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A Discourse on Pleading

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By Hon. John N. Denison

HOWEVER much it is neglected and goes unnoticed the fundamental thing about common law pleading was the issue. Whether this was noted or formulated in the early practice, when the system was a-forming, is not of much consequence; the important thing is that it was the feature which controlled the formation of the system; and this is true though mistakes in reasoning made of parts of it a maze in which the feature itself was lost. The notion was that the issue must be one, that is, one matter of fact or law affirmed on one side and denied on the other the determination of which would determine the case, and the pleadings were for the purpose of finding what that matter was.

We do not wish to discuss here the expansion of the scope of this one issue in the pleas of the general issue nor the causes of it, but even in those pleas the theory of one issue was kept and even after the statute of Anne and the similar legislation in this country which permitted more than one issue, the theory that every issue should be single and complete in itself was maintained, and it was understood that it must be upon a material point, i. e., one the decision of which would decide the case.

While this system was undergoing development, equity pleading grew up, a system based on a different theory, its usages and customs rooted in the idea that the defendant, in response to the details of fact alleged against him, should not only admit and deny in equally minute detail, but should, as far as he could, add all facts not already alleged, to the end that all details be made known. It made compulsory what the older plan forbade, the statement of evidential facts; neither, however, was following an arbitrary rule but was in the logical pursuit of a cardinal theory.

Then came the codes of procedure. The framers of the original, (1) the New York code of 1848, the Field Code, so called, met the situation wisely. They evidently saw that the two old systems were incompatible, that there was much in the practice and methods of either that was undesirable and should be discarded yet much that was desirable, should be adopted and might be combined in a new system, but when they met the question of pleading proper there could be no compromise. It was impossible to lay the matters in dispute before the court on the theory that evidential facts should be disclosed and that they should not; that the allegations should be of the vital, determinative matter or matters alleged and denied or for the minutiae which might govern the nature of the relief; that the questions between the parties should be those the answer to which would decide the case or the details of the transactions from which the dispute arose and out of which the court would cull that which was vital; whether the court should seek for a direct question the answer to which, yes or no, would tell what, if anything, should and could be done and how.

They took the former alternative. They prepared a code which provided for the formation of issues and for their trial; Codes of 1848 and 1849, Tit. VIII Ch II; that they were of two kinds, law and fact; that an issue of law arises upon demurrer to the complaint, an issue of fact upon a material

(1) Com. on Prae. & Pldg.

allegation in the complaint controverted by the answer, or on new matter in the answer controverted by the reply or upon new matter in the reply.

The New York legislature of 1849, besides amending the original code, appointed a commission to draft a new one. That commission reported Dec. 31, 1849, and its report added a section, No. 665, which defined a material allegation as "one essential to the claim or defense, and which could not be stricken from the pleading without leaving it insufficient." That section is not in the present New York code and I do not find that it was ever adopted in that state, but it was transcribed verbatim into the Practice Act of California and thence to the codes of Montana and Colorado and was adopted in letter or substance by many other legislatures. There can, however, be little if any distinction between a material fact at common law and one under this definition or under a code without it. In all of them it is a disputed question of fact or law the decision of which will decide the case.* In Colorado, whatever may be the rule in other states, the issue theory is prescribed mandatorially, Code 1921 §§78 and 66 and Chap. XII. By §78 a material allegation is defined as above; by Chap. XII an issue of fact is defined as a material allegation denied, and by §66 immaterial allegations are to be stricken out.

When, however, we come to actual practice under the code, we find great confusion. The committee of the New York legislature regretted that before making their report they had not had time to prepare "a book of forms to accompany the code." Every thoughtful student of pleading now joins them in that regret. Such forms would have given concrete illustrations of the meaning and purpose of the general expressions in the statute, would have had something of the same effect as had the forms prepared for English pleading under the Act of Parliament of 1873. Doubtless, also, the example of preparation of forms would have been followed in other states.

What was the result of this omission? A majority of lawyers and (perhaps) judges, having lost the background of common law and equity, deprived of both compass and rudder, some even believing that when forms of action were abolished forms of pleading were too, went each at his own will. It was a paradox, a way without method, a system without order.

It was necessary and inevitable that there should be a struggle to rationalize such a practice and to escape this state of affairs; such struggle arose at once and still goes on. Another thing was inevitable: that one jurisdiction should tend (or drift?) toward one system and another toward the other, this toward common law, that toward equity.

In Colorado upon the adoption of the code, the most influential member of the *nisi prius* bench (*1) ignored the sections which we have quoted, avowedly supported one kind of pleading in equity and another at law, and very consistently, refused to strike out allegations which, under those sections, were immaterial. He afterwards expressed the same ideas on the Supreme bench but they were never established by a decision of that court. In Peo. v. Commrs 12 Colo., 91, he seems to approve an answer raising no issue nor pleading in confession and avoidance. In Wilson v. Hawthorne 14 Colo. 534, he suggests the necessity of pleading a fact not

*We say this against some of the reasoning in Tucker v. Parks, 7 Colo., 62-69; but do not, of course, mean to deny the propriety of allegations appropriate to show a right to particular relief.

(*1) Elliott of the Second District which included Denver.

traversable. See also Roberts v Arthur, 15 Colo., 456, 458-9.

In Wisconsin the code itself abandons the theory of issues (though still providing for their trial) by the provision (**) that "the allegation of new matter in an answer not pleaded as a part of a counterclaim or of new matter in a reply is to be deemed controverted by the adverse party as upon direct denial *or avoidance* as the case may be."

An assumed denial creates an issue as definitely as an express one and the provision for such a denial is, of course, consistent with the issue theory, but an assumed avoidance, whenever the provision above quoted can take effect at all, leaves the issue unstated, the real point in dispute undisclosed. Upon the issue theory, therefore, the pleadings are in such case a nullity.

Nebraska has a similar provision, which applies, however, not to answers but to replies only. This has the same effect as the Wisconsin provision, but, since it postpones the assumption of an avoidance one step, and since the occasion for pleading in avoidance after the reply rarely arises, the effect of this feature of the Nebraska code, and other similar codes will not be noticeable in their actual operation.

Other codes grant to the court discretion in the matter of the necessity for a reply. Georgia seems to authorize no reply. So of California, though her courts say that there must be one to a counterclaim, which leaves the California rule in substance like Wisconsin's.

In New York the original code reported by the committee was the same. Sec. 651. This seems illogical, since the previous sections, as we have seen, definitely established the issue plan, and this section permits the issue occasionally to remain undiscovered.

The inconvenience of this must have appeared many times; as in Reno v. Thompson, 97 N.Y. Supp., 744, and was doubtless the occasion of the amendment (Code §516, retained in 1925 Code §274) permitting the court to compel a reply on proper occasion, even when there was no counterclaim. This power was not wholly discretionary, because judgments were reversed for failure to compel a reply on motion of defendant. Steinway v. Steinway, 68 Hun, 430. This results in something not wholly unlike the English system, in which, after the pleading, a master declares and delimits the issues.

Now the English seem to have considered our codes, especially that of New York, and to have observed their great defect. We have gone on the understanding that the purpose of pleading was twofold, to inform the court and the opposite party and to discover the precise point in dispute.

Is not that our fundamental mistake? Are not those two purposes inconsistent? The English let the pleadings state enough for information and then, if necessary, they hunt out the issues and state them. They avoid the consequence of prolixity which we incur in the attempt to give or get detailed information, by prescribing simple forms of pleadings. Is not this the solution of our difficulties?

**Wis. St. 1915, §2667 Comp. St. 1922, §8646.

New Members

The following have been approved by the Membership Committee of this Association and will be voted on at the next meeting:

Dwight Campbell
Joseph E. Graves
Martin C. Molholm

We Apologize

"The Association is indebted to Leroy McWhinney and Senators Quiat and Toll for their full discussions of recent legislation, and to the Hon. B. C. Hilliard, who delivered one of his *inimical* addresses."

Joseph C. Sampson, Esq.
Denver, Colorado.
Dear Mr. Sampson:

Some of my friends are chiding me a bit about my *unfriendly* speech at the annual meeting. One of them, to emphasize his alleged point, clipped and sent me an item from *The Record*. I am sending it on to you just as it came. I say, let 'em laugh!

Your friend,
B. C. HILLIARD.

Test For Eyes

Two Scots were walking down Broadway.

One picked up a $5 bill.

The other borrowed it to go and have his eyes tested.

Acknowledgments

This Association is indebted to the W. H. Kistler Stationery Company, who very kindly printed fifty thousand Amendment No. 4 cards practically without cost, in order to assist us in our endeavor to improve the Justice Court situation in Denver.

The Association is also indebted to Sidney Eastwood who printed the Amendment No. 4 petitions without charge.

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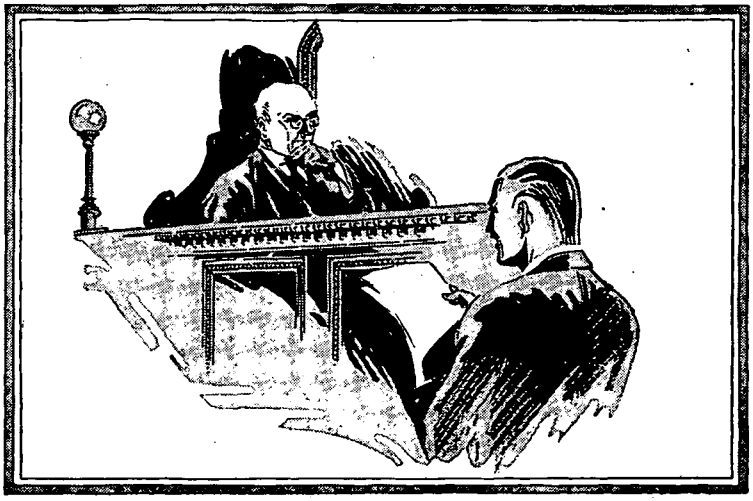

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A Foreword

This, the forty-third issue of the RECORD, marks the opening of another fiscal year.

From a membership of fifty in 1891, this Association has grown to approximately seven hundred active members.

Originally formed for social purposes, it has developed into an organization with over twenty standing committees, each of which is endeavoring to improve judicial and legal conditions and procedure.

Collectively, we should strive to maintain public confidence in the Bar, but, INDIVIDUALLY, WE MUST MERIT THAT CONFIDENCE.

May the coming year witness further progress along these lines.