Civil Procedure: Final Examination (May 1973)

William & Mary Law School
I. Place a T or an F before each of the following statements to indicate whether the statement is true or false.

_____ 1. Pleadings in law actions consist of written statements by or on behalf of the litigants setting forth their respective grounds of action and defense.

_____ 2. The FRCP provide for the following pleadings: complaint, answer, counterclaim, reply to counterclaim, cross-claim, answer to cross-claim, third-party complaint, and answer to third-party complaint, and expressly prohibit all other pleadings.

_____ 3. Modern reforms of common law pleading made discovery, pre-trial conferences, and summary judgment procedures significant and effective.

_____ 4. Common law courts afforded no procedure for discovery but courts of chancery did provide machinery for interrogating an adversary, obtaining disclosure of documents in possession, and for taking depositions.

_____ 5. In Scott v. Shepherd the plaintiff in effect alleged that the defendant threw a squib at the plaintiff and hit and injured the plaintiff, but the evidence introduced proved that the defendant threw the squib at a third party who then caused the squib to be thrown so that eventually it exploded near the plaintiff, and thus the plaintiff was guilty of a variance.

_____ 6. The original system of code pleading in New York replaced issue pleading with fact pleading; therefore a plaintiff in a simple tort action would allege that the defendant was negligent instead of alleging duty owed, violation of duty, and injury as a proximate result.

_____ 7. Allegations in a pleading to which a responsive pleading is required (other than unliquidated damages) are admitted when not denied in the responsive pleading.

_____ 8. Demurrers, pleas, and exceptions for insufficiency of a pleading are not used under the FRCP.

_____ 9. It is possible for either a plaintiff or a defendant to violate the rule against negative pregnants in pleadings, but such mistakes were more commonly made by defendants than plaintiffs.

_____ 10. The FRCP expressly prohibit a pleading from being internally repugnant and require that the pleading must contain the "grounds" for relief.

_____ 11. When an attorney signs a pleading pursuant to Rule 11 of the FRCP, the attorney impliedly certifies that he has read the pleading, that to the best of his knowledge, information, and belief there is a good ground to support it, and that it is not interposed for delay.

_____ 12. The FRCP require that items of special damages must be specifically alleged.

_____ 13. At common law the procedure to object to the form of an opponent's pleading was a motion to strike the pleading.

_____ 14. If a defendant files an answer under the FRCP and proceeds to defend the case on its merits, the defendant waives defenses of lack of jurisdiction over person, improper venue, insufficiency of process and insufficiency of service of process, unless the defendant specifically asserts such defenses.
15. A defendant, however, under the FRCP can always assert defenses of failure to state a claim upon which relief can be granted, failure to join an indispensable party, or lack of jurisdiction over the subject matter, even though the defendant has not pleaded such matters, by a motion to dismiss.

16. A court can refuse to accept as true an allegation by one party and admitted as true by the adverse party if the substance of the allegation is contrary to the ordinary facts of life about which there is no dispute.

17. At common law a general demurrer was broader and more comprehensive than a special demurrer.

18. Under code pleading a defendant was generally required to plead the statute of limitations affirmatively where it was a part of the remedy, but could show violation of the statute of limitations where it was a part of the right, by a denial, but the FRCP do not expressly provide for such a distinction.

19. Under the common law forms of action it was necessary for a lawyer to learn the scope of the general issue under each form in order to determine whether to file a plea of confession and avoidance or a denial.

20. In classical procedure, equity courts encouraged anticipatory pleading and law courts discouraged anticipatory pleading.

21. Since the FRCP expressly provide that contributory negligence must be pleaded affirmatively, plaintiffs in states where the substantive law requires the plaintiff to prove his freedom from contributory negligence, are relieved of the burden of persuasion on the issue of contributory negligence.

22. In order for a defendant to use recoupment as a defense under the FRCP, the defendant must allege and prove independent grounds of jurisdiction from the plaintiff's complaint.

23. At common law if the plaintiff abandoned his original cause of action at the replication stage and alleged a different cause of action, the plaintiff was guilty of a departure; but this is not true under the FRCP.

24. Under the FRCP a defendant must always assert as a counterclaim any claim which he has against the plaintiff if it arose out of the transaction or occurrence that is the subject matter of the plaintiff's claim.

25. Amendments to pleadings under the FRCP always relate back to the date of the filing of the original pleading.

26. As a general rule courts are more liberal in permitting defendants to amend pleadings than they are plaintiffs.

27. Discovery is ordinarily obtained without affirmative court order, but if a party opposes discovery, the one so opposing takes the initiative to obtain a court order to prevent discovery.

28. Discovery cannot be obtained of information which under the rules of evidence will be inadmissible at the trial of the case.

29. The discovery deposition of a witness is admissible in evidence at the trial if the witness is not present in person to testify.

30. A party who is ordered to submit to a physical examination under Rule 35 FRCP, and refuses to do so, may be punished for contempt of court.
31. Since oral discovery examinations provide spontaneous answers and written questions allow more time for the deponent to think and phrase his answer in a favorable way to his interest, written interrogatories are seldom used.

32. Summary judgment procedure is a method for promptly disposing of actions in which there is no genuine issue as to any material fact.

33. The standard to determine whether an order entered as a conclusion to a pretrial conference can be set aside or amended is whether the order is clearly wrong as a matter of law.

34. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States is preserved under the FRCP to the parties inviolate.

35. It is clear that a party having the burden of persuasion in an ordinary civil action does not satisfy the burden by merely introducing more evidence, or evidence of greater convincing force than that introduced by his adversary.

36. At common law the trial judge at nisi prius would not rule on a demurrer to the evidence, but referred the matter to the full bench at Westminster.

37. As a general rule where a plaintiff voluntarily submits to a nonsuit, or the action is dismissed without prejudice, the plaintiff is not barred from maintaining an action on the original cause of action by Res Judicata.

38. A court should direct a verdict for the defendant where it would be required to set aside a contrary verdict for legal insufficiency of evidence.

39. Even though contributory negligence is an affirmative defense in most jurisdictions and must be pleaded by the defendant, a court can direct a verdict against a plaintiff even though the defendant did not plead contributory negligence, if the plaintiff's evidence proved contributory negligence.

40. Under the Slocum case which is now codified in FRCP 50 (b) when a motion for a directed verdict was made at the conclusion of all the evidence, the trial court was conclusively presumed to have reserved the right to rule on the motion irrespective of the jury verdict.

41. If a verdict loser made a motion for a directed verdict at the close of all the evidence, it is proper for him to make a motion for judgment n.o.v. or a new trial in the alternative, and the trial court is required to rule on both motions.

42. The FRCP expressly provide that a federal court is authorized to comment on the evidence, but it cannot do so in a prejudicial way, provided that the court makes it clear that the jury is not bound by the comments of the court.

43. The rule that a juror cannot impeach his own verdict is not violated by the dissent of a juror on the polling of the jury even though the dissenting juror has changed his mind on the basis of the mental processes used to reach the original decision.

44. Under the FRCP the court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact.
45. No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial unless it appears to the court inconsistent with substantial justice.

46. Where a verdict in a federal court is excessive or inadequate, the court can put the plaintiff on terms to remit that portion which shocks the conscience of the court, or the defendant to pay an additional sum which would provide justice, and thus avoid a new trial.

47. The FRCP provide that findings of fact by a trial court shall be given the same weight by an appellate court that a jury verdict is given.

48. Misjoinder and non-joinder of necessary parties constituted defects of substance under code pleading, but do not constitute a defect under the FRCP.

49. Even though a declaratory judgment contains no coercive or consequential relief, it can be enforced against any party to the proceeding without the necessity of the institution of a new case.

50. Where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action.

II.
A. (1) What procedure does one use to obtain the right to trial by jury?
5. (2) Since law and equity are combined under the FRCP and there is but one form of action known as a civil action, how does a court determine whether a party is entitled to the right to trial by jury?

B. Place the number of the item in the first column before the item in the second column which is most closely related to it.

<table>
<thead>
<tr>
<th>Item</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Res Judicata</td>
</tr>
<tr>
<td>2.</td>
<td>Jeofails</td>
</tr>
<tr>
<td>3.</td>
<td>Writ of Inquiry</td>
</tr>
<tr>
<td>4.</td>
<td>Multifarious</td>
</tr>
<tr>
<td>5.</td>
<td>General Verdict</td>
</tr>
<tr>
<td>6.</td>
<td>Fieri Facias</td>
</tr>
<tr>
<td>7.</td>
<td>Judgment for Costs</td>
</tr>
<tr>
<td>8.</td>
<td>Interpleader</td>
</tr>
<tr>
<td>9.</td>
<td>Directed Verdict</td>
</tr>
<tr>
<td>10.</td>
<td>Failure to Plead or Defend</td>
</tr>
</tbody>
</table>
C. List seven threshold defenses which may at the option of the pleader be made by motion rather than the responsive pleading.

D. Explain each of the following:

1. Voluntary nonsuit

2. Voluntary dismissal

3. Involuntary dismissal

4. Recoupment

5. Set-off

E. Please write a short review of the required casebook for this course, including your recommendations for addition or deletions of materials, and revision of the order of presentation of materials.