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Common Law Pleas and Subsequent Pleadings in West Virginia

Leo Carlin
West Virginia University College of Law

COMMON LAW PLEAS AND SUBSEQUENT PLEADINGS IN WEST VIRGINIA

LEO CARLIN*

Some time ago the writer published an article[1] dealing with the common law declaration in West Virginia, the general purpose of which was to collect and analyze the local statutes modifying or dispensing with common law requirements and to determine what further might be done by way of statutory reform. It is now proposed to deal with some of the features of common law pleas and the subsequent pleadings somewhat in the same manner and with the same general purpose in view. Necessarily, an attempt can be made to deal only with selected details of the subject. The pleadings discussed will be considered in chronological order.

It will be observed that the defendant, in assuming his initial pleading task, is confronted with a more complicated problem than that assumed by the plaintiff in framing his declaration. Not only must he determine the content and form of the allegations and formal parts of his plea, once the appropriate method of defense is selected, but he must first of all select and adapt his method of defense with reference to what the plaintiff has already alleged. More specifically, he must decide whether he is going to traverse, confess and avoid, or plead by way of estoppel; or, since he is no longer confined to a single defense,[2] whether he will do more than one of these things all at the same time. This discussion will deal first with the form and contents of the plea, leaving what is believed to be the more complicated problem, selection of the proper method of defense, for subsequent attention.

If the defendant decides to traverse, his task under the local law is very simple; in fact, so simple that it would seem that nothing could be done to make it easier. The common or specific traverse and the special traverse, which contributed so many intricacies and technicalities to the era of special pleading, although not abolished by statute, are obsolete in this state.[3] If the de-

* Professor of Law, West Virginia University.

[1] *The Common Law Declaration in West Virginia* (1928) 35 W. VA. L. QUAR. 1.

[2] W. VA. REV. CODE (1931) c. 56, art. 4, § 39.

[3] "The common traverse denies the allegation of the declaration in the language of the allegation traversed, and it is said that not many instances of it occur in pleas. At present it is rarely encountered in pleading, and when it is, it is treated as the general issue. The special traverse, or traverse

fendant desires to traverse the allegations in the declaration, he now does so collectively by a general traverse, more commonly known as the general issue, and there should be no difficulty in pleading the general issue, whatever the manner in which it is pleaded. Although it may be pleaded as a formal written plea, if the defendant so elects, nevertheless, if so pleaded, owing to the uniformity of its language for all cases coming within a given form of action and the availability of unvarying precedents, there is little excuse for getting it wrong. However, there is no necessity for taking whatever risk there may be in resorting to a formal plea. It is not necessary to plead it formally at all. The measure of its traversing function, although logically indefinite, is yet so well established by precedent that it may be taken as traversing symbolically, rather than through the express purport of its language, and hence may be pleaded by name only, the defendant thus at the same time dispensing with both form and allegations.

The defendant is concerned with the allegation of facts only when he undertakes to plead a special, or affirmative, plea, which may be by way of confession and avoidance or by way of estoppel. And, since it is only when he undertakes to plead specially that he is under any necessity of resorting to a formal plea, it is here that he is particularly concerned with the form of the plea and the content of its allegations. An examination of the local law will indicate that the defendant is hampered very little with the requirements of form, if he should desire to abandon the formal habiliments still clinging to the precedents.

The parts of a plea have been enumerated by Professor Minor[4] as follows: (1) the title of the court and the rules; (2) the names of the parties in the margin; (3) the commencement, including especially the defense; (4) the *actionem non,* in pleas by way of confession and avoidance; (5) the body or substance of the plea; and (6) the conclusion, embracing (a) the tender of issue, or the verification, and (b) the prayer of judgment when there is a verification.

It has been decided in a recent case that it is unnecessary to entitle the declaration as of the court in which it is filed.[5] If

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with an *absque hoc,* or formal traverse, or simple traverse has fallen into 'innocuous desuetude,' is rarely used, is seldom if ever of any value, and is of interest from an historical rather than a practical standpoint.'' BURKS' PLEADING AND PRACTICE (1913) 328-9.

But see W. VA. REV. CODE (1931) c. 56, art. 4, § 43, regulating its use and, therefore, implying its possibility as a pleading.

[4] 4 MINOR, INSTITUTES (1878) 635, 640.

[5] Fleming v. Hartrick, 100 W. Va. 714, 131 S. E. 558 (1926).

such is true as to the declaration, *a fortiori* the same would be true as to pleas; and of course there would be still less necessity for entitling a plea as of the rules at which it is filed.[6]

The names of the parties in the margin "do not strictly constitute a part of the plea,"[7] and hence might be omitted, but nevertheless serve a useful purpose. Such a designation of the parties serves to identify compendiously the action in which the plea is filed and, by reference, will supply a description of the parties for the commencement of the plea.

At the common law, the commencement of the plea was cluttered with various formalities, some of them extremely technical in their application.[8] All of these are dispensed with by a local statute.

> "No formal defense shall be required in a plea. It may commence as follows: 'The defendant says that.' "[9]

The *actionem non*,[10] at the common law proper only in pleas in bar by way of confession and avoidance, is no longer necessary[11] under the local law.

> "In a plea, replication or subsequent pleading, intended to be pleaded in bar or in maintenance of the action, it shall not be necessary to use any allegation of 'actionem non' or 'precludi non', or to the like effect, or any prayer of judgment."[12]

At the common law, all the general issues except *nul tiel record*[13] and the common, or specific, traverses conclude to the

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[6] 4 MINOR, INSTITUTES (1878) 568.
[7] *Id.* 635.
[8] *Id.* 635-7.
[9] W. VA. REV. CODE (1931) c. 56, art. 4, § 40.
[10] "Ought not to have or maintain his aforesaid action against him."
[11] Professor Minor assumes that, if the plea is intended as a defense to only part of the cause of action, the statute does not dispense with the *actionem non*. 4 Minor, Institutes (1878) 637-9. This assumption is based on the supposition that the local statute is intended to operate with the same effect as the Hilary Term Rules read, "intended to be pleaded in bar of the whole action generally." 1 CHITTY, PLEADINGS (16th Am. ed. 1879) 752. Our statute leaves out the words, "whole action generally". Even if this construction of the local statute is correct, there would seem to be no necessity for the formal *actionem non*. Its only purpose in the case of a partial defense would be to indicate that the plea went only to a part of the cause of action. This fact the pleader would hardly omit, otherwise his plea would be demurrable as too large; but there is no reason why he should be compelled to resort to the formal *actionem non* for such a purpose.
[12] W. VA. REV. CODE (1931) c. 56, art. 4, § 41.
[13] "The plea of *nul tiel record* does not conclude to the country, because the matter is to be determined by the court by inspection of the record." Wilbur v. Abbott, 59 N. H. 132, SUNDERLAND, CASES ON COMMON LAW PLEADING 579 (1879).

country.[14] The special traverse, because it contains new matter in the inducement, and all special pleas alleging new matter conclude with a verification.[15] As already stated, the special traverse is obsolete under our practice, but we nevertheless have a statute copied from the English Hilary Term Rules which provides that it, like other traverses, shall conclude to the country.[16]

These formal conclusions are merely devices which serve to identify pleas as traverses or as special pleas introducing new matter, as the case may be. If the plea concludes to the country, this is an indication that it is a traverse and tenders an issue for jury trial; and if it concludes with a verification, the indication is that it is a special plea introducing new matter which calls for further pleading before an issue may be tendered. Since the nature of the plea must first be determined in order to select the proper conclusion, it would seem that adding the conclusion is a mere formality and that its omission should not constitute a substantial defect. Such is the view of Mr. Chitty.

> "Since the statute (of Anne), a wrong or defective conclusion, either to the country or with a verification, &c. can only be objected to by *special demurrer.*"[17]

In the absence of any specific statutory provision, it would seem that the local statute,[18] descendant of the statute of Anne, dispensing generally with the necessity for formal allegations in pleadings, would dispense with a conclusion either to the country or with a verification. Nevertheless, we have a statute which, while it prohibits a demurrer to a pleading because it lacks a verification, still excuses the opposite party from replying to the pleading until a verification is added.[19] It would seem that the statute might wholly dispense with a conclusion either to the country or with a verification without causing any confusion.[20]

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[14] "And of this he puts himself upon the country."
[15] "And this he is ready to verify."
[16] N. 3, *supra.*
[17] 1 CHITTY, PLEADINGS (16th Am. ed. 1879) 585.
[18] W. VA. REV. CODE (1931) c. 56, art. 4, § 37.
[19] *Ibid.*
[20] See 4 MINOR, INSTITUTES (1878) 620, criticising the statute. "We have thus the singular anomaly of the legislature itself propounding a demurrer without the agency of the party, in several instances of the most immaterial formality, whilst in all other cases the courts are denied the means of compelling pleaders to *employ the accustomed forms of allegation,* notwithstanding serious difficulties and inconveniences will arise from their habitual non-observance." See Merchants' and Mechanics' Bank of Wheeling v. Evans and Dorsey, 9 W. Va. 373 (1876), seemingly holding that pleas may properly be rejected because they lack a conclusion to the country. It is submitted that such a view is technical and should not be followed at the present day.

As to the final conclusion, the prayer of judgment, it will be noted that the statute above quoted[21] dispenses with such a conclusion in a plea "in bar or in maintenance of the action."[22] However, the express language of the statute indicates that it does not apply to pleas in abatement, and the local pleader must still have recourse to the precedents for forms of the various prayers of judgment appropriate to the different classes of pleas in abatement.[23]

The body or substance of the plea, of course, will contain all the allegations of facts constituting the defense. As to the form and substance of these allegations, it may be said briefly that the statutes dispensing with profert,[24] allegation of time[25] or place,[26] except when material, fictions for the purpose of making the venue of the facts correspond with the venue of the action,[27] and dispensing generally with formal requirements,[28] all of which are discussed in the article dealing with the declaration,[29] are equally applicable to pleas in bar. To these may be added the statute which dispenses with the necessity for a protestation in any pleading.[30]

The collective result of these statutes would seem to be that the facts of the defense in a plea in bar may be alleged in any language, rhetorical form or sequence which will make the facts intelligible, without any restrictions as to form, and that the pleader could not demand any more liberality in this respect. In fact, as a mere matter of literary construction, it would seem that the pleader would find it inconvenient to dispense with many of the features of form which the statutes would permit him to ignore.

It should be remembered, however, that the statute dispensing generally with formal requirements[31] does not apply to pleas in

[21] W. VA. REV. CODE (1931), c. 56, art. 4, § 41.

[22] To the effect that a prayer of judgment, for the reasons explained in n. 11, *supra*, would still be necessary in a plea asserting a partial defense, see 4 MINOR, INSTITUTES (1878) 639. But why, if the body of the plea indicates that it is asserted only to a specific part of the cause of action, should a prayer of judgment be any more essential in such a plea than in a plea to the whole action?

[23] The *actionem non*, of course, is improper in pleas in abatement. Pleas in abatement ordinarily have no formal commencement.

[24] W. VA. REV. CODE (1931) c. 56, art. 4, § 15.

[25] *Id.*, c. 56, art. 4, § 16.

[26] *Id.*, c. 56, art. 4, §§ 14, 16.

[27] *Id.*, c. 56, art. 4, § 14.

[28] *Id.*, c. 56, art. 4, § 37.

[29] *Op. cit. supra* n. 1.

[30] W. VA. REV. CODE (1931) c. 56, art. 4, § 42.

[31] *Supra* n. 28.

abatement and that such pleas are still left open to demurrer for formal defects, a statutory policy which reflects the often repeated enmity of the courts toward dilatory pleas.[22]

The real problem which confronts the pleader under the local practice is not concerned with the form or substance of any given plea, but rather with the selection of the proper mode or modes of defense. Before the pleader can make a start in solving this problem, it is necessary for him to determine the various functions of the different modes of defense and the operative effect of the different classes of pleas by which the different modes of defense may be asserted. The trouble lies principally with the general issues.

After the declaration has been filed in a common law action, it is familiar law that the pleading process must be carried forward until an issue results from something affirmed on one side and denied on the other. This is a fundamental particularly emphasized (although in the later days of general pleading by no means always practically observed) in the common law system; but it would not seem to be the peculiar fruit of any technical tendency that may be ascribed to that system. It is a requirement which, in some form and to some extent, cannot be dispensed with in any system of pleading without abandoning one of the practical objects of pleading. It is the accomplishment of this result—the production of some sort of an issue, however general in its scope—which is supposed to deliver the judicial method of defining and settling controversies from the chaos so generally prevalent in lay disputation. The only difference of opinion should be as to the methods by which this object is to be attained and how far we may go in the way of seeking precision in the results without over refining the process.

The common law formula for carrying on the pleading process is to the effect that, after the declaration has been filed, each party in turn, unless he demurs, must plead, either (1) by way of traverse or (2) by way of confession and avoidance,[23] until an issue has been reached by something affirmed on one side and de-

[22] If such a policy is proper, of course the present state of the statutory law is in accord with it. But it has always seemed to the writer inconsistent for the law to tell a party that he has a clear right (to use dilatory pleas) and then proceed to place formal obstacles in the way of asserting that right. If such requirements merely operated to qualify the right and to reduce it to equitable proportions, very well and good; but to admit the unqualified right and then place artificial obstacles in the way of it is an entirely different thing.

[23] This is the way the formula is usually stated. Strictly, a third alternative, "by way of estoppel", should be added.

nied on the other. Hence the first task with which the pleader is confronted is to determine which one of these alternatives is appropriate for the particular defense which he proposes to urge. In more concrete language, since in this state the common, or specific, traverse and the special traverse are obsolete for purposes of controverting the allegations in the declaration, the problem for the defendant to solve is whether he will plead the general issue or a special plea; or, since he now may plead more than one plea, whether he will plead both the general issue and a special plea or pleas, the general issue ordinarily being pleaded as a matter of course.

Common law pleading reached the pinnacle of its development in the form of a technical and subtle art, preeminently as a system of special pleading. Not only were the common, or specific, traverse and the special traverse preferred to the general issue, but the proper functions of the general issue were usurped even by special pleas, through employment of the fictional device of giving express color in pleas alleging facts constituting mere argumentative denials. The later ascendency of the general traverses may be taken in a large measure as the manifestation of a desire to escape from the fictions, subtleties and technicalities incidental to the use of specific denials.

It will be noted that the original tendency of the general issues—those in the older forms of action, and presumably the earlier general issues in assumpsit and case—was mainly to serve as substitutes for specific denials. In other words, their general tendency was to put in issue only such matters in the declaration as might have been put in issue by the use of a common, or specific, traverse or a special traverse. For instance, the plea of not guilty in trespass, one of the older forms of action, puts in issue the act of trespass and the property right, either of which might have been put in issue by a specific traverse. If all the general issues had been confined to this simple and logical function as substitutes for specific denials, it would seem that there should not have been much confusion as to the scope of the general issues or as to when it would be permissible and necessary to resort to a special, or affirmative, plea. A defendant was permitted to traverse specifically only the *material allegations* of the declaration, and such was the maximum measure of denial of what may be taken as the model general issue, not guilty in trespass. Since the burden is generally upon the plaintiff to prove all the material allegations of his declaration, another way of stating the scope of this

general issue is that it puts in issue every allegation of the declaration which the plaintiff would be compelled to prove to make a prima facie case.[24] But, unfortunately for the logic of pleading, the development of the general traverses did not stop with this definite and logical delimitation which would have permitted the formulation of a single, general and standard rule for the purpose of defining the scope of all the general issues.

The general issues in case and assumpsit, although not the only culprits, ordinarily are the principal targets for criticism. This is perhaps true not so much because of the breadth of their transgressions (yet there are none broader), as because of the fact that their functions belie their names and contradict the express purport of their language. Not only do they put in issue the material allegations of the declaration, but, in addition thereto, include most affirmative defenses which in other forms of action must be pleaded specially. That this constitutes an illogical expansion of the scope of these general issues is indicated by the fact that it can be explained only on historical grounds, and that legal historians are not even in accord as to the historical facts. The different views are thus set forth by Professor Minor:

> "The declaration in the action of trespass on the case in *assumpsit*, states that the defendant, upon a certain consideration therein set forth, made a certain promise to the plaintiff, (St. Pl. 40; Id. (Tyler's Ed.) 72.) The general issue of *non-assumpsit* avers that defendant 'did not undertake or promise in manner and form,' &c. This, according *to its terms*, puts in issue merely the fact of the defendant's having made a promise such as is alleged. A much wider effect, however, in practice belongs to this plea, for which two reasons have been assigned. The first, suggested by Mr. Stephen, is that it is owing to the fact that the action of assumpsit is not unfrequently founded upon an implied promise, as well as upon an express one; and that the extension of the issue of *non assumpsit* was at first applied only in those cases where the promise was *implied from circumstances*, it being deemed not unreasonable that under a plea denying the promise, any circumstance should be provable which tended to repel the implication. And the doctrine having been once established in respect to *implied assumpsit*, it was, by a fallacious analogy, ultimately extended to such also as are express. The other reason has all the authority to be derived from the name of Lord Mansfield; but savoring as it does of his loose *equity views* of legal doctrines and processes, is not much regarded at present. It is

[24] Fuller v. Rounceville, 29 N. H. 554, SUNDERLAND, CASES ON COMMON LAW PLEADING, 563 (1854).

that the action of *assumpsit* (as well as other actions *on the case),* is founded on the mere justice and conscience of the plaintiff's case, and is *in the nature of a bill in equity, and in effect is so;* and, therefore, a release, payment, accord and satisfaction, or in short, whatever in equity and conscience will preclude the plaintiff from recovering, may properly be given in evidence under a plea which *denies the existence of the demand.* (St. Pl. 162 n (20); Id. (Tyler's Ed.) 173-4; Bird v. Randall, 3 Burr. 1653; 1 Chit. Pl. 527.)"[35]

"The declaration in *trespass on the case in* general sets forth specifically the subject of complaint; and this general issue of *not guilty* in terms is a mere traverse of the facts alleged in the declaration, and therefore on principle should be applied only where the defense *rests on* such denial. But here a relaxation has taken place similar to that which prevails in *trespass on the case in assumpsit;* for under the plea in question, not only is a defendant permitted to contest the declaration, but with certain exceptions, (e. g. the statute of limitations, the *truth* in an action of libel, &c.,) to prove any matter of defense which tends to show that the plaintiff has no right of action, though the matter be in confession and avoidance, as e. g. a *release given,* or *satisfaction* made. This relaxation of the just principles of pleading seems to have no other excuse but that of a forced analogy to the similar practice in *trespass on the case in assumpsit.* (St. Pl. 162, n (20); Id. (Tyler's Ed.) 178-9.)"[36]

This illogical, even if expedient, expansion of the two general issues mentioned is objectionable for more than one reason. While they, like other general issues, with at least one anomalous exception,[37] perform the legitimate function of putting in issue the material allegations of the declaration, they do not stop there. They permit other defenses to be asserted at the trial which have never been put in issue in any proper sense at all. It is ordinarily said that they put in issue certain enumerated affirmative defenses, such as infancy, accord and satisfaction, etc., but in fact they do nothing of the sort. They merely warn the plaintiff that the defendant may elect at the trial to rely upon numerous affirmative defenses the facts of which have never been put in issue by any pleading, because nothing has even been affirmed, much less denied, in the pleadings with reference to such facts. Hence, as to such defenses, they give no notice to the plaintiff of the nature or extent of the evidence which he must prepare to combat, nor do they furnish any guide for the introduction of

[35] 4 MINOR, INSTITUTES (1878) 644-5.
[36] *Id.* 646.
[37] Falsity (or truth) of the words in an action for libel or slander.

proof by either party. Such issues as are produced are developed and finally emerge from the proof process.[38] The great breadth of these general issues, however, would seem to minimize any risk that the defendant might take in relying on too broad a content, since one can easily retain in memory the few exceptional defenses which cannot be asserted under them. Yet upon his memory the pleader must rely, and not upon any logical rule, for the purpose of determining what he must plead specially.

Confusion in another respect, although perhaps not very excusable, may arise for those who do not thoroughly comprehend the anomalous situation. A defendant is not compelled to assert any defense involving new matter under these broad general issues. He merely has the option to do so. If he so elects, he has the right to plead any new matter in a special plea, in spite of the fact that he has already pleaded the general issue and might assert the defense under the latter plea.[39] He has this right because such a special plea truly confesses and avoids the declaration. But the fact that such use may be made, and frequently is made, of a special plea, may give rise to the unwarranted impression that the special plea is a necessity under such circumstances, rather than a privilege.[40] And this confusion may be augmented by the fact that defenses involving new matter must be pleaded specially in other forms of action.[41]

As already suggested, the general issues in case and assumpsit are not the only ones which usurp the legitimate functions of special pleas. *Nil debet,* in an action of debt on a simple contract, is said to be equally as broad as *non assumpsit,*[42] and there are few

[38] "Nor was it difficult to make a plausible case against the extended scope which had been given to the general issue, for, though it was by far the most efficacious remedy for the evils of the system of special pleading, it had its defects. The issue was not clearly defined. Issues of fact were not distinguished from issues of law, and the parties did not know exactly what were the issues of fact upon which the case really turned. It followed from this that the parties incurred expense by reason of the 'unnecessary accumulation of proof,' often of facts which turned out at the trial to be undisputed." W. S. Holdsworth, *The New Rules of Pleading of the Hilary Term, 1834,* 1 CAMBRIDGE L. J. 261 (1923), quoted in CLARK, CASES ON PLEADING AND PROCEDURE (1930) 154.

[39] First National Bank of West Union v. Freeman, 83 W. Va. 477, 98 S. E. 558 (1919); State v. Turner, 84 W. Va. 485, 100 S. E. 294 (1919).

[40] For instance, the writer some years ago heard a practitioner of considerable experience insist that infancy must be asserted by a special plea in assumpsit.

[41] For example, infancy, which may come in under the general issue in assumpsit, must be pleaded specially in covenant.

[42] Virginia Fire and Marine Insurance Co. v. Buck, 88 Va. 517, 13 S. E. 973 (1891). See 4 MINOR, INSTITUTES (1878), 641-2, criticising this general issue as too broad.

defenses which cannot be asserted under *non detinet* in detinue and "not guilty" in trover. *Nil debet* and *non detinet* are naturally broad in their terms, operating, as they do, under the present tense.[43] Furthermore, they operate upon very general allegations in the declaration, as does "not guilty" in trover. In fact, "not guilty" in trover traverses a broad legal conclusion alleged in the declaration. But the fact remains that these traverses permit many defenses which have nothing to do with a denial of allegations which the plaintiff must prove in order to establish a prima facie case and give as little notice to the plaintiff of the nature of the defense as do the general issues in case and assumpsit. Such being so, the practical situation will receive little aid from the mere logic of language.

A reaction developed against the general issues. No doubt a large measure of this reaction resulted from a realization of the obvious evils of a system of pleading that had become too general; but the reaction was at least stimulated and partly guided by the influence of lawyers, such as Stephen,[44] who had not forgotten the splendors of the golden age of pleading—the subtleties and artistry of special pleading, which offered the legal knight errant such a worthy opportunity to test his mettle.

This reaction culminated in the adoption in England, in 1834, of the famous Hilary Term Rules; and in America, in the enactment in New York, in 1848, of the Field Code, the latter being the progenitor of the various practice codes which were afterward adopted in a majority of the states. The general tendency of these rules and codes is toward a system of special pleading, but the Hilary Term Rules, more particularly than the codes, exemplify this tendency by way of specific attack upon the general issues.

The results obtained from the Hilary Term Rules were far from satisfactory. Professor Holdsworth refers to them as a "disastrous mistake."[45] Yet it has always seemed to the writer that the general object of these rules was both logical and expedient, if the reaction away from general pleading had not been carried too far in the opposite direction.

The general effect of the Hilary Term Rules was to narrow the scope of the general issues by way of requiring specific traverses or special pleas in numerous instances where the general

[43] The Hilary Term Rules substituted *"numquam indebitatus"* for *nil debet.*

[44] Stephen was one of the commissioners who framed the Hilary Term Rules.

[45] See CLARK, CASES ON PLEADING AND PROCEDURE (1930), 155.

issue had before been sufficient. Not only did they divorce the abnormally broad general issues from their illogical content, but they further narrowed the traversing effect of all the general issues until they amounted to nothing more than single specific traverses. For example, under the common law, "not guilty" in trespass denies both the plaintiff's property right and the act of trespass, because without these two things the plaintiff does not have a prima facie case. But under the Hilary Term Rules, only the act of trespass was put in issue, and, in the absence of a specific traverse of the property right, it was confessed, in spite of the fact that it is one of the indispensable original elements of the plaintiff's cause of action. As a result, many of the original evils of special pleading were revived. But the mischief did not stop there. An entirely new field of uncertainty was opened up, producing a multitude of cases in which the courts were called upon to construe the rules and decide the propriety of their application.

The object of the practice codes is not, like the Hilary Term Rules, to amend the common law situation, but rather to substitute a new system for the common law system. They differ somewhat in the different states, but, as compared with the common law system in its present state, their general tendency is in the direction of special pleading. Already enough evils have arisen from this tendency to cause dissatisfaction. They are not subject to all the technicalities of common law special pleading, but still their tendency is to over refine and over regulate the processes of pleading. There is a growing suspicion that, although the practice codes may be better than the common law system, still we have not yet succeeded in discovering the ideal system, even relatively. It is believed that there is at least the beginning of a present reaction back again in the direction of general pleading, without any very definite goal toward which it is directed.[46]

Should we make a change in the local practice? If so, what should we do? As long as we retain the common law forms of action and the common law declaration, perhaps we should not seriously consider doing anything other than to alter the common law system with reference to pleas and the subsequent pleadings.

A study of the reactions enumerated above, which are almost, if not quite, "equal and opposite in direction," would seem to justify one generalization, if no other: that all systems of plead-

[46] This tendency may be noted in the implications arising from such terms as "notice pleading", a generalization frequently heard in recent days.

ing, without exception, are machinations of the devil, and as such are to be endured, if at all, like sin, as a necessary evil. To this sentiment the writer is willing to subscribe. Yet it is believed that lawyers should not have as much difficulty in demonstrating the necessity for their evil as theologians have encountered in justifying sin. It is believed that it is a virtue in pleading to dispense with pleading as far as practicable. But some pleading, in some form at some stage of the procedure, we must tolerate. If a disclosure of all defenses, like the affirmative defenses now comprehended within the scope of the general issue, were transferred from the pleadings to the trial process, one or the other of two possible consequences would follow: (1) The trial might proceed without any of the issues being defined in advance of the introduction of evidence. Such a situation would not be any worse than part of the situation which now exists. (2) The parties at the trial, preliminary to the introduction of proof, might give way to a spontaneous and inevitable urge to define some sort of an issue and resort to oral altercation, either before the court or before the jury by way of opening statement. This would be a mere reversion to the days of oral pleading.

There is something to be said in favor of transferring as much of the burden as practicable from the pleadings to the trial process, as a means of escaping technicality. There seems to be an inevitable tendency in any system of pleading, designed to operate and be controlled through its own mechanism, to resort to and develop technicalities. This seems to be inherent in the nature of the process. The less formal and more spontaneous methods of the trial process would tend to obliterate matters which call for technical decision in the pleading process. Yet it is believed that this consideration would justify neither of the alternatives mentioned above. The conclusion is that there must be a compromise, and the problem is where to draw the line.

Perhaps some who have not taken the trouble to analyze the situation may be startled by the statement that in most of the forms of action virtually all pleading may be dispensed with except the allegations in the declaration. Enough has already been said to indicate the purport of this statement. Practically all defenses come in under the general issues. It must be pleaded, of course, in the absence of a special plea, to make up an issue. But the plaintiff always expects it and comes prepared to meet it. So far as it casts the burden of proof upon him, he looks to his declaration and not to the plea to determine the nature of that burden. To this extent and for this purpose, the plea is a mere

formality, and for that reason may be pleaded generally and informally. But to the extent that it permits all the various defenses involving new matter, it is really no plea at all. The plaintiff would be just as well off if a statute provided that the defendant might assert such defenses in the absence of any plea. It would be no radical departure from the present state of the law if a statute should be enacted providing that the general issues in most of the forms of action should be abolished; that all the material allegations of the declaration should be in issue without a plea; that all other defenses, except a few specifically enumerated, might be asserted without a plea; and that the defenses so enumerated should be asserted by special pleas. In fact, it may be seriously considered whether such a statute would not tend to simplify the situation. This is a matter for consideration by those who are satisfied with the present scope of the general issues.

It is assumed, however, that the majority of objectors to the present situation disapprove of the scope of the general issues in most of the forms of action and are interested only in seeking some practical method by which the scope may be narrowed. In selecting the method, it will likely be agreed that, other things being equal, it would be desirable to devise and adopt some logical and uniform rule, for the purpose of defining the scope, that may intelligently be applied in all the forms of action. Four possible alternatives are suggested. (1) Each general issue may be narrowed to the scope of a specific traverse denying what is supposed to be the principal allegation of the declaration, leaving all other allegations to be denied by specific traverses and all defenses involving new matter to be asserted by special pleas. Such was the practical effect of the Hilary Term Rules. (2) The scope of each general issue may be made to depend upon the literal language of its formal allegations, its traversing breadth being determined by the purport of its language as operating upon the allegations of the declaration. (3) It may be provided that the general issue in each form of action shall put in issue only such allegations of the declaration as, if specifically traversed, the plaintiff would be compelled to prove to make a prima facie case. (4) It may be provided that the general issue in each form of action shall put in issue all the material allegations of the declaration.[47]

The first alternative would bring back the evils of special pleading, and, therefore, would be subject to all the criticism

[47] Something in the nature of the third or the fourth alternative is now common in the code states.

which has been incurred by the Hilary Term Rules.[43] Such a solution, in fact, would involve, not reformation, but abolishment, of the general issues, and a mere transfer of their names to certain selected specific traverses.

The second alternative would be undesirable for more than one reason, assuming (as is assumed) that the language of the general issues is not to be changed, but that they are to be accepted in their present and long established general form. A serious objection is that the language is so general in its purport, having final significance only by way of reference to and operation upon the allegations of the declaration, that it would furnish an indefinite guide as to the traversing effect. It was probably this consideration which caused the commissioners who framed the Hilary Term Rules specifically and literally to define the content of the various so called general issues which they established. Moreover, such a solution would leave some of the general issues still too .broad through operation of the express terms of their language. Such would be true, for reasons already noted, in the actions of debt on a simple contract, detinue and trover. And it would seem that nothing definite could be done by way of a change

[43] The following satiric dialogue, quoted in CLARK, CASES ON PLEADING AND PROCEDURE (1930) 155-6, is supposed to have taken place between the shades of Mr. Crogate, of the celebrated Crogate's Case, fountain source of the principles governing the replication *de injuria,* and Baron Surrebutter, alias Baron Parke, concerning the Hilary Term Rules.

"Crogate. Oh! you've been making new rules about pleading, have you? then I suppose, as a matter of course, that you've pretty nearly done away with the whole thing. Surrebutter B. Done away with special pleading? Heaven forbid! On the contrary, we adopted it (subject to the relaxation introduced by the Statute of Anne) in even more than its original integrity; for we have enforced the necessity of special pleas in many actions in which the whole case was previously left at large, on the merits under the general issue. And we framed a series of rules on the subject, which have given a truly magnificent development to this admirable system; so much so, indeed, that nearly half the cases coming recently before the Court, have been decided upon points of pleading. Crogate. You astonish me. But pray, how do the suitors like this sort of justice? Surrebutter B. Mr. Crogate, that consideration has never occurred to me, nor do I conceive that laws ought to be adapted to suit the tastes and capacities of the ignorant. At first, to be sure, we found that in consequence of our having restored the ancient strictness of pleading, when it had been relaxed, and applied it to several of the most common forms of action to which it had never previously been applied, plaintiffs were put into considerable perplexity by special pleas. If they denied too much a demurrer for duplicity followed; and if they only denied one point, and consequently admitted the rest, they sometimes traversed the only allegation which could be proved, or, to use your language, they took the wrong sow by the ear. In this state of things, though justice was by no means uniformly defeated, yet this result took place more frequently than was convenient, and some obloquy was beginning to attach to the new rules. In this emergency, Mr. Crogate, we fell back on the replication de injuria with the happiest success. * * * And thus we were enabled to bring the system of pleading as near to perfection as I believe to be possible."

in the language that would not result in a mere collection of specific traverses, unless general language should be adopted for the purpose of resorting to the third or the fourth alternative.

The third alternative would seem to be more in accord than any other solution with the true and logical function of a general traverse, if we are to have such a traverse at all. In fact, we already have a precedent for it at the common law in a general issue which had become fixed in its content before the process of inflation began to operate upon the later general issues. In the action of trespass, the oldest tort action, the plea of "not guilty" puts in issue such allegations, and only such allegations, as the plaintiff is compelled to prove to make a prima facie case.[49] Such a limitation would eliminate defenses involving new matter from the scope of the general issues in all the forms of action, but would not compel a resort to specific traverses, as did the Hilary Term Rules. The effect would be the same as if a separate specific traverse were pleaded to each material allegation of the declaration which the plaintiff is bound to prove under the present general issues, without the risks and complications involved in undertaking actually to plead such traverses. The general issue, by force of the statute, would stand as a symbol to this effect, whatever the implications that might come from its name or the language in which it was worded,[50] if indeed it should need to have a name or to be worded in any language at all other than the mere statement that it is pleaded. Such a solution would seem to be fair to both the plaintiff and the defendant, and to provide a uniform and logical rule for the purpose of determining the scope of all the general issues. On the one hand, the plaintiff must know that under such a plea he would be compelled to prove all the material facts alleged in his declaration as to which he had the burden of proof, and surely he should not object to the task of diagnosing the nature of the facts which he himself has alleged. And he would know that he did not have to prepare proof for any other purpose, unless specifically warned and informed by a special plea. On the other hand, the situation would be simple for the defendant. He would know that he was entitled to plead specially,

[49] Fuller v. Rounceville, *supra* n. 34.

[50] It is suggested that the general issue, if it is put in the form of an allegation at all, either under the third or the fourth alternative, be worded as follows: "The defendant traverses generally the plaintiff's declaration;" or "The defendant traverses generally the first count of the plaintiff's declaration;" or some equivalent language, leaving it to the statute to define the breadth of the traverse. Such a form of traverse would be in accord with the present local practice as to general replications.

and must plead specially, only such matters as do not operate by way of denying the material allegations of the declaration as to which the plaintiff has the burden of proof. There would be no confusion resulting from the right to elect between the general issue and a special plea, because there would no longer be any such right. He would still be under the necessity of distinguishing between facts constituting new matter in confession and avoidance or estoppel and facts the effect of which is merely argumentatively to deny the allegations in the declaration, but this would be no new burden. He already knows that, under the present practice, he should not attempt to plead specially any facts the effect of which is simply to deny an allegation in the declaration, because, if he does so, his plea is objectionable because it amounts to the general issue, is an argumentative denial and pleads evidence. But if he made a mistake in this respect, the error would be one of little consequence.[51]

It may be urged that the general issues, even as narrowed in their scope by the proposed innovation, would still be impracticably broad, because they might compel the plaintiff to come to the trial prepared to prove allegations in his declaration which the defendant did not intend to controvert. This objection is one commonly urged against the present general issues. There are several counter arguments to this objection.

If the objection be urged in favor of specific traverses, it may be doubted whether a resort to specific traverses in lieu of a general traverse would remedy the situation. The defendant is not, under the statute, confined to a single plea, and the modern policy of the law is to permit him to assert as many defenses as he may propose. If he is denied the full logical breadth of the general issue as a traverse, he will certainly be given the privilege of pleading a sufficient number of specific traverses to cover the breadth of the general issue. These traverses would presumably be pleaded with the same facility as the general issue and would be a means, merely involving more trouble on the part of the defendant, of putting the plaintiff to the same measure of proof to which he would be subjected by the general issue.

Even under the present law, the plaintiff has a remedy in

[51] See BURKS' PLEADING AND PRACTICE (1913) 330-331. Such pleas have been held by the local court properly rejected as amounting to the general issue. Richards v. Riverside Iron Works, 56 W. V. 510, 49 S. E. 437 (1904); Raleigh County v. Cottle, 79 W. Va. 661, 92 S. E. 110 (1917). But in each case observed by the writer, the general issue apparently had already been pleaded, and the question did not arise as to the effect of the plea standing alone.

situations where he conceives that the general issue does not give him sufficient notice for the purpose of preparing his proof, or might cause him to come to the trial with a surplus of proof.

> "In like manner, if good cause therefor appear, and there be no unreasonable delay on the part of the plaintiff in applying for such order, the court or judge in vacation may order the defendant to file a more particular statement, in any respect, of the nature of his defense, or the facts expected to be proved at the trial, which statement shall be made under the oath of the defendant, or some other credible person, to the effect that the affiant believes the same will be supported by evidence at the trial."[52]

Under the present scope of the general issues, this statute is of principal use to the plaintiff as a means of compelling the defendant to disclose his affirmative defenses. Under the proposed narrower general issues, it would be necessary to assert all such defenses by special pleas and such pleas, without the aid of any additional statement, would likely give the plaintiff sufficient notice. But the statute undoubtedly covers the traversing portion of the present general issues and would compel statements supplementing them after they had been narrowed as proposed.

Other statutes provide that, in certain specific instances, it shall not be necessary for the plaintiff to prove certain facts alleged in his declaration "unless the pleading which puts the matter in issue be verified, or there be an affidavit filed therewith denying" such facts.[53] If the defendant desires to put such facts in issue by the general issue, an affidavit denying the specific facts must accompany the general issue. Otherwise, the facts are admitted and no proof is necessary.

It may be suggested that these affidavits and sworn statements, to the extent that they deny facts alleged in the declaration, are, after all, merely specific traverses operating under a disguise. Such may be their practical effect upon the issues, but upon the whole they are desirable *substitutes* for technical special pleading, and it is believed that there are other instances not now covered by the statutes where they should be prescribed.[54] If they

[52] W. VA. REV. CODE (1931) c. 56, art. 4, § 20.

[53] The making, indorsing, assigning or accepting of any writing alleged in any pleading. W. VA. REV. CODE (1931) c. 56, art. 4, § 46. Entry or genuineness of a judgment or decree, when recovery thereof is alleged in a pleading. *Idem.* The existence of a plaintiff or defendant corporation or partnership. W. VA. REV. CODE (1931) c. 56, art. 4, § 47.

[54] For instance, proof of the ownership or control of property or premises through which a tort is alleged to have been committed.

Such statutory provisions are justifiable largely upon two assumptions:

perform the functions of specific traverses, they nevertheless do so outside of the technical field of pleading, thus performing all the desirable functions of special pleading and at the same time avoiding the technicalities. They are in effect informal intermediaries between the pleading process and the proof process, aiding the latter and avoiding the technicalities of the former.

The fourth alternative mentioned above almost, but not quite, coincides with the third, and most that has been said with reference to the third will apply equally to the fourth. The third involves a determination of the burden of proof, while the fourth does not, simply putting in issue all the material allegations regardless of where the burden of proof lies. Ordinarily, this distinction would be immaterial, because the plaintiff usually must prove all the material allegations of his declaration in order to make a prima facie case at the trial. Such, for instance, is true in the action of trespass. But in some of the forms of action, there are a few instances, somewhat anomalous, where the plaintiff must allege matters which he is not required to prove, as, for example, falsity of the words in libel or slander and non-payment in debt or assumpsit. If it were not for these exceptional instances, the fourth alternative would be preferable to the third, because it is simpler in application. It would introduce no innovation as to non-payment. The present general issues put payment in issue. But it would put in issue the falsity (or truth) of the words in libel or slander without a justification having been specially pleaded. If it would be undesirable to permit the defendant to prove the truth of the words without a special plea, or if it would be desirable to require a special plea of payment, these would be considerations why the third alternative would be preferable to the fourth.

Objection to the third alternative because it would involve determination of the burden of proof perhaps should not carry much weight. In fact, it may be desirable to perform this task, to the extent that there is any, at this stage of the procedure. It is a task which, at any event, must be performed before the introduction of proof. If the diagnosis is made when the issues are made up, it will be done with more deliberation and lead to a more definite understanding of the situation on the introduction of proof.

(1) that the matter in the majority of cases will not be controverted in the evidence; or (2) that the matter is difficult for the pleader to prove because of the nature of the evidence or because the truth or falsity of the matter is more peculiarly within the knowledge of the opposite party.

As to the replication and the subsequent pleadings, little need be said. After the plea, the pleading process under the local practice is comparatively simple.

A joinder of issue, or *similiter,* upon a traverse (upon the general issue, for instance), which could not occur until the replication stage, is unnecessary at any stage of the pleadings.

> "When any party takes issue on another party's pleading, or traverses the same, or demurs, so that such other party is not let in to allege any new matter, no similiter or joinder in demurrer shall be necessary, but either party may proceed as if there were a similiter or joinder in demurrer."[55]

Most that has been said with reference to the formal parts[56] and contents of pleas will apply to replications and the subsequent pleadings. The same statute which dispenses with the *actionem non* and prayer of judgment in pleas likewise dispenses with the formal commencement, or *precludi non,* and prayer of judgment in replications and the subsequent pleadings.[57] And, of course, the statute dispensing generally with formal requirements in the allegations[58] is applicable to all pleadings indiscriminately.

After pleas, there is nothing at the common law which resembles the general issues except the replication *de injuria,* which is permitted as a general traverse of all the material allegations of pleas in certain forms of action and under certain circumstances.[59] Where the replication *de injuria* is not proper, the plaintiff is compelled to resort to a specific traverse for the purpose of denying any allegation of a plea. The replication *de injuria,* in its common law technical form, is not used under the local practice; but, in lieu thereof, the plaintiff makes use of what is called a "general replication,"[60] the effect of which is to traverse all the material allegations of the plea. The general replication may be pleaded informally, in any language which discloses an

[55] W. VA. REV. CODE (1931) c. 56, art. 4, § 44.

[56] See 4 MINOR, INSTITUTES (1878) 670, for the formal parts of a replication.

[57] W. VA. REV. CODE (1931) c. 56, art. 4, § 41. But see 4 MINOR, INSTITUTES (1878) 671, to the effect that the *precludi non* and prayer of judgment are still necessary when the replication does not maintain the whole action. The observations in n. 11, *supra,* apply here.

[58] W. VA. REV. CODE (1931), c. 56, art. 4, § 37.

[59] See Selby v. Bardons, 3 Barnwall & Adolphus 2, SUNDERLAND, CASES ON COMMON LAW PLEADING (1832) 660; KEIGWIN, CASES IN COMMON LAW PLEADING (1924) 608-9; 4 MINOR, INSTITUTES (1878) 671-2. Professor Keigwin explains that the use of this traverse was much extended through the effect of the Hilary Term Rules.

[60] National Valley Bank of Staunton v. Houston, 66 W. Va. 336, 66 S. E. 465 (1909); Parfitt v. Sterling Veneer & Basket Co., 68 W. Va. 438, 69 S. E. 985 (1910); Hunt v. DiBacco, 69 W. Va. 449, 71 S. E. 584 (1910).

intent to "reply generally" to the plea. It is appropriate in all forms of action and with reference to any plea the allegations of which are subject to a traverse. The writer is not aware of any statute authorizing this practice, which is an innovation upon the common law, and has not observed in the local cases or books any explanation that would justify its use. It is significant, however, that a similar practice was adopted by statute in England about the middle of the last century, and it may be surmised that the English statutory practice has been adopted by the courts of this state without legislative sanction.

> "The Hilary Rules, as a whole, have not been adopted in any of the American states, and the English decisions upon this point have not generally been accepted here as authorities *per se.* But in 1852 an English statute provided that either party might plead, in answer to the plea or subsequent pleading of his adversary, that he joins issue thereon, in this form, 'The plaintiff joins issue on the defendant's (1st) plea,' or 'The defendant joins issue upon the plaintiff's replication to the first plea.' The effect of such a joinder is to traverse and put in issue all the material averments in the pleading on which issue is joined. This form of pleading has been well said to be 'in the nature of a general replication de injuria.'
>
> "In many, perhaps most, American jurisdictions a like joinder in issue is authorized in all actions and at any stage of the cause. As such form of pleading is equivalent to the Replication *de Injuria* in its effect of compendious negation, the practical result is that a party may in any action, not only reply, but rejoin or surrejoin *de injuria;* and some lawyers who shudder at the imaginary intricacies of pleading would be shocked to learn that they have all their lives been using the archaic and mysterious Replication *de Injuria* in disguise, and to an extent vastly beyond the contemplation of the common law, very much as the *bourgeois* in Moliere's comedy was startled to discover that he had always spoken prose without knowing that it was prose."[61]

Whatever the origin of the local practice, it is believed to be wholly desirable. This general replication is subject to none of the criticisms which apply to the general issues which let in affirmative defenses. All new matter in opposition to any plea must be pleaded by a special replication. Yet it has that precise scope of denial which would seem to be desirable in the general issues. We should be entirely thankful that we have it instead of the replication *de injuria.* There may not be anything mysterious about the use of the replication *de injuria* in a situation where it is

[61] KEIGWIN, *op. cit. supra* n. 59, 609-610.

proper to use it, but the diagnosis of situations for the purpose of determining the propriety of its use calls for some of the most subtle distinctions in the whole course of procedure; and after all, its use is limited.

In conclusion, space will permit only a brief consideration of the statutes permitting and regulating multiple pleading. The statutes permitting pleas in abatement and in bar at the same time,[62] any number of pleas in bar and a demurrer at the same time and more than one replication to the same plea,[63] have long been familiar; but it may not be so generally known that, until the enactment of the Revised Code, there could not be a demurrer and a replication at the same time to the same plea.[64] Nor, since special pleadings are seldom used beyond the replication stage, may it be so well understood that, after that stage, the common law requiring singleness of issue both as to law and facts is still in force in this state; and hence that there can be only one rejoinder to the same replication and there cannot be a rejoinder and a demurrer to the same replication at the same time.[65]

As already suggested, there is not very frequent occasion for filing a special pleading after the replication stage, and the occasion for filing more than one would be still less frequent; but the writer has always been inclined to believe that the statute might have given entire liberty in that respect at any stage of the pleadings without any serious risk of further unduly multiplying the issues, which is the only objection. It would seem obvious that the chances for unduly multiplying the issues by multiple pleading after the replication stage are rather negligible in comparison with the effect in that respect of the present statutes providing for multiple pleas and replications. There might be more occasion for pleading and demurring at the same time after the replication stage, but to permit such a practice would only produce an extra issue of law to be decided by the court and would in no way tend to amplify or confuse the issues which the jury must decide. It would seem desirable to expand the terms of the statute so as to permit either party, at any stage of the pleadings, to file as many different pleadings as he may desire and to demur at the same time, for the sake of uniformity in practice, if for no other reason.

[62] W. VA. REV. CODE (1931) c. 56, art. 4, § 38.

[63] *Id.*, c. 56, art. 4, § 39.

[64] Camden Clay Company v. Town of New Martinsville, 67 W. Va. 525, 68 S. E. 118 (1910). The procedure was to withdraw the demurrer after it had been overruled and then reply.

[65] Under the present law, after a demurrer to the replication is overruled, it is necessary to withdraw the demurrer before rejoining, and a similar practice is necessary at all subsequent stages of the procedure.