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Charles Liebert Crum

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CHARLES LIEBERT CRUM*

It is worth remembering in considering problems of pleading in North Dakota that only two years ago the one hundredth anniversary of the Field Code of Civil Procedure, the basic pleading law of North Dakota, was observed by a group of distinguished lawyers.[1]

North Dakota adopted the Field Code of Civil Procedure in 1868, incorporating the amendments which had been added to it by the California legislature.[2] Our law of pleading is therefore 82 years old. Since it was adopted, many changes have come and gone in the field of pleading and in procedural law in general. Many states have adopted provisions, based upon years of experience with the problems of the Field Code, which represent improvements over the provisions of David Dudley Field's celebrated attempt to prescribe a uniform, simple system of procedure. The federal courts, after calling in a committee of nationally recognized experts, have adopted a new and simplified system of pleading and procedure which it has been suggested might well be considered for use in North Dakota.[3]

All of this has come about primarily because it has been recognized that procedural law is a field of law which requires constant, watchful attention.[4] Substantive law is often of such character that it requires only minor changes to remain up to date, but it has been said by one of the acknowledged masters of the law of pleading that "unless pleading rules are subject to constant examination and revaluation, they petrify and become hindrances, not aids, to the administration of justice."[5]

One portion of the law of pleading which it is submitted is ripe for re-examination consists of the rules which have grown up around the general denial permitted by the Field Code. Based as it is upon a common law development of pleading which was very unusual in character, the general

*Assistant Professor of Law, University of North Dakota.

1 See Reppy, **The Field Codification Concept** in Field Centenary Essays 17 (1949).

2 Viesselman, Dakota Practice § 2 (1930); Preface to N. D. Rev. Code of 1895, p. v.

3 See Lanier, **Should North Dakota Adopt the Federal Rules of Civil Procedure?**, 26 N. D. Bar Briefs 153 (1950).

4 Clark, **Simplified Pleading**, 2 F.R.D. 456, 459-60 (1943).

5 Clark, Code Pleading § 12 (2d ed. 1947).

denial presents a serious obstacle toward the development of a clear and concise system of pleading which serves to notify both parties of the issues to be litigated.

The general denial is simply a pleading which denies every material allegation of the plaintiff's complaint.[6] In form it is ordinarily very brief and simple:

"For his answer to the complaint of the plaintiff herein, the defendant denies each and every allegation of the complaint."[7]

Despite this superficial simplicity, however, the plea presents a series of complex and difficult problems.[8] Before considering the present status of the plea, it may be well to consider briefly the history which underlies it.

As it now exists, the general denial is the lineal descendant of the plea of the general issue permitted under the common law system of special pleading.[9] Modern legal thinking recognizes pleading for what it actually is—a branch of the law of procedure which has as its chief object the furnishing of notice to the adversary party of the claims and defenses which it is proposed to present in a pending legal proceeding.[10] But at common law, pleading was regarded as being an end in itself instead of as a means to an end. Holdsworth states that the three main characteristics of common law pleading were its "precision, subtlety, and technicality" and adds that it was regarded as "the most exact, if the most occult, of the sciences."[11]

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[6] Pomeroy, Code Remedies § 533 (1904).

[7] Clark, Code Pleading 584 (2d ed. 1947); Phillips, Code Pleading § 331 (2d ed. 1932).

[8] "No topic connected with the whole subject of pleading is. . .more important than the questions thus suggested." Pomeroy, **op. cit. supra** note 6, § 543.

[9] The relationship can be clearly traced through such cases as McLarren v. Spalding, 2 Cal. 510 (1852) and Gavin v. Annan, 2 Cal. 494 (1852), both of which held that the general denial permitted by the Field Code was identical in scope with the plea of the general issue permitted at common law. In **McLarren v. Spalding** a tenant being sued for rent was allowed to prove that he had been evicted from the premises under a general denial, the court stating that the plea of the general denial was substantially equivalent to a plea of **nil debet** at common law. In **Gavin v. Annan** the defense of accord and satisfaction was held admissible under a general denial for the same reason. Both cases were overruled by Piercy v. Sabin, 10 Cal. 22 (1858).

[10] Clark, **Simplified Pleading**, 2 F.R.D. 456, 460 (1943).

[11] 9 Holdsworth, History of English Law 263 (1926).

Exact and precise, to the point of logical absurdity, the common law system of pleading certainly was. It had as its theoretical object the presentation of but a single point or issue to the jury for settlement.[12] To this end, when a plaintiff had presented a complaint, the common law imposed on the defendant the duty of doing one of two things: he might traverse (take issue with) all or some of the allegations found in the complaint, or he might admit the truth of the matters alleged in the plaintiff's pleading and plead new matter to avoid the legal consequences flowing from his admission.[13] To the doing of these two things, the common law system of pleading rather rigidly restricted the defendant. He could not, for example, deny the allegations of the declaration by pleading a set of facts at variance with the complaint. This rendered the pleading subject to demurrer on the ground that it contained an argumentative denial.[14]

As a practical matter, however, it was generally simpler to deny or traverse the allegations of the complaint than admit them and plead new matter. This was because the common law system called for a further pleading on the part of the plaintiff once the defendant had confessed the truth of the plaintiff's declaration and avoided the legal effect of the confession by pleading new matter in avoidance. Thus, if a plaintiff pleaded a debt arising from contract and the defendant pleaded payment—a defense which admitted the contract and the former existence of the debt but avoided the effect of the admission by adding the new point that the debt had been paid—the single issue which was the objective of common law pleading had not been formed until the plaintiff had either traversed the new matter by denying payment or had in turn pleaded matter which confessed the plea of payment and avoided its effect.[15]

It was easier, therefore, to bring matters to a head at once by simply taking issue with the allegations of the plaintiff's

[12] Thayer, Preliminary Treatise on Evidence at Common Law 353 (1898).

[13] Holdsworth, op. cit. supra note 11, at 269, 287.

[14] Day v. Wamsley, 33 Ind. 145 (1870); Spencer v. Southwick, 9 Johns. 314 (N. Y. 1812). See Pendleton County v. Amy, 13 Wall. 297, 303 (U. S. 1871).

[15] The process of confessing and avoiding outlined above could be carried on almost indefinitely. Thus, the plaintiff's declaration was followed by the defendant's plea (answer). Then followed a "replication" by the plaintiff, a "rejoinder" by defendant, "surrejoinder" by plaintiff, "rebutter" by defendant, and "surrebutter" by plaintiff. Phillips, Code Pleading §§ 86, 87 (2d ed. 1932).

declaration, thereby cutting short the complicated process of further pleading which was required following a plea in confession and avoidance. By simply pleading the general issue the common law pleaders found they could avoid the reefs awaiting them once they embarked on the sea of special pleading. The popularity of the plea of the general issue with the common law pleaders may be in part explained on the theory that it was a practical method of simplifying a system of pleading which had grown too technical for successful application.[16]

But a further explanation of the use of the general issue by the common law pleaders may be found. The verbalistic precision of the common law courts had early led them to admit proof of practically any matter which went to show that the plaintiff did not have a right of recovery when the case came to trial. This was particularly true of the general issue when used in the actions of debt and assumpsit.[17] So construed, the general issue was an ideal tactical weapon for a defendant. It permitted him to keep his adversary in the dark as to his defense until the last minute.[18] The scope of the matter admissible under the general issue varied slightly with the form the plea took. Thus, *nil debet,* the general issue in actions of debt, was at one time construed to let in defenses which would not have been admissible under the plea of *non assumpit,* for the reason that the plea of *nil debet* was couched in the present tense, "there is *now* no debt owing from the defendant to the plaintiff," while the plea of *non assumpsit* was couched in the past tense: the defendant denied that he had undertaken to pay. Because of these slight differences in point of grammatical form, anything which showed that there was no debt owing when the case came on for trial, including matter in confession and avoidance, was held to be admissible under the plea of *nil debet*; under the plea of *non assumpsit,* because in form it denied only the defendant's undertaking to pay, the defendant was restricted to proof

[16] Holdsworth, op. cit. supra note 11, at 263 et seq.

[17] Draper v. Glassop, 1 Ld. Rymd. 153, 91 Eng. Rep. 999 (1702); Anonymous, 1 Salk. 278, 91 Eng. Rep. 243 (1690); Fitz v. Freestone, 1 Mod. 210, 86 Eng. Rep. 834 (1676); Beckford v. Clark, 1 Sid. 236, 82 Eng. Rep. 1079 (1665).

[18] Young v. Rummell, 2 Hill 478 (N. Y. 1842); 22 Halsbury, Laws of England 429 (1912); Chitty, Pleading 476 et seq. (11th Am. ed. 1851). See Johnson v. Paramour, 12 Mod. 376, 88 Eng. Rep. 1390 (1701).

which showed he had never made the promise declared on.[19] Yet matter in confession and avoidance eventually became admissible to some extent under all forms of the general issue.[20] Objection to this practice on the ground it produced surprise and injustice was repeatedly made; but we find it said in one early New York case that "the objection...has been disregarded a hundred times."[21]

The result was that the common law system allowed almost unlimited proof of any possible defense under the plea of the general issue. A cursory listing might include as examples of such defenses the statute of frauds,[22] res judicata,[23] payment,[24] the statute of limitations,[25] release,[26] discharge of contract,[27] truth in actions of slander and libel,[28] accord and satisfaction,[29] lack of title in actions of trespass,[30] infancy,[31] and illegality.[32]

The adoption of the Field Code of Civil Procedure throughout most American states operated to narrow very considerably the scope of the evidence admissible under the general denial.[33] The North Dakota statute follows closely the language of the original Field Code provision:

"The answer of the defendant must contain:

1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of

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[19] See cases cited note 17, supra.

[20] See, e. g., Anonymous, 1 Salk. 278, 91 Eng. Rep. 243 (1690); Burrows v. Jemino, 2 Str. 733, 93 Eng. Rep. 815 (1726); Season v. Gilbert, 2 Lev. 144, 83 Eng. Rep. 490 (1675); 22 Halsbury, Laws of England 429 (1912).

[21] See Young v. Rummell, 2 Hill 478, 480 (N. Y. 1842).

[22] Buttermere v. Hayes, 5 M. & W. 456, 151 Eng. Rep. 193 (1839).

[23] Young v. Rummell, 2 Hill 478 (N. Y. 1842); Burrows v. Jemino, 2 Str. 733, 93 Eng. Rep. 815 (1726).

[24] Fitz v. Freestone, 1 Mod. 210, 86 Eng. Rep. 834 (1796), semble.

[25] Anonymous, 1 Salk. 278, 91 Eng. Rep. 243 (1690), semble; Draper v. Glassop, 1 Ld. Rymd. 153, 91 Eng. Rep. 999 (1702), semble.

[26] Beckford v. Clarke, 1 Sid. 236, 82 Eng. Rep. 1079 (1665).

[27] Abbot v. Chapman, 2 Lev. 81, 83 Eng. Rep. 459 (1674).

[28] Smithies v. Harrison, 1 Ld. Rymd. 727, 91 Eng. Rep. 1385 (1706).

[29] See Paramour v. Johnson, 1 Ld. Rymd. 566, 91 Eng. Rep. 1278 (1705).

[30] Argent v. Durrant, 8 T. R. 403, 101 Eng. Rep. 1457 (1789).

[31] Darby v. Boucher, 1 Salk. 279, 91 Eng. Rep. 244 (1795).

[32] See Hussey v. Jacob, 5 Mod. 175, 87 Eng. Rep. 591 (1700).

[33] The English also drastically restricted the scope of the defenses provable under the general issue 14 years before the Field Code of Civil Procedure was drafted. See the rules of Hilary term, 1834, a set of rules of pleading adopted by the English courts, 5 Barn. & Adolph. i—xx, 27 Eng. Com. Law 470 et seq.

any knowledge or information thereof sufficient to form a belief; and

2. A statement of any new matter constituting a defense or counterclaim in ordinary and concise language without repetition."[34]

Considered from the functional standpoint, this section raises several important problems. First and foremost among these is the question of what is included in the definition of "new matter constituting a defense" which the section requires to be contained in the answer.

Actually, the distinction conventionally made by the courts in defining new matter which must be specially pleaded to be admissible in evidence omits an important class of pleas.[35] Thus, the rule generally quoted by the courts is that any proof which tends to show that the plaintiff never had a cause of action, *i. e.*, that the facts alleged in the complaint are untrue, is theoretically admissible under the general denial.[36]

On the other hand, the courts state that anything which admits the existence of the facts alleged in the complaint but avoids their legal effect by setting up additional facts which show that the plaintiff's right of recovery has been destroyed by some further transaction constitutes an affirmative defense and must be specially pleaded. Thus, in *First State Bank v. Radke,*[37] the North Dakota court stated that "new matter constituting a defense" includes only "matter which...admitting the alleged cause of action nevertheless sets up facts which at the time when the action is brought show that the plaintiff is not entitled to recover."

Manifestly, the classification thus adopted has its origin in the common law requirement that the defendant must answer the plaintiff's declaration by either denying the allegations contained in it or by setting up new matter in

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[34] N. D. Rev. Code § 28-0710 (1943).

[35] Thyson, **The General Denial in Missouri**, 26 Wash. U.L.Q. 398 (1941).

[36] First State Bank v. Radke, 51 N. D. 246, 199 N. W. 930 (1924); Hagen v. Klabo, 13 N. D. 319, 100 N. W. 847 (1904).

[37] 51 N. D. 246, 264, 199 N. W. 930, 937 (1924).

confession and avoidance.[38] The fact that this classification leaves out several types of defenses can be appreciated most easily by applying the ordinary rules to a specific fact situation.

Assume that John Jones brings an action against Peter Smith, his complaint alleging that Smith entered into an agreement to sell 100 bushels of wheat and has failed to perform. The fact may be that this is true but that Smith promptly made a settlement with Jones. May Smith show this fact under a general denial?

No, say the courts.[39] The general denial simply denies that Smith and Jones ever entered into a contract at all. The plea of accord and satisfaction, on the other hand, admits that a contract was made but adds a new set of facts which tend to show that Smith is not now liable for the breach of it.[40] This is matter in confession and avoidance; it cannot be shown under the general denial because it would tend to produce surprise and injustice.

But the fact may be that Smith never entered into a contract at all. Possibly Jones made an offer to purchase the wheat but Smith never accepted it. May this be shown under a general denial?

Yes, say the courts. Proving the facts that Smith never entered into a contract directly negatives the allegations of Jones' complaint by showing that Jones never had a cause of action. Therefore no additional matter has been added to the case. Jones put the question of whether or not there was a contract in issue by pleading that Smith entered into a contract with him.

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[38] As a broad general rule, therefore, defenses in confession and avoidance must be specially pleaded. This was early established as the true construction of the Field Code provision dealing with the answer by the case of McKyring v. Bull, 16 N. Y. 297 (1857), which held that evidence of payment as a defense was inadmissible under a general denial on the ground it was matter in confession and avoidance. By dictum the same holding was suggested for release, accord and satisfaction, and arbitration. It is of interest to note that the North Dakota court, while adopting the principle of **McKyring v. Bull**, has rejected its holding. Payment is therefore admissible as a defense under the general denial in North Dakota. Hughes v. Wachter, 61 N. D. 513., 238 N. W. 776 (1931); Brown v. Forbes, 6 Dak. 273, 43 N. W. 93 (1889).

[39] Fed. R. Civ. P. 8 (c).

[40] Harvey v. Denver Ry., 44 Colo. 258, 99 Pac. 31 (1908); Grand Lodge v. Grand Lodge, 83 Conn. 241, 76 Atl. 533 (1910); Crilly v. Royle, 87 Neb. 367, 127 N. W. 251 (1910); Dibble v. Dimick, 143 N. Y. 549, 38 N. E. 724 (1894). See Poer v. Johnson, 48 Ind. App. 596, 96 N. E. 189 (1911); Jacobs v. Day, 5 Misc. 410, 25 N. Y. Supp. 763, 765 (1893).

Thus far, so good. But suppose that Smith's defense is that the contract was illegal. Obviously, two views of such a defense are possible. Looked at in one way, the defense of illegality should be provable under the general denial. It may be argued that an illegal contract is not a contract at all. Consequently, by proving that the contract was illegal, Smith has disproved an essential element of Jones' case. Jones is bound to establish that a valid, binding contract was entered into before he can recover. The existence of a binding contract is indispensable to his cause of action. Therefore, by showing that the contract between himself and Jones was never valid, Smith merely disproves an element of Jones' case. Under this theory, it has been held that the defense of illegality is admissible under the general denial.[41]

Looked at from a slightly different angle, however, it can logically be argued that Smith is obligated to plead the defense of illegality. Jones' denial would simply operate to place in issue the question of whether or not Jones and Smith had actually done the acts alleged in the complaint. Based on this view of the function of the general denial, it can be argued that the defense of illegality does not negative any of the facts alleged in the complaint; indeed, illegality is a defense to the action only if all the facts alleged in the complaint are conceded, since if Smith and Jones never made a contract at all it is irrelevant that the contract they might have

[41] Goodrich v. Northwestern Telephone Co., 161 Minn. 106, 201 N. W. 290 (1924). The element of public policy has had some influence here, since the courts have held that it is their duty to refuse recovery on an illegal contract even where the issue of illegality is not raised by the pleadings. Oscanyan v. Arms Co., 103 U. S. 261 (1880); Dunham v. Hastings Pavement Co., 56 App. Div. 244, 67 N. Y. Supp. 632 (1900). But it was said in Jacobson v. Barnes, 176 Minn. 4, 222 N. W. 341, 342 (1928): "All else aside, a contract being declared upon, it is but logical to allow proof of illegality under a general denial, for such proof simply shows no contract." A similar situation appears to have developed in suits for divorce, where the rule that affirmative defenses must be pleaded has been complicated by the factor of the public's interest in the maintenance of the family. Thus, though it is generally held that condonation, Lipe v. Lipe, 327 Ill. 39, 158 N. E. 411 (1927), prior divorce, Nichols v. Nichols, 189 Ky. 500, 225 S. W. 147 (1920), and adultery, Banks v. Banks, 118 Miss. 783, 79 So. 841 (1918), are not available as defenses to an action for divorce unless specially pleaded, some courts have refused divorces where defenses such as these were not pleaded but appeared in the proof. This is on the theory that while the defendant may be concluded by his pleadings the judge is not; and since the judge represents the state, which has a public policy to be served in divorce actions, the judge may decide the case on the basis of a defense to the action which does not appear in the pleadings. Giesselman v. Giesselman, 134 Md. 453, 107 Atl. 185 (1919); Moore v. Moore, 41 Mo. App. 176 (1890); Amend v. Amend, 135 Ore. 550, 296 Pac. 875 (1931). See Note, 76 A.L.R. 990 (1932).

made would have been illegal. This view has also been sanctioned by the courts.[42]

What is true of the defense of illegality—that it can be interpreted in such a way as to fall within either of the generally recognized classes of pleas in bar—is also true of such defenses as contributory negligence,[43] the fellow servant rule,[44]

[42] In Finley v. Quirk, 9 Minn. 179 (1864), plaintiff sued to recover for breach of warranty with respect to a horse he had purchased from the defendant. The answer was a general denial. Under the general denial the defendant sought to introduce evidence that the sale was made on a Sunday and therefore illegal. It was held the evidence was properly excluded, though the defendant's counsel specifically argued that the illegality of the sale should have been admissible because it went to show that no valid contract had ever been made. The court said: "We hold, therefore—first, that an answer, merely by way of denial, raises an issue only on the facts alleged in the complaint; second that the denial of the sale of the horse in this case only raised an issue on the sale in point of fact, and not on the question of the legality of such sale; third, that all matters in confession and avoidance, showing the contract sued upon to be either void or voidable in point of law, must be affirmatively pleaded." 9 Minn. 188-89. The case is vigorously approved in Ross, **Minnesota Pleading as Fact Pleading,** 13 Minn. L. Rev. 348 (1929). See also Fed. R. Civ. P. 8 (c), laying down the rule that illegality as a defense must be pleaded in the federal courts.

[43] Ordinarily, contributory negligence is held to be an affirmative defense which must be specially pleaded. Carr v. Soo Ry., 16 N. D. 217, 112 N. W. 972 (1907); Hall v. San Francisco, 188 Cal. 641, 206 Pac. 459 (1922); Francis v. Humphrey, 25 F. Supp. I (E. D. Ill. 1938). But some jurisdictions hold that the plaintiff must allege freedom from contributory negligence in order to state a cause of action in negligence cases. Dee v. City of Peru, 343 Ill. 36, 174 N. E. 901 (1931); Walters v. City of Ottawa, 240 Ill. 259, 88 N. E. 651 (1909). In Francis v. Humphrey, **supra,** the plaintiff brought an action in the federal court to recover for injuries sustained in an accident in Illinois. The Federal Rules of Civil Procedure, Rule 8 (c), specify that contributory negligence is regarded in the federal courts as an affirmative defense and must be pleaded by the defendant. It was held that the plaintiff was nevertheless bound to allege freedom from contributory negligence, since by the substantive law of Illinois, applicable in the federal court, an allegation to that effect was necessary to state a good cause of action.

[44] See, e. g., holding that the fellow servant rule must be pleaded before it is available as a defense, Reeve v. Colusa Gas & Electric Co., 152 Cal. 99, 82 Pac. 89 (1907); Layng v. Mt. Shasta Mineral Spring Co., 135 Cal. 141, 67 Pac. 48 (1901); O'Brien v Corra-Rock Island Mining Co., 40 Mont. 212, 105 Pac. 724 (1909); Millen v. Pacific Bridge Co., 51 Ore. 538, 95 Pac. 196 (1908); Duff v. Willamette Iron & Steel Works, 45 Ore. 479, 78 Pac. 363 (1904); East Tennessee & W.N.C. Ry. v. Collins, 85 Tenn. 227, 1 S. W. 883 (1886); Fed. R. Civ. P. 8 (c). **Contra:** Pennsylvania Co. v. Fishback, 123 Fed. 465 (6th Cir. 1903); Vinson v. Morning News, 118 Ga. 655, 45 S. E. 481 (1903); Wiggins Ferry Co. v. Blakeman, 54 Ill. 201 (1870); Big Hill Coal Co. v. Abney, 125 Ky. 355, 101 S. W. 394 (1907); Kaminski v. Tudor Iron Works, 167 Mo. 462, 67 S. W. 221 (1902); Dover v. Lockhart Mills, 86 S. C. 229, 68 S. E. 525 (1910).

assumption of risk,[45] and the statute of frauds.[46] Thus, for example, if one assumes that the effect of non-compliance with the statute of frauds is to prevent the formation of a contract, it is logical to assume that the statute of frauds should be available to a defendant under a simple denial in the case of actions based on contract. On the other hand, it has been often held that the effect of the statute of frauds is not to prevent the formation of a valid contract but merely to deprive the plaintiff of the right to enforce it or recover damages for its breach. If this view is adopted, proof of non-compliance with the statute of frauds should be specially pleaded before it could be available to a defendant. Depending on their view of the effect of the statute, the courts have adopted varying views,[47] the more modern trend being to require the statute to be specially pleaded.[48]

What has been said should be sufficient to suggest the idea that as presently interpreted by the courts the general denial is both uncertain in its scope and unpredictable in its operation. From the standpoint of the plaintiff who is faced with an unexpected defense which has been allowed by the court on the ground it is not matter in confession and avoidance, it makes little difference whether the defense is technically one in confession and avoidance or not. The essential fact is still that he has been surprised, that an argu-

[45] See, e. g., holding that assumption of risk must be pleaded, Lucid v. E. I. Du-Pont De Nemours Powder Co., 199 Fed. 377 (9th Cir. 1912); Boin v Spreckels Sugar Co., 155 Cal. 612, 102 Pac. 937 (1909); Coogan v. Aeolian Co., 87 Conn. 149, 87 Atl. 563 (1913); Warner v. Pittsburgh-Idaho Co., 38 Idaho 254, 220 Pac. 492 (1923); Stevens v. Henningsen Produce Co., 53 Mont. 306, 163 Pac. 470 (1917); Union Stock-Yards Co. v. Goodwin, 57 Neb. 138, 77 N. W. 357 (1898). Contra: New York, N. H. & H. Ry. v. Vizvari, 210 Fed. 118 (2d Cir. 1913); Woodworth v. Iowa C. Ry., 170 Iowa 697, 149 N. W. 522 (1914); Cuozzo v. Clyde S. S. Co., 223 Mass. 521, 112 N. E. 521 (1916); Phillips v. Union P. Ry., 100 Neb. 157, 158 N. W. 966 (1916); Dixon v. New York, O. & W. Ry., 198 N. Y. 58, 91 N. E. 271 (1910); Shirley v. Abbeville Furn. Co., 76 S. C. 452, 57 S. E. 178 (1907).

[46] It has clearly been settled in North Dakota that the Statute of Frauds is not available as a defense under a general denial. Abraham v. Durward, 46 N. D. 611, 180 N. W. 783 (1920). Cf. Groff v. Cook, 34 N. D. 126, 157 N. W. 973 (1916). See Erickson v. Wiper, 32 N. D. 193, 203, 157 N. W. 592, 595 (1916).

[47] See, e. g. holding that the Statute of Frauds may be raised by a general denial, Dunphy v. Ryan, 116 U. S. 491 (1886); May v. Sloan, 101 U. S. 231 (1879); Walsh v. Standart, 174 Cal. 807, 164 Pac. 765 (1917); Jamison v. Christman, 95 Kan. 131, 148 Pac. 247 (1915); Bean v. Lamprey, 82 Minn. 320, 84 N. W. 1016 (1901); McKee v. Rudd, 222 Mo. 344, 121 S. W. 312 (1908).

[48] The Statute of Frauds must be pleaded under the Federal Rules of Civil Procedure. Fed. R. Civ. P. 8 (c). This is also the rule in North Dakota. See cases cited in note [46], supra. For a general discussion of this aspect of pleading see Thyson, The General Denial in Missouri, 26 Wash. U.L.Q. 398, 400 et seq. (1941).

ment has been raised which in many instances he is unprepared to meet because unwarned to anticipate.

Tested by its function in the system of pleading, it is doubtful whether any serious argument can be made that the general denial serves a useful purpose. The American Bar Association has listed the purposes of the pleadings as follows: (1) to serve as a formal basis for the judgment to be entered; (2) to separate issues of fact from questions of law; (3) to give litigants the advantage of the plea of res judicata if again molested; and (4) to notify the parties of the claims, defenses and cross demands of their adversaries.[49] Of these, the modern pleading systems tend to emphasize the fourth, or notice, function.[50] Yet of all pleadings, surely the general denial does least to notify the adverse party of the defenses which it is proposed to introduce. Indeed, its main purpose is ordinarily to conceal the defenses to the plaintiff's action until the last possible moment. It has been pointed out that it is only in exceptional cases that a plea of the general denial can be considered truthful; in not one case in a thousand can one party deny in good faith every allegation of the other party's pleading.[51]

The efforts at reform have taken varying approaches to the problem. In New York, Illinois and Michigan, statutes or rules of court have been adopted which, following English precedent, enumerate specific defenses which must be pleaded, irrespective of whether or not they are technically affirmative in nature, coupled with a general requirement that anything which might tend to surprise the adverse party should be pleaded.[52] This type of statute has been the subject of some

[49] 35 A. B. A. Rep. 614, 638-39 (1910), cited in Clark, Code Pleading 3 (2d ed. 1947).

[50] Clark, Code Pleading 4 (2d ed. 1947).

[51] Sunderland, **The New Federal Rules**, 45 W. Va. L. Q. 5, 13 (1938); 1 Moore, Federal Practice 562 (1938).

[52] Thus, the Illinois statute provides: "The facts constituting any affirmative defense, such as payment, release, satisfaction, discharge, license, fraud, duress, estoppel, laches, statute of frauds, illegality, that an instrument or transaction is either void or voidable in point of law, or cannot be recovered upon by reason of any statute or by reason of non-delivery, want or failure of consideration in whole or in part, and any defense which by other affirmative matter seeks to avoid the legal effect of or defeat the cause of action set forth in the plaintiff's complaint, or the defendant's counterclaim, in whole or in part, and any ground or defense, whether affirmative or not, which if not expressly stated in the pleading, would be likely to take the opposite party by surprise, must be plainly set forth in the answer or reply." Ill. L. 1933, p. 784, Smith-Hurd Ill. Stats. c. 110,§ 167.

criticism on the ground that it makes the pleadings bulkier and more intricate instead of tending to simplify them.[53]

The framers of the Federal Rules of Civil Procedure have attempted to solve the problem in a slightly different fashion. The federal rules provide that the general denial may be used in the federal courts, but only where the pleader intends "in good faith to controvert all the averments of the preceding pleading. . . ."[54] This section is followed by a listing of defenses which it is required shall be set forth affirmatively. Included among these are accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and "any other matter constituting an avoidance or affirmative defense."[55] Coupled with these provisions are rules providing for pre-trial conferences and extensive discovery procedures, which give full opportunities to the parties to become acquainted with all of the issues which will be raised at the trial itself.[56]

As so limited, the general denial is in effect prohibited in the federal courts in all save the exceptional case where no single allegation of the complaint is true.[57]

It is submitted, however, that for a state like North Dakota a rule or statute similar to those adopted in Michigan, New York and Illinois would be more appropriate. Although the North Dakota Code provides for a pre-trial conference modeled after that provided for by the federal rules,[58] the procedure does not appear to have come into general use in the state. While statistics are not available, it is believed that very few instances of the use of the pre-trial conference have occurred in North Dakota.

It would seem wiser, therefore, to design any changes in the present statute in such a way as to operate without the supple-

[53] Thyson, **The General Denial in Missouri**, 26 Wash. U. L. Q. 398, 421 (1941).

[54] Fed. R. Civ. P. 8 (b).

[55] Fed. R. Civ. P. 8 (c).

[56] Fed. R. Civ. P. 16, and see also Fed. R. Civ. P. 26 through 37.

[57] Sunderland, **The New Federal Rules**, 45 W. Va. L. Q. 5, 13 (1938).

[58] N. D. Rev. Code c. 28-11 (1943).

mental assistance furnished by the pre-trial and discovery procedures contemplated by the federal rules.

A rule which provided a specific listing of the defenses which it is desired should be pleaded specially and added a general provision requiring any matter which would tend to surprise the other party to be also pleaded would have the additional advantage of eliminating from the law of pleading the over-technical common law distinction between defenses which go to negative the direct allegations of the complaint and defenses which are in confession and avoidance. The federal rules seem to contemplate a retention of the common law distinction. This is indicated by the language of the rules, which specify a number of specific defenses which should be pleaded and then extend the requirement, as noted above, to include matter "constituting an avoidance or affirmative defense."[59]

The rule suggested here would be admittedly vague, considered as a general principle. It has, however, the advantage of making the general policy behind the rule—that the pleadings should give notice of every important defense, whether affirmative or not—clearly apparent on the face of the statute.

Furthermore, in practice the vagueness behind the rule tends to be an advantage instead of a defect. By requiring a party to plead every fact, whether affirmative or not, likely to take the other party by surprise, the objective of notice pleading is clearly attained. And the rule in its actual operation has been soundly tested by the experience of the New York, Illinois and Michigan courts. To use the language of one commentator, "The lawyer drawing the defensive pleading resolves every doubt in favor of setting up the facts. He does not want to take any chance of having his evidence excluded on the trial."[60]

As was pointed out at the beginning of this discussion, the section of our code dealing with the answer is over 82 years old. Clearly, it has had time to "petrify." Serious consideration might well be given to the desirability of an amendment to our Code of Civil Procedure clearly specifying the defenses

[59] Fed. R. Civ. P. 8 (c).

[60] Sunderland, **Observations on the Illinois Civil Practice Act**, 28 Ill. L. Rev. 861, 867 (1934).

which should be specially pleaded and eliminating the confusing and ambiguous common law distinction between denials and defenses in confession and avoidance.

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