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FUNCTIONS OF A DEMURRER UNDER THE REVISED CODE

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The Revised Code undertakes to establish the demurrer as the uniform method of objecting to the insufficiency of pleadings. Although the intention was to accomplish a maximum of uniformity and simplicity, not only as to selection of the remedy, but also, presumably, as to its operative effect, there already may be detected some divergence of opinion among members of the bar as to the specific application of the new provisions. As an illustration of conclusions that may be too hastily drawn, perhaps due to a superficial consideration of the apparent general motives by which the Revisers were actuated, may be mentioned the impression which seems to prevail among some to the effect that no objection of any sort can be interposed to a pleading except through the medium of a demurrer. A brief analysis of the statutes and a comparison of the present provisions with the common law and equity practice and prior statutory regulations which have been superseded may help to clarify the situation. It is perhaps superfluous to state that space will not permit any attempt to cover more than a few of the more prominent features of the subject.

Demurrers are divided into two classes, general and special. A special demurrer assigns grounds of demurrer. A general demurrer assigns no grounds and the grounds are not known until disclosed in the argument. Under the original common law, with a single exception,[1] the distinction between the two classes was wholly one of form and did not involve any differenti-

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1 Duplicity. Anonymous, 3 Salk. 122 (1704).

ation as to the subject matter upon which the demurrer operated. All defects, substantial and formal, with the sole exception of duplicity, were equally open to either kind of demurrer. It is said that, in the days of oral pleading at the bar of the court, no inconvenience arose from omission to assign grounds in a demurrer, because exceptions were taken to the pleadings as delivered; but that, when the pleadings were required to be written, a demurrer might be filed in advance of the argument, and it became expedient, in order to prepare for the argument, to have the grounds disclosed in the demurrer.[2] As a result, in the reign of Elizabeth, a statute[3] was enacted which, by the use of general terms, was intended to prohibit a general demurrer as to formal defects — the less meritorious grounds of objection. But the lawyers and the courts, displaying an attitude toward innovation and an aptitude for circumvention such as so frequently have defeated efforts at reform, immediately proceeded to nullify the intended effect of the statute. As a consequence, in the course of a few decades, a number of defects purely formal in nature had been adjudicated substantial defects. To meet this turn of events, in the reign of Anne, as a supplement to the former statute, a second statute[4] was enacted, which specifically enumerated a series of defects and declared them to be formal, and hence subject only to a special demurrer. The result of the two statutes, of course, was not to preclude objections to formal defects, but merely to prescribe a special demurrer as the only mechanism by which objections could be interposed.

Statutes more or less similar in effect to the English statutes have been adopted in many of the American states, some of them later to be superseded by practice code provisions. In West Virginia, however, the zeal for reform was not to be satisfied with a mere regulation of the methods of objecting. Instead of undertaking to differentiate between the respective functions of general and special demurrers, the statutes[5] have undertaken, with the exception of defects in pleas in abatement[6] and certain formal defects subjected to a special statutory method of objecting herein-

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[2] *Idem.*

[3] 27 ELIZ., c. 5, § 1.

[4] 4 ANNE, c. 16, § 1.

[5] Carlin, *The Common Law Declaration in West Virginia* (1928) 35 W. VA. L. Q. 1; Carlin, *Common Law Pleas and Subsequent Pleadings in West Virginia* (1931) 38 W. VA. L. Q. 14.

[6] W. VA. REV. CODE (1931) c. 56, art. 4, § 37. This Code will be cited hereinafter as REV. CODE.

after mentioned, to abolish all objections to formal defects. Furthermore, possibly on the assumption that special demurrers were no longer necessary, the former Code prescribed a form of demurrer[7] which has been construed as general in effect.[8] As a result,[9] it has commonly been said that special demurrers have been abolished in West Virginia, although there has never been any provision in the Code expressly so stating. The meaning of the statement, of course, so far as it is based on the abolishment of objections to formal defects, is that special demurrers have been abolished because all of the objections which formerly required their use have been abolished, ignoring the fact that under the original common law and the later English statutes a party had the right, at his election, to demur specially — assign grounds of demurrer — as to substantial defects, if he cared to do so.[10]

Although the conclusion that special demurrers have been abolished in West Virginia may be understood as expressing only a half truth, its acceptance as a whole truth has led to an entirely new concept as to the basis of differentiation between general and special demurrers. As already indicated, the original basis of distinction was purely one of form, involving no inquiry as to the nature of the defects upon which the demurrer operated. But in West Virginia, prior to the Revised Code, the nature of a demurrer has been defined with reference to the subject matter — the defects — upon which it operates, and not with reference to its form. There was nothing that prevented a demurrant from stating grounds in his demurrer, and the fact that they were so stated of course did not preclude the court from considering them. Nevertheless, in spite of its form, such a demurrer was only a general demurrer unnecessarily assigning grounds.[11]

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[7] W. VA. CODE ANN. (Barnes, 1923) c. 125, § 28. This Code will be cited hereinafter as CODE 1923.

[8] See Cook v. Dorsey, 38 W. Va. 196, 18 S. E. 468 (1893).

[9] In some instances, the prescribed form of demurrer is referred to as accomplishing the result. See Cook v. Dorsey, *supra* n. 8. In other instances, the abolishment of objections to formal defects is suggested as the instrumentality. See Coyle v. Baltimore & Ohio R. R. Co., 11 W. Va. 94 (1877).

[10] The statement, frequently made, that special demurrers have been abolished *except as to pleas in abatement* involves an inaccuracy resulting from the haziness of definition noted. What is really meant is that pleas in abatement are still subject to demurrer because of formal defects. A general demurrer reaches formal defects in pleas in abatement. Mantz v. Hendley, 2 Henning & Munford 308 (Va. 1808).

[11] Miller v. McLuer, Gilmer, 338 (Va. 1820); Oliver Refining Co. v. Portsmouth Cotton Oil Refining Corp., 109 Va. 513, 64 S. E. 56 (1909); BURKS, PLEADING AND PRACTICE (1913) 341. Such would necessarily be the result if special demurrers have been abolished.

The term "general demurrer" is frequently used to describe a demurrer

Under the Revised Code,[12] all demurrers in civil cases must be in writing and must assign grounds.

> "All demurrers in civil cases shall be in writing and shall state specifically the grounds of demurrer relied on, and no grounds shall be considered other than those stated, except by the court of its own accord, but the demurrant may, by leave of the court, amend his demurrer by stating additional grounds, or otherwise, at any time before the trial at law or final hearing in equity."

This section prescribes, in form, a special demurrer in all cases; but there is nothing in the Revised Code changing the policy of former statutes abolishing objections to formal defects, and hence no reason is perceived why the courts should not continue the former concept and, if it is important to make any distinction at all, treat a demurrer under the present statutes, regardless of its form, merely as a general demurrer assigning grounds. The only difference between the present situation and the former is that formerly the assignment of grounds was optional, while now it is compulsory.

It is, of course, impracticable to define the situations in which the court should permit the assignment of additional grounds by way of amendment. It is such impracticability that impelled the Revisers to leave the whole matter to the discretion of the court. Presumably, in determining the propriety of an amendment, the court will look to such matters as the time of the application to amend, the nature of the proposed additional ground, and diligence of the demurrant.

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which goes to a whole pleading, as distinguished from one directed to only a part of a pleading. Such a usage may lead to confusion. See Henderson v. Stringer, 6 Gratt. 130 (Va. 1849), apparently misinterpreted by BURKS, *supra*. Also, see Pyles v. Carney, 85 W. Va. 159, 101 S. E. 174 (1919). Similarly, the term "special demurrer" is frequently used to describe a general demurrer going to a part of a pleading.

The following provision in the former Code (the last sentence of c. 125, § 29) has been omitted from the Revised Code as superseded by c. 56, art. 4, § 36, of the revision (see revisers' note to c. 56, art. 4, § 37).

"If nothing be alleged by the demurrant in support of his demurrer, the court, if it overrule the same, shall state that fact in the order; and if final judgment be obtained in the cause by the party whose pleading is demurred to, the same shall not be reversed by reason of any defect in the pleading so demurred to."

This provision was construed as applying only to common law pleadings. Anderson v. Anderson, 78 W. Va. 118, 88 S. E. 653 (1916). Since it uses the word "alleged", it might have been construed as requiring grounds to be alleged in thee demurrer, but was not so construed. Seemingly, the interpretation was correct. Otherwise, there would have been no need for a court order to show what had occurred. See Cook v. Dorsey, *supra* n. 8.

[12] C. 56, art. 4, § 36.

There is no provision as to how the court shall deal with grounds not assigned but which the court may consider of its own accord. However, a consideration of the purpose for which grounds are required to be stated ought to give a clue as to how the court should deal with those omitted. The primary object in requiring assignment of grounds must have been to give the demurrant and the demurree an equal advantage in preparation for argument of the demurrer. Apparently, the mere fact that the demurrant has in some way called attention to an unassigned ground orally, at the argument or elsewhere, should not preclude the court from considering the ground of its own accord. Otherwise, the court might be compelled to try the case on an immaterial issue. But to permit the demurrant, without amending his demurrer and subjecting himself to the possibility of a continuance because of the amendment, to argue the ground, would plainly obviate the general purpose of the statute. If the unassigned ground has come to the attention of the court in such a manner as to indicate that the demurrant was unaware of it at the time of the argument, there would seem to be no impropriety in the court's calling upon both parties for argument, although it seems clear that it would not be error to refuse argument in such a case. It would seem that the appellate practice, where grounds of error not assigned in the petition are noticed by the appellate court, should offer a helpful analogy.

In one respect, the new statute offers an opportunity for complications in the procedure. The courts will now be presented with problems relating to the form of the demurrer. Unless a liberal attitude shall be adopted, construction of the statute may become very technical with reference to sufficiency of statement of the grounds — especially, with reference to the necessary degree of particularity. The change from the old to the new practice is in the nature of a change from general to special pleading and involves the usual consequences of multiplying questions with reference to the mere functional sufficiency of the pleading process.[13]

As a method of testing the sufficiency of a common law pleading or a bill in equity, a demurrer performs practically the same functions at law and in equity. It is the one method of testing the sufficiency of the pleading as such and it challenges the *sufficiency* alone. Sufficiency, of course, includes both substance

[13] The Virginia courts have had to deal with this proposition. See Morriss v. White, 146 Va. 553, 131 S. E. 835 (1926); Richmond College v. Scott-Nuckols Co., 124 Va. 333, 98 S. E. 1 (1919).

and form, to the extent that objections to form have not been abolished. But whatever the lack of sufficiency, it can be sought by a demurrer only within the allegations or formal requisites of the pleading itself and the prior record of the case to which the pleading is related, and not within circumstances extraneous to the pleading and the record.[14] Furthermore, the defect must be one which goes to the operative effect of the pleading as a pleading, and not to something which constitutes a mere extraneous condition precedent to availability of the pleading. Hence it has been held that a pleading is not demurrable because it has been tendered or filed too late;[15] because it lacks a verification by affidavit required by statute;[16] or, in most jurisdictions,[17] because it has not been signed, although the contrary has been held in West Virginia as to a bill in chancery.[18] It has been held that the objection that an amended declaration departs from the original by way of setting up a new and different cause of action can not be reached by a demurrer.[19] In fact, it may be stated generally that, where for any cause the propriety of filing or asserting a pleading, rather than its sufficiency, is involved, a demurrer is not the proper remedy.[20] In all such cases, the proper method of raising the objection is by motion to reject or motion to strike.

In equity, independently of statute, it is elementary law that a demurrer can be interposed only to a bill, and hence is not available to test the sufficiency of a plea or an answer. The sufficiency of a plea is tested by setting it down for argument, the result being practically the same as if a demurrer were interposed. The method of testing the sufficiency of an answer depends upon the nature of the defect. Strictly, exceptions to an answer are filed because it fails to respond to the bill in some respect, and particularly because it fails to give sufficient discovery.[21] The result of

[14] Morgan v. Dyer, 10 Johns. 161 (N. Y. 1813); 49 C. J. 420 *et seq.*, 21 R. C. L. 504 *et seq.*

[15] Morgan v. Dyer, *supra* n. 14; Cobb v. Miller, Ripley & Co., 9 Ala. 499 (1846); Smith v. Champion, 102 Ga. 92, 29 S. E. 160 (1897); 49 C. J. 384, n. 76.

[16] Lewis v. Hicks, 96 Va. 91, 30 S. E. 466 (1898), holding that the affidavit is not a part of the pleading and may be waived; 49 C. J. 383-4, citing some cases *contra;* 49 C. J. 709.

[17] 49 C. J. 383, 708; 10 R. C. L. 427-8.

[18] Dever v. Willis, 42 W. Va. 365, 26 S. E. 176 (1896).

[19] McMechen v. Baltimore & Ohio R. R. Co., 90 W. Va. 21, 110 S. E. 474 (1922), and cases cited.

[20] Cross v. Kemp, 45 N. J. L. 51 (1883).

[21] FLETCHER, EQUITY PLEADING AND PRACTICE (1913) §§ 332-334; CLEPHANE, EQUITY PLEADING AND PRACTICE (1926) 285, 297; 1 WHITEHOUSE, EQUITY PRACTICE (1915) §§ 272, 273; LANGDELL, EQUITY PLEADING (1883) § 82.

sustaining the exceptions, of course, is to compel the defendant to answer further. If the answer is defective as a pleading in such a way as to make it demurrable if it were a common law pleading, the orthodox method of taking advantage of the deficiency is to set the cause down for hearing on bill and answer.[22] On such a hearing, however, the decree is final,[23] and not interlocutory, as in the case of an order on the hearing of a demurrer. In other respects, a hearing on bill and answer, so far as sufficiency of the answer is concerned, involves practically the same incidents as a hearing on a demurrer and is in effect an indirect method of demurring to an answer.

In Virginia and West Virginia, it is said, the regular equity practice has been supplemented by an unorthodox practice indulged in by the courts, by virtue of which the sufficiency of an answer in any respect might, prior to the present statutes, have been determined by exception or objection to the answer.

> "Strictly speaking the office of an exception to an answer in equity is to specifically point out some particular allegation of the bill which is not responded to, or to which a better or more specific answer is required, or to rid the answer, when desired, of some scandalous or impertinent matter.
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> "But in this state and in Virginia, by a loose practice indulged, the sufficiency of an answer as a whole or in part may be challenged by an objection or exception thereto; and perhaps, on specific objection to immaterial matter in the answer, such matter may be eliminated, and the issues thereby limited to the material facts put in issue by the bill and answer.
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> "The practice in some of our federal courts to treat a demurrer to an answer, or general exceptions thereto which are equivalent to a demurrer, as a motion to set the cause down for hearing on bill and answer, and a waiver of the right to contest the facts alleged, has not been followed in the courts of this state. And where such general exceptions are interposed to an answer and one or more of the allegations thereof may be good or sufficient to put in issue some material fact alleged in the bill, the decree below overruling such exception as a whole will not be reversed on appeal."[24]

It will be noted that this anomalous practice, particularly as

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[22] FLETCHER, EQUITY PLEADING AND PRACTICE, § 332; CLEPHANE, EQUITY PLEADING AND PRACTICE, 305; LANGDELL, EQUITY PLEADING, § 83.

[23] LANGDELL, EQUITY PLEADING, § 83.

[24] Lawrence v. Montgomery Gas Co., 84 W. Va. 382, 99 S. E. 496 (1919). It may be that this practice came into vogue in order to escape the finality that resulted from a hearing on bill and answer.

exemplified in the last sentence of the quotation, recognizes an objection or exception to an answer as practically the equivalent of a demurrer.

It is a fundamental rule, both in equity and at law, that a pleading is not demurrable because it contains a surplusage. *Utile per inutile non vitiatur*. Hence a bill or an answer in equity is not demurrable merely because it contains scandalous or impertinent matter. The proper procedure is to except to the bill or the answer.[25] At the common law, the proper procedure is a motion to strike.[26]

The common law and equity methods outlined above were supplemented by the former Code with a statutory method for testing the sufficiency of a plea.

> "When a plea is offered in any action or suit, which is not sufficient in law to constitute a defense therein, the plaintiff may object to the filing thereof on that ground, and the same shall be rejected. But if the court overrule the objection and allow the plea to be filed, the plaintiff may take issue thereon without losing the benefit of the objection, and may, on an appeal from a judgment rendered in the case in favor of the defendant, avail himself of the error committed in allowing such plea to be filed, without excepting to the decision of the court thereon."[27]

It will be noted that this section, by using the words "action or suit", purports to apply to both law and equity, and it may be that the practice described above permitting a general exception or objection to an answer was adopted by analogy from this section relating to pleas.[28] However, the primary object of the statute is understood to have been to provide a method of escape from consequences incidental to demurring to a common law plea. Under the common law and the former Code, if the plaintiff demurred to a plea and the demurrer was overruled, he was compelled to withdraw his demurrer before he could reply to the plea.[29] When the demurrer was withdrawn, of course no question could be raised on

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[25] FLETCHER, EQUITY PLEADING AND PRACTICE, §§ 185, 337; 1 WHITEHOUSE, EQUITY PRACTICE, §§ 108, 274.

[26] Metropolitan Life Ins. Co. v. Hill, 177 S. E. 188 (W. Va. 1934); 49 C. J. 368 and cases cited.

[27] CODE 1923, c. 125, § 56.

[28] The objection, in conformity with the method prescribed by the statute, was usually interposed by way of objeection to the filing of the answer. See Ward v. Ward's Heirs, 50 W. Va. 517, 40 S. E. 472 (1901); Gauley Coal Land Association v. Spies, 61 W. Va. 19, 55 S. E. 903 (1906).

[29] Camden Clay Co. v. New Martinsville, 67 W. Va. 525, 68 S. E. 118 (1910). See BURKS, PLEADING AND PRACTICE, 343.

error as to the soundness of the trial court's ruling on the demurrer. The statute obviously was framed so as to avoid such a consequence on objection to the filing of a plea. As will be more fully noted hereinafter, this statutory practice relating to pleas has been extended by the Virginia and West Virginia courts to replications and subsequent pleadings.

Another provision of the former Code provided a statutory method, in lieu of a special demurrer, for objecting to certain formal defects.

> "No demurrer shall be sustained because of the omission in any pleading of the words, 'this he is ready to verify', or 'this he is ready to verify by the record', or 'as appears by the record'; but the opposite party may be excused from replying, demurring or otherwise answering to any pleading which ought to have, but has not such words therein, until they be inserted."[30]

It is undoubtedly the policy of the Revised Code, partly by expressed language and partly by proscription of other methods, to establish the demurrer as the one and only uniform method of testing the sufficiency of a pleading. That, perhaps due to inadvertence, the avowed objective has not quite been reached, will be noted hereinafter. It is first desired to call attention to the precise results which apparently were intended to be accomplished.

It must be noted that the statutes emphatically do not undertake to prescribe a demurrer as the method for raising all objections to pleadings.

> "The sufficiency of any pleading, in law or equity, may be tested by a demurrer. Objections to the filing of any pleading, because of insufficiency, are abolished."[31]
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> "Exceptions to answers for insufficiency are abolished. The test of sufficiency shall be made by a demurrer; if found insufficient, but amendable, the court may allow an amendment on terms."[32]

Only the first provision quoted relates to common law pleadings. In terms, the first sentence of this provision is only permissive, and not mandatory, in effect. However, the second sentence abolishes the provision in the former Code[33] establishing the only alternative to a demurrer as a means of testing the sufficiency of the substance of a common law pleading, together with

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[30] CODE 1923, c. 125, § 29.
[31] REV. CODE, c. 56, art. 4, § 36.
[32] REV. CODE, c. 56, art. 4, § 65.
[33] *Supra* n. 27.

any analogous practice adopted by the courts beyond the confines of the statute, and the result is the same as if the first sentence had been mandatory in terms.

The first provision expressly abolishes any objection to the filing of any pleading in equity because of insufficiency, whether under the former statute or under any peculiar court practice; while the second provision specifically abolishes exceptions to answers in equity for insufficiency. If there should be any doubt as to whether the term "exceptions" is intended to include a possible objection to an answer after it is filed, a vestige of the "loose practice" noted above, the consequences would seem to be immaterial; because in the second provision, contrary to the mode of statement in the first, the use of a demurrer to test the sufficiency of an answer is made mandatory.

It may be stated definitely that objection to the filing of any pleading because of insufficiency and exception to any pleading for insufficiency, whether at law or in equity, are abolished and prohibited. It will be noted, however, that there is no expressed inhibition against testing the sufficiency of a plea in equity by setting it down for argument, as under the equity practice. In fact, the Revised Code contains a provision,[34] carried over from the former Code, for setting a plea in equity down for argument.

> "A plaintiff in equity may have any plea or demurrer set down to be argued."

The only object in having a plea set down for argument would be to determine the sufficiency of the plea. Hence the provision could serve no other purpose than to prescribe a method for testing the sufficiency of the plea, and it would seem, therefore, that the Revised Code provides alternative methods for testing the sufficiency of a plea in equity. However, since the provision last quoted is contrary to the general policy of the revision and its retention was likely due to inadvertence, and since the same results would follow from a demurrer to the plea, it would seem preferable to resort to a demurrer. Whether, by resorting to the alternative equity practice, a plaintiff could escape the necessity of assigning grounds for insufficiency of the plea, would be a debatable question. Such a requirement might be imposed as coming within the spirit of the statute requiring statement of grounds in a demurrer.

[34] REV. CODE, c. 56, art. 4, § 56.

Seemingly, there would be no place where the grounds could be stated except in the order setting the plea down for argument.

There is likewise no express inhibition against setting a cause down for hearing on bill and answer, although the section in the former Code expressly providing for such a practice has been substantially modified, possibly with a view to eliminating the practice. The former Code section, substantially declaratory of the equity practice, is as follows:

> "A plaintiff in equity may, at or after the rule day at which the bill is taken for confessed as to any defendant, or at which his answer is filed, have the cause set for hearing as to such defendant; and it may be so set for hearing on the answer, or upon a general replication thereto, as the plaintiff may prefer. If two months elapse after the answer of a defendant is filed, without the case being so set and without exceptions being filed to his answer, he may have the case set for hearing as to himself."[35]

The section appears in the Revised Code as follows:

> "Whenever a suit in equity is matured at rules as to all of the defendants, it shall be the ex officio duty of the clerk, as soon as the same is matured, to set the case for hearing as to them. If the suit is matured as to only a part of the defendants, the plaintiff may appear at rules and have it set for hearing as to such part. If one month elapse after the answer of a defendant is filed, without the case being so set and without a demurrer being filed to his answer, such defendant may appear at rules and have the case set for hearing as to himself."[36]

It will be noted that the provision in the former section specifically permitting the plaintiff to have the cause set for hearing on the answer, or, at his option, on the replication to the answer, has been omitted from the new section. Owing to the fact that the revisers' note makes no comment on the omission, it is left to surmise as to whether it was the intention to dispense with a hearing on bill and answer at the instance of the plaintiff, on the assumption that he should be compelled to resort to a demurrer as a means of testing the sufficiency of the answer, or whether it was the understanding that the general provisions in the new section would include the specific methods of hearing provided for in the former section. It seems most likely, in view of the other statutory

[35] CODE 1923, c. 125, § 50.
[36] REV. CODE, c. 56, art. 4, § 68.

provisions and the general policy of the revision, that the intention was that the new section should include all the methods of hearing embodied in the former section, with the exception that the plaintiff should not be given the privilege of having the cause set for hearing on bill and answer. When a bill is taken for confessed in default of a demurrer or an answer at rules, the cause is matured for a hearing on default. Also, when a demurrer, or an answer and replication or a plea and replication have been filed at rules, the suit is matured at rules on an issue of law or of fact. But if an answer setting up new matter purely in confession and avoidance has been filed, the typical case where a plaintiff would have the cause set for hearing on bill and answer, the suit would not be matured and the clerk could not set it for hearing until a replication had been filed. In such a situation under the former section, if the plaintiff desired to test the sufficiency of the answer, he clearly had a right (although, as heretofore noted, he usually resorted to an exception or objection) to have the cause set for hearing on bill and answer. The new section gives him no such privilege, nor does it lodge any such power in the clerk until the suit has been "matured"; in other words, until a replication has been filed. However, the filing of a replication would call upon the defendant for proof and would concede the sufficiency of the answer. Moreover, it should not be forgotten that the provision[37] dealing specifically with answers provides, mandatorily, that "the test of sufficiency shall be made by demurrer." There being no doubt that the plaintiff would have the right to demur, it might be surmised that it would be wholly immaterial whether he should also be given the privilege to have the cause set for hearing on bill and answer. As to merely testing the sufficiency of the answer, the surmise would be correct; but there would be a substantial difference in the consequences. As already noted, a hearing on bill and answer is final; while a hearing on demurrer is not necessarily so. If the demurrer were sustained, the defendant might be permitted to amend;[38] while if the demurrer should be overruled, the plaintiff would always be permitted to reply.

There still remains a possibility that the sufficiency of an answer might be tested by having the cause set for hearing on bill and answer. The new section last quoted, substantially in accord with the old section, gives the defendant the right to have the

[37] *Supra* n. 32.
[38] *Idem.*

cause set for hearing when his answer has been filed for a month and the cause has not been set for hearing by the plaintiff or the clerk and no demurrer has been filed to the answer. Nothing is said as to the nature of the hearing. Presumably, it would be a final hearing on the merits, possibly involving sufficiency of the answer. Otherwise, it would result merely in a dismissal of the bill for failure to prosecute. If the latter result had been the one intended, apparently the statute would have said so. In fact, the simple and obvious remedy would have been to dispense with any hearing at all and simply provide that the bill should be dismissed at rules by the clerk for failure to prosecute, as would result under the statutes[39] in other instances where the plaintiff fails to prosecute his suit.

The abolishment of former methods of objecting and the shift to the demurrer might have entailed inadequacies and embarrassments in the new procedure if consideration had not been given to the consequences involved. Under the orthodox equity practice, exceptions to an answer are required to be specific. Wherefore, under the former Code, which required no assignment of grounds in a demurrer, a demurrer would not have been an adequate substitute for exceptions to an answer. However, under the Revised Code, as has already been noted,[40] a demurrer is required to "state specifically the grounds of demurrer", and it would seem to be within the power of the court to require the same degree of specification in a demurrer as in exceptions to an answer. Under the former Code,[41] it was not desirable to demur to a plea, because, if the demurrer should be overruled, it was necessary to withdraw the demurrer before a replication could be filed. Under the Revised Code, such an embarrassment is obviated by a provision[42] permitting a plaintiff to demur and reply at the same time. However, as to stages of the pleadings after the replication stage, the situation is different.

The former statute[43] permitting objection to the filing of a pleading because of insufficiency relates only to pleas; but, whether from analogy to the statute or from a practice developed independently by the courts, as in Virginia,[44] the practice of permitting

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39 REV. CODE, c. 56, art. 4, §§ 6, 7.
40 *Supra* n. 12.
41 *Supra* n. 29.
42 REV. CODE, c. 56, art. 4, § 39.
43 *Supra* n. 27.
44 See BURKS, *loc. cit. supra* n. 29.

objection to the filing of replications and subsequent pleadings for such reason has been recognized in West Virginia.[45] Such a practice is now prohibited by the new statutes. Yet there is no provision permitting a party to demur and plead at the same time to any pleading beyond the replication stage. For example, a defendant is not permitted to demur and rejoin at the same time. Consequently, after the replication stage, a party will be faced with the necessity of withdrawing his demurrer before he can plead, a dilemma which he escaped under the former practice when he was permitted to object to the filing of the pleading. This would seem to be a consideration, in addition to others elsewhere indicated by the writer,[46] why a party should now be permitted to demur and plead at the same time at any stage of the pleadings.

We now come to a consideration of the question, To what extent have the provisions in the Revised Code prescribed a demurrer as the only method of objecting to a pleading? As may be surmised from what has already been said, an answer to this question will depend upon the construction which should be placed upon the words "sufficiency" and "insufficiency" as used in the statutes.[47] Do the statutes mean sufficiency of a pleading solely with reference to its allegations and form — its substantial and formal content — or do they mean sufficiency in a broader sense, with reference to extrinsic conditions and circumstances which do not go to the intrinsic merits of the pleading as a pleading, but merely place external limitations upon its availability, such as lack of an affidavit or failure to tender the pleading within a proper time?

There is nothing in the statutes nor in the revisers' notes to indicate that the Revisers, in adopting the demurrer as the uniform method for testing the sufficiency of a pleading, intended to strain or warp the ordinary functions of a demurrer. The demurrer is merely adopted, without qualification, as a substitute for other methods of testing the sufficiency. The field of its application is broadened, but there is nothing to indicate any intention to alter its inherent and basic operative functions. In fact, the contrary is indicated by the fact that the Revisers justify the sub-

[45] Quaker City Nat. Bank v. Showacre, 26 W. Va. 48 (1885); Spence v. Robinson, 35 W. Va. 313, 13 S. E. 1004 (1891).

[46] Carlin, *Common Law Pleas and Subsequent Pleadings in West Virginia* (1931) 38 W. VA. L. Q. 14, 35.

[47] *Supra* notes 31 and 32.

stitution by undertaking to demonstrate that the superseded methods substantially performed the orthodox functions of a demurrer under other names; in other words, that the revision merely undertakes to change the form of the procedure and not the substance.[48] Furthermore, the language in which the superseded methods are abolished indicates an intention to place only a limited ban upon them. "Objections to the filing of any pleading, *because of insufficiency,* are abolished."[49] "Exceptions to answers *for insufficiency* are abolished."[50] If it was the intention to abolish all objections to filing and all exceptions, why were the italicised words not omitted? Such would have been the line of least resistance in expression. The insertion of these words must have called for a special effort, and the effort can be explained and justified only by the supposition of a purpose. As to the motive, the only logical conclusion is that the words were intended to delimit a class of objections to which a demurrer is to apply, excluding another class which is to remain unaffected by the statutes; and it is submitted that there is no logical means of determining the line of demarcation except by resorting to a consideration of the comman law and equity functions of a demurrer as a device for testing the sufficiency of a pleading. As already indicated, the function of a demurrer, independently of statutory regulation, is to test the intrinsic merits of a pleading, and not to interpose extrinsic objections to its reception or operation.

Wherefore, it is submitted that objection may still be interposed to the filing of a pleading on the ground that it is tendered too late. In fact, such a practice is expressly recognized in the Revised Code.[51] A similar practice is also recognized where a plea lacks an affidavit.[52] Consequently, it should be inferred that, in instances where the statutes are silent as to the method of objecting because of lack of an affidavit, the West Virginia courts will follow the Virginia decision and other cases in accord[53] holding that a demurrer is not proper. Logically, the affidavit does not go to the sufficiency of the pleading as a pleading. It adds nothing to the allegations. It operates merely as a method of preliminary proof of the truth of the allegations, and hence performs an evi-

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48 See revisers' note to REV. CODE, c. 56, art. 4, § 36.
49 See n. 31, *supra.* Italics supplied.
50 See n. 32, *supra.* Italics supplied.
51 C. 56, art. 4, § 33.
52 REV. CODE, c. 56, art. 4, § 32.
53 *Supra* n. 16.

dentiary rather than a pleading function. Even this evidentiary function ceases when it has once performed its purpose of fulfilling the condition upon which the pleading may be filed. In short, the affidavit serves as a sort of statutory one-man *secta.* It has been held that a demurrer, because it admits the truth of the allegations, dispenses with the necessity for an affidavit where it would otherwise be necessary.[54]

As to the objection that an amended declaration departs from the original, if the court shall continue to adhere to the view that such a circumstance is foreign and extrinsic to the merits and sufficiency of the amended declaration, as it has heretofore held,[55] it would seem that there is nothing in the Revised Code that would make a demurrer proper in such a case. In fact, a refusal on objection to file an amended pleading on such a ground is merely an exemplification of the ordinary practice relating to amendments. A court has a general discretion as to whether an amendment will be permitted. Precisely for the reason that such discretion may be concerned with considerations extrinsic to the merits of the amended pleading, the discretion is not properly called into operation by a demurrer after the amendment has been filed, but by objection to permission to amend, which means, procedurally, objection to reception and filing of the amended pleading, or motion to strike it after it has been filed.[56] Certainly it could not have been the intention to apply the procedural mechanism of a demurrer to the whole field of discretion relating to amendments. On the contrary, the Revised Code seems to show specific recognition of a motion to strike as the proper method for getting rid of an improper amendment.[57]

A demurrer is not the proper method even for testing the sufficiency of a pleading for all purposes and on every occasion. Its use must await the arrival of the time when a proper test may be made by demurrer. The sufficiency of a pleading may become

[54] Keach v. Hamilton, 84 Ill. App. 413 (1889); City of Chicago v. Banker, 112 Ill. App. 94 (1904); Fowler v. Fowler, 204 Ill. 82, 68 N. E. 414 (1903).

[55] McMechen v. Baltimore & Ohio R. R. Co., *supra* n. 19.

[56] Western Union Tel. Co. v. Crumpton, 138 Ala. 632, 30 So. 517 (1903); Cincinnati, N. O. & T. Ry. Co. v. Smith, 165 Ky. 235, 176 S. W. 1013 (1915). Ordinary departures may be reached by a demurrer. For instance, a replication is demurrable if it departs from the declaration; a rejoinder, if it departs from the plea. A reason for differentiating such departures from departures involving amendments, as to the method of objecting, may be that, in the one case the pleading is filed as a matter of right, while in the other case the pleading involves a general discretion as to its reception.

[57] REV. CODE, c. 56, art. 4, § 25.

involved in various ways in the procedure relating to the granting or refusal of interlocutory relief, as in a case involving a preliminary injunction. A defendant may oppose the granting of an injunction or move to dissolve it on the ground that the bill is insufficient. He should not be compelled to resort to a demurrer for such purposes, but should be permitted to urge insufficiency of the bill in support of his objection or motion. A defendant should not be compelled to subject himself to the incidents of a remedy opposing final relief until final relief is sought. Although it is common practice in West Virginia for a defendant to oppose the granting of an injunction or seek to dissolve it in vacation through the medium of a demurrer,[58] it may very well be doubted whether there is any authority in this state to file a demurrer in vacation.[59] If it can be filed in vacation at all, it may, conceivably, in due course of time, be entertained for one or both of two different purposes: (1) as a substitute for objection to granting or motion to dissolve the injunction (since equity looks to the substance of procedure rather than to the form); and (2) as an appearance in bar to the final merits of the case. The mere fact that the suit has not been matured in pursuance of the ordinary course of procedure presents no obstacle to entertaining and deciding the demurrer. Process and rule proceedings may be waived by the defendant,[60] and, if the demurrer can be received in vacation, no reason is perceived why the case can not then and there be placed on the docket for a hearing on demurrer. But whether a hearing *on the demurrer* can then take place in vacation, in lieu of a mere adjudication as to the interlocutory relief, or must await the arrival of a court session, is a different question.[61] A hearing on a de-

[58] See Lamp v. Locke, 89 W. Va. 138, 108 S. E. 889 (1921).

[59] City of Wheeling v. Chesapeake & Potomac Tel. Co., 81 W. Va. 438, 94 S. E. 511 (1917).

[60] Lamp v. Locke, *supra* n. 58.

[61] See City of Wheeling v. Chesapeake & Potomac Tel. Co., *supra* n. 59. "The ruling upon the application for the injunction only incidentally involved sufficiency of the bill." *Idem.*

The Georgia cases seem to be the most nearly in point.

"A demurrer to a bill could not be made and disposed of in vacation and before the term of court to which the bill was returned had arrived; and although it could then be used as a cause shown against the grant of an injunction or *ne exeat*, or the appointment of a receiver, it stood over for a hearing at the term to which the bill was returned. Under the law, it could only be heard then, or thereafter upon notice or order that it be heard in vacation." The Old Hickory Distilling Co. v. Blyer, 74 Ga. 201 (1884).

"At the interlocutory hearing of a petition for injunction demurrer to the petition can be considered only as showing why an interlocutory injunction should not be granted, and the judge can not, at chambers, before the appearance term, either overrule or sustain such demurrer." Reynolds

murrer is a hearing on the merits as to final relief and it does not seem to be the policy of the local law to permit such a hearing in vacation, except, of course, by consent of the parties.[62] If the demurrer can not be heard in vacation as a demurrer, then necessarily, in spite of the new regulations, the right to the interlocutory relief must be tested by objection or motion, whether or not under the name of a demurrer.

Similar questions may arise with reference to procedure involving other phases of interlocutory relief, such as an application for appointment of a receiver, and apparently should be settled by the same principles.

The Revisers have expressly indicated[63] that it was not their intention to abolish a motion to strike scandalous or impertinent matter — in other words, surplusage — from equity pleadings. The Supreme Court has recently decided[64] that a like motion is proper with reference to surplusage in a common law pleading.

Attention has already been called to a provision in the former Code[65] substituting a statutory method of objecting, in lieu of a special demurrer, with reference to certain formal defects. This provision has been carried into the Revised Code[66] and supplies another instance where objection to a pleading may be interposed without a demurrer.

Other instances than those enumerated undoubtedly will be found where objection to a pleading may still be raised without resort to a demurrer. No attempt has been made to exhaust the

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& Hamby Estate Mortgage Co. v. Kingbery, 118 Ga. 254, 45 S. E. 235 (1903). "A judgment overruling a demurrer to a petition for injunction and receiver, rendered upon an interlocutory hearing in vacation before the appearance term, is a mere nullity." Toomer v. Warren, 123 Ga. 477, 51 S. E. 393 (1905).

62 "In the absence of a statute so providing, no decree of any kind can be entered in the vacation of the court." HOGG'S EQUITY PROCEDURE (2d ed. 1921) § 600, quoted with approval in McGibson v. County Court, 95 W. Va. 338, 121 S. E. 99 (1924), holding that there would be no power to dissolve an injunction in vacation in the absence of statutory authority.

It will be noted that, while the statutes give the court power to grant or dissolve an injunction in vacation, no power is given to decide a demurrer in vacation. If express statutory authority to dissolve is necessary, where only interlocutory relief is involved, such authority would be all the more necessary to decide a demurrer, involving final relief.

"A judge in vacation may dissolve an injunction, but cannot dismiss the bill." Logan v. Ballard, 61 W. Va. 526, 57 S. E. 143 (1907). Neither can final relief be granted in vacation by way of perpetuating the injunction. Conley v. Brewer, 85 W. Va. 725, 102 S. E. 607 (1920).

63 See revisers' note to REV. CODE, c. 56, art. 4, § 36.

64 Metropolitan Life Ins. Co. v. Hill, *supra* n. 26.

65 *Supra* n. 30.

66 C. 56, art. 4, § 37.

field of possibilities. It is only hoped that enough has been said to dispel the illusion that a demurrer is the only resort.

In conclusion, attention is called to what may be considered an overstatement by the Revisers, when they say that "a motion to strike out a plea has the same effect upon the legal sufficiency thereof that a demurrer thereto would have had."[67] If the declaration should be good, this statement would be true; but if the declaration should be substantially bad, a demurrer would have a more radical effect than a motion to strike. It is a familiar principle in the law of demurrers that a demurrer opens up the record back through the entire series of pleadings, and that the demurrer is applied to the first substantially faulty pleading in the series. This principle, in later days, seems to have been largely unfamiliar to practitioners in West Virginia,[68] possibly due in part to the fact that, under the former practice hereinbefore noted, the custom has been to object to the filing of pleadings subsequent to the declaration rather than to demur. On objection to the filing of a pleading, according to the weight of authority, only the sufficiency of the pleading objected to is considered and the record is not opened.[69] The status of this retroactive function of a demurrer is doubtful under the Revised Code, due to the fact that application of the principle clashes with the requirement that a demurrer must state grounds. Obviously, a demurrer to a plea would not state grounds of demurrer to a declaration. The result may be that the demurrer can be given no retroactive effect except as to grounds which the court notices of its own accord.

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[67] See revisers' note to REV. CODE, c. 56, art. 4, § 36.

[68] No instance has been noted where the principle has been applied in a common law action subsequent to 1870. See Hoke v. Hoke, 3 W. Va. 561 (1869); Caperton v. Martin, 4 W. Va. 138 (1870); Jarrett v. Nickell, 4 W. Va. 276 (1870); Doolittle v. County Court, 28 W. Va. 158 (1886). The latter case was a proceeding in mandamus.

[69] Chesapeake & Ohio R. R. Co. v. Bison, 99 Va. 18, 28-29, 37 S. E. 320 (1900); 49 C. J. 687, citing some cases *contra*. Strictly and formally, a pleading could not open the record until it had been filed and so had become a part of the record. On the other hand, the objection to filing may be considered as a substitute for a demurrer and hence, by liberal application, as involving all the incidents of a demurrer.