient to state that the party duly performed all the conditions on his part. If such allegation be controverted, the party pleading must establish, on the trial, the facts showing such performance." Ohio Gen. Code (Page, 1938) § 11339; Crawford v. Satterfield, 27 Ohio St. 421 (1875) (section covers expressed, implied, and constructive conditions including previous demand or request, previous notice and readiness to perform).

Comment: Provision is similar to N. Y. Civil Practice Rule 92.

Oregon. "Performance of conditions precedent. In pleading the performance of conditions precedent in a contract it shall not be necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part; and if such allegation be controverted, the party pleading shall be bound to establish on the trial the facts showing such performance." Ore. Code (1930) §1-805; Griffin v. Pitman, 8 Ore. 342 (1880) (allegation "that the work was performed according to contract" is equivalent to stating that the plaintiff duly performed all the conditions on his part).

Comment: Provision is similar to N. Y. Civil Practice Rule 92.

Utah. "Conditions Precedent in a Contract, How Pleaded—Burden of Proof. In pleading the performance of conditions precedent in a contract it is not necessary to state the facts showing such performance, but it may be stated generally that he duly performed all the conditions on his part; and, if such allegation is controverted, the party pleading must establish on the trial the facts showing such performance." Utah Rev. Stat. (1933) § 104-13-6.

Comment: Provision is similar to N. Y. Civil Practice Rule 92.

Washington. "Conditions precedent, how pleaded. In pleading the performance of conditions precedent in a contract, it shall not be necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part; and if such allegation is controverted, the party pleading shall be bound to establish, on the trial, the facts showing such performance." Wash. Stat. (Remington Rev. Stat. 1932) § 288; Port Blakely Mill Co. v. Hartford Fire Ins. Co., 50 Wash. 657, 97 Pac. 781 (1908) (refers only to conditions precedent and not conditions subsequent); Walesby v. National Polish Independent Catholic Church, 135 Wash. 211, 237 Pac. 291 (1925) (general allegation of performance of a contract is sufficient without specially pleading performance of a condition precedent of a tender of arbitration of disputes).

Comment: Provision is similar to N. Y. Civil Practice Rule 92.

Wisconsin. "Conditions precedent in contract, how pleaded. In pleading the performance of conditions precedent in a contract it shall not be necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part; and if such allegation be controverted the party pleading shall be bound to establish on the trial the facts showing such performance." Wis. Stat. (1937) § 263.34; Reff v. Paige, 55 Wis. 496, 502, 13 N. W. 473 (1882) (allegation that "the plaintiff has fully
The second provision is contained in the second sentence. It is mandatory in character. It provides that "a denial of performance or occurrence shall be made specifically and with particularity." It is a restriction upon the adversary pleader.

1. Permissive provision.—In stating that the use of the abbreviated form of pleading is sufficient, the rule should not be construed as denying to a pleader the right to set forth in extenso the performance of conditions precedent.

(a) Rule not limited to contracts. Rule 9(c) marks a departure from the corresponding rule effective in the majority of the states, including New York, in that it is not restricted to contract actions. The usual restriction to contract causes has been deliberately omitted. In this respect, the Federal Rule corresponds to the Florida and New Jersey provisions, and is in accord with the liberal spirit of the English Rule. This departure from the usual provision makes performed all of the conditions of said contract upon his part to be performed" held authorized by statute and sufficiently pleaded).

Comment: Provision is similar to N. Y. Civil Practice Rule 92, but Wisconsin courts have shown greater liberality in construction.

Wyoming. "Conditions precedent, how pleaded. In pleading the performance of conditions precedent in a contract, it shall be sufficient to state that the party duly performed all the conditions on his part; and if such allegation be controverted, the party pleading must establish, on the trial, the facts showing such performance." Wyo. Civ. Code of Proc. (1931) § 89-1037.

Comment: Provision is similar to N. Y. Civil Practice Rule 92.

England. "Any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or defendant (as the case may be); and subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case of the plaintiff or defendant shall be implied in his pleading." English Rules Under the Judicature Act (The Annual Practice, 1938) O. 19, r. 14; Gates v. W. A. & R. J. Jacobs (1920) 1 Ch. 567 (a general averment of the due performance of all conditions precedent is implied in every pleading and therefore it need not be alleged); Jefferson v. Paskell (1916) 1 K. B. 74 (in action for breach of contract, an allegation that plaintiff was ready and willing to perform the contract, may be implied).


See, for example, provisions of Arizona, California, Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, New York, North Dakota, Ohio, Oregon, Utah, Washington, Wisconsin and Wyoming. For text of applicable provisions, see note 82, supra.

3 Ohlinger, Federal Practice (1939) 142.

For text of applicable provisions, see note 82, supra.
the abbreviated rule of pleading of much wider use and application.

(b) "Occurrence of conditions precedent." The corresponding state provisions govern the performance of conditions precedent. Federal Rule 9(c) relates to the performance of conditions precedent as well as to their occurrence. None of the state provisions examined includes the term occurrence. The English Rule affects the performance of conditions precedent and their occurrence. In this respect, Federal Rule 9(c) is based on the English Rule. This departure from state provisions makes the abbreviated rule of pleading of much wider use and application. It should be available, for example, in instances where a condition precedent to the prosecution of an action is the lapse of a stated period of time. It should also be available in tort actions and in actions of a statutory type.

(c) Omission of "duly". Rule 9(c) marks a departure from the corresponding rule effective in many of the states, including New York, in that the word duly is omitted. Such omission is deliberate. In this respect, the Federal Rule corresponds to the Florida, Illinois, Indiana, Michigan and New Jersey provisions, and is in accord with the liberal spirit of the English Rule. This omission of the word "duly" removes many of the technical objections that have arisen in connection with the general use of the abbreviated form of pleading.

(d) Limitation to conditions "precedent". Rule 9(c) provides that in pleading the performance or occurrence of conditions precedent it is sufficient to aver that all conditions precedent have been performed or have occurred. In

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86 Under this provision of Federal Rule 9(c), a complaint which failed to allege facts showing the expiration of sixty days after receipt by the defendant of the final statement of claim, and which was held insufficient on the ground that the requirement was a condition precedent, but not covered by N. Y. Civil Practice Rule 92, (Shawmut Coal & C. Co. v. American Credit Indem. Co., 232 App. Div. 29, 248 N. Y. Supp. 378 (4th Dept. 1931)), would be sufficient.

87 See, for example, provisions of Arizona, California, Colorado, Idaho, Iowa, Kansas, Minnesota, Missouri, North Dakota, New York, Ohio, Oregon, Utah, Washington, Wisconsin, Wyoming. For text of applicable provisions, see note 82, supra.

88 For text of applicable provisions, see note 82, supra.
the majority of the states, including New York, the rule of abbreviated pleading is applicable to conditions precedent, but the allegation in the pleading of performance of conditions does not expressly qualify the conditions. Thus, the abbreviated pleading in New York is to the effect that the plaintiff duly performed all the conditions of the contract on his part, and not that the plaintiff duly performed all the conditions precedent of the contract on his part. In this respect, the Federal Rule corresponds to the Florida and New Jersey provisions, and is in accord with the liberal spirit of the English Rule. This departure from the usual provision removes an ambiguity otherwise inherent in the form of the allegation.

2. **Mandatory provision.**—The second sentence of Federal Rule 9(c) provides: “A denial of performance or occurrence shall be made specifically and with particularity.”

This provision does not permit the interposition in a responsive pleading of a general denial of an allegation of performance or occurrence of conditions precedent. Such general denial, if interposed, will not put in issue the allegation of performance or occurrence. In this respect, Federal Rule 9(c) marks a departure from the corresponding rule effective in the majority of the states, including New York. It corresponds to the Florida, Illinois, Iowa, Michigan and New Jersey provisions. It is in accord with the liberal provisions of the English Rule. The latter is more radical in that an averment of performance or occurrence of all neces-

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8 See, for example, provisions of Arizona, California, Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, North Dakota, Ohio, Oregon, Utah, Washington, Wisconsin, Wyoming. For text of applicable provisions, see note 82, supra.

9 One Moore, Federal Practice (1938) 590.

10 See, for example, provisions of Arizona, California, Colorado, Idaho, Illinois, Kansas, Minnesota, North Dakota, Ohio, Oregon, Utah, Washington, Wisconsin, Wyoming. For text of applicable provisions, see note 82, supra.

N. Y. Code of Civil Procedure § 533 provided: “In pleading the performance of a condition precedent in a contract, it is not necessary to state the facts constituting performance; but the party may state, generally, that he, or the person whom he represents, duly performed all the conditions on his part. If that allegation is controverted, he must, on the trial, establish performance.”

N. Y. Civil Practice Rule 92, which in 1921 superseded § 533, omits the second sentence of § 533 to the effect that where the performance allegation is controverted the pleader must on the trial establish performance. This omission from the rule has, however, effected no change in practice.
necessary conditions precedent is implied in every pleading, and
the duty is imposed upon the adversary pleader to distinctly
specify in his pleading any conditions precedent, the perfor-
mance or occurrence of which he intends to contest.\footnote{92}

The Federal Rule in this respect is a substantial improve-
ment over the rule effective in the majority of the states. By
a general denial, a party is not made aware of the particular
condition or occurrence which is to be contested at the trial.\footnote{93}

(c) \textit{Summary of Advantages of Federal Rule 9(c).}

Contrary to the majority rule, the Federal Rule is not
restricted in its use to contract actions. It is unique in this
country in that it relates not only to the \textit{performance} of con-
ditions precedent but to their \textit{occurrence} as well. The omis-
sion of the word “duly” makes unnecessary the use of a word
which has become a legal shibboleth. It removes the ambigu-
ity in respect to the application of the Rule to conditions
precedent. In so far as it requires the adversary pleader to

\footnote{92} It is for the defendant if he contends that there was a condition precedent
and that it has not been duly performed, to state specifically what that condition
was, and to plead its non-performance; otherwise due performance will be
presumed. It is not sufficient for him to allege generally that an “express
condition” had been agreed to; he must state its terms and between whom it
was made, and whether verbally or in writing. When a condition precedent is
properly pleaded, the burden of proving its due performance or the waiver of
its due performance still rests on the plaintiff. \textit{The Annual Practice (1938)}
O. 19, r. 14.

\footnote{93} An allegation of performance or occurrence of conditions precedent pur-
suant to Federal Rule 9(c) may read as follows: “All conditions precedent
have been performed by the plaintiff or have occurred.”

A denial may take the following form: “The defendant denies (1) that
the plaintiff rendered proofs of loss to the defendant pursuant to the terms of
the policy and (2) that sixty days had elapsed after the proofs of loss were
received by the defendant before the commencement of this action.”

Moore states that the following form may be used under Rule 9(c) to
allege performance of conditions precedent: “Plaintiff has performed all of the
conditions of said contract to be performed by him.” \textit{1 Moore, Federal Prac-
tice (1938) 592}. It is to be noted that the word “precedent” specified in
Federal Rule 9(c) is here omitted. It is believed by this writer that the form
suggested by Moore would be sustained by the federal courts under the rules
requiring a liberal construction. It is to be noted, however, that the allegation
is not in literal compliance with Federal Rule 9(c). The form as suggested is
subject to further criticism on the ground that it does not avail itself of the
right to allege that the conditions precedent “have occurred”. Consider the
significance of such omission in Shawmut Coal \& C. Co. v. American Credit
\textit{supra}.
deny performance or occurrence specifically and with particularity, it places the burden of pleading where it more properly belongs.

The federal courts in implementing Federal Rule 9(c) are aided by a number of provisions contained in the Federal Rules requiring liberal construction.94

III. COMMENT AND CONCLUSIONS.

Procedure is a means to an end. At times, it is made to appear as an end in itself. Procedure is form and not substance. Law is both science and art. Jurisprudence is the science of the law; procedure is the art of the law. Sir Henry Maine, the distinguished English jurist, said over fifty years ago: "A disposition to overrate technicalities, or to value them for their own sake, is the characteristic mark of the journeyman as distinguished from the artist." 95 "Technical rules," he added, "will sometimes lead to perverse results." A lawyer must needs resort to technical rules. But he must not permit these technical rules to "lead to perverse results." 96

Pleadings were devised to draw the lines of battle between litigants. They should not be viewed microscopically to determine their stylistic perfection. It is too late to argue the case in behalf of formal dialectical perfection in plead-

94 Federal Rule 1 provides that the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action."

Federal Rule 8(e) provides: "No technical forms of pleading or motions are required."

Federal Rule 8(f) provides: "All pleadings shall be so construed as to do substantial justice."

Federal Rule 61 provides: "The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

In respect to Federal Rule 8(f), supra, Moore makes the following comment: "This mandate is the heart of the rules on pleadings. In carrying out this mandate recent language of the Supreme Court is most important. 'Pleadings are intended to serve as a means of arriving at fair and just settlements of controversies between litigants. They should not raise barriers which prevent the achievement of that end.' Matsy v. Grasselli Chemical Co., 303 U. S. 197, 58 Sup. Ct. 507, 509." 1 Moore, FEDERAL PRACTICE (1938) 579.

95 Sir Henry Sumner Maine, in an address delivered at the University of Calcutta, an excerpt of which appeared in N. Y. L. J., Feb. 6, 1939, p. 584.

96 Sir Henry Sumner Maine in the address referred to in note 95, supra.
ing. The case was lost long ago when the legislature commanded that pleadings “must be liberally construed with a view to substantial justice between the parties.”

Unfortunately, the rule of liberal construction was not implemented by the courts to apply to the rule of abbreviated pleading of performance of conditions. Abbreviated pleadings were devised by the legislature to aid the pleader. The courts have hallowed this effort, and have treated the language of the provision as if it were holy script and of divine inspiration. Thus, allegations that the plaintiff fully and entirely performed; that the plaintiff fully performed, and fully and entirely performed; that the plaintiff did actually perform; that the plaintiff fully and completely performed, have been held not equivalent to an allegation that the plaintiff duly performed. Allegations that the plaintiff duly complied; that the plaintiff duly fulfilled, have been held not equivalent to an allegation that the plaintiff duly performed. Allegations that the plaintiff duly performed all the terms and obligations; that the plaintiff fully performed his duties, have been held not equivalent to an allegation that the plaintiff duly performed all the conditions of the contract. Such variations and excuses, said the courts, would unsettle the law.

But such insistence upon literal compliance with a rule of pleading is mere formalism. It has no place in a modern system of procedure. In other jurisdictions, the courts have been more liberal in construing the rule.

Court calendars should not be encumbered with motions to dismiss a complaint because a plaintiff spoke of a full and entire performance instead of a due performance, etc. The time of attorneys and courts deserves to be put to better use.

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99 For cases so holding, see part I of this article, subd. (c), supra.
101 In a recent classroom discussion of the case law on this subject, a number of the writer’s students criticized the holdings as “quibbling” and “nominalism”. “Ritualism” and “ritualistic lore” may be added to these characterizations.
102 See note 82, supra.
103 To quote Sir Henry Maine again, “The grand criterion of legal soundness
As construed by the courts of New York, the rule of abbreviated pleading of performance of conditions has become so encrusted with outworn technicalities that amelioration must take the form of legal surgery. We must make a fresh start. Rule 92 of the New York Rules of Civil Practice should be repealed and replaced by Federal Rule 9(c).104 We should simultaneously amend our statutory provisions of liberal construction so as to comprehend the Rules of Civil Practice.

IV. RECOMMENDATIONS.

(1) Rule 92 of the New York Rules of Civil Practice should be repealed. In its place, a new Rule 92 should be enacted to correspond to Federal Rule 9(c), and to read as follows:

Rule 92. Conditions precedent.105 In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

(2) Section 2 of the New York Civil Practice Act should be amended to read as follows:

Section 2. Act to be liberally construed. This act and the rules made pursuant thereto shall be liberally construed.

(3) Section 3 of the New York Civil Practice Act should be amended to read as follows:

Section 3. Rule of strict construction not applicable. The rule of the common law that a statute in derogation of the common law is strictly construed does not apply to this act or to the rules made pursuant thereto.

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is common sense, and if you are inclined to employ an argument * * * which is out of harmony with experience and with the practical facts of life, I do not say reject it absolutely but strongly suspect it, and be sure that the presumption is heavily against it.” See note 95, supra.

104 Though the English Rule may have much to commend it, uniformity in procedure is an overbalancing consideration.

105 Italics in this and the two following numbered paragraphs indicate new matter.