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## Rules of Pleading Applied to Representative Capacity

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### RULES OF PLEADING APPLIED TO REPRESENTATIVE CAPACITY

Few instances will be found in the law where there is greater confusion in application of the rules of pleading than there is among the cases dealing with the representative capacity of a party who sues or is sued as executor or administrator. The manner of indicating that the party is sued or is being sued in the representative capacity; the necessity of alleging that he has such capacity; the manner of alleging it; whether a contest of the capacity amounts to a defense in abatement or one in bar; whether a plea contesting the capacity is a special plea or a traverse, and, if a traverse, whether it may be the general issue or must be a specific traverse — all these and minor problems are involved in the confusion.

The primary purpose of this note is to call attention to some of

the potential problems introduced in this state by the decision of *Austin v. Calloway*,<sup>1</sup> in which it was for the first time decided by the supreme court of appeals that a declaration in which the plaintiff declares as administrator is demurrable unless it contains an allegation of the plaintiff's representative capacity.<sup>2</sup> Since, perhaps rather surprisingly, these problems, although discussed by members of the bar, have not during the considerable period of time which has elapsed since the decision of *Austin v. Calloway* been brought to the attention of the supreme court, it will be necessary to resort to the decisions of other jurisdictions in order to make them intelligible. Although the problems involved, for the most part, apply equally to personal representatives as plaintiffs and as defendants,<sup>3</sup> they have most frequently arisen, as in *Austin v. Calloway*, with reference to plaintiffs, and the present discussion will be so confined. Space will permit only the most general analysis, without any attempt to cover all the cases.

Some courts have held that it is necessary only to indicate in the declaration that the plaintiff is suing in a representative capacity, and that, when this is done, his title to that capacity will be presumed until controverted by a plea.<sup>4</sup> As already indicated, this was the practice in West Virginia until the decision of *Austin v. Calloway*. Other courts have held that, not only must the plaintiff describe himself as suing in the representative capacity, but

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<sup>1</sup> 73 W. Va. 231, 80 S. E. 361 (1913).

<sup>2</sup> See *Moss v. Campbell's Creek E. R.*, 75 W. Va. 62, 65, 83 S. E. 721, L. R. A. 1915C 1183 (1914). "At the time this action was instituted, as well as at the time the demurrer was entered, considered, and overruled, it was generally deemed unnecessary to aver that a plaintiff administrator had been duly appointed and qualified. Our decision in *Austin v. Calloway* came later and brought the neglected point to the attention of the profession . . . . Many a similar action has gone through this court and the judgment has been sustained here with the same allegation lacking . . . . we have recently discovered its materiality, and in a sense have taken litigants by surprise . . . ."

<sup>3</sup> In one respect the plaintiff has a lighter pleading burden when he deals with representative capacity in his opponent. The familiar rule that a party may state his opponent's title with less particularity than his own, because its essentials lie more particularly within the knowledge of the person to whom it pertains, permits him to indulge in a more general statement. See 24 C. J. 828.

<sup>4</sup> *Brown v. Nourse*, 55 Me. 230, 92 Am. Dec. 583 (1867); *Langdon v. Potter*, 11 Mass. 313 (1814); *Ellis v. Appleby*, 4 R. I. 462 (1857). In the latter case, after stating the common law of England requiring an allegation and profert, the court says: "It has not, however, been our practice, nor the practice in the New England states generally, for the plaintiff to set forth in his declaration, the title by which he claims to sue as executor or administrator, or to make profert of his letters. *Champlin v. Tilley*, 3 Day, 305; *Matthewson's Adm'r v. Grant's Adm'r*, 2 Howard, 283, per Story, J." See 24 C. J. 826, citing many additional cases, most of which were decided under practice codes.

he must also in some manner show that he possesses the capacity.<sup>5</sup> Under the original English practice, not only was it necessary to state the representative capacity, but profert was required of the letters of administration or of probate, and the declaration was subject to a general demurrer unless profert was made.<sup>6</sup> Later, by the statute of Anne, failure to make profert was declared to be ground only for a special demurrer, and hence only a formal defect.<sup>7</sup> Under some modern statutes, as in West Virginia,<sup>8</sup> the necessity for profert is entirely dispensed with, although oyer may still be had as if profert had been made.

It is impossible, through analysis of the decisions, to point out any positive line of cleavage between them that would indicate a definite principle upon which they are divided. Upon the whole, however, one is impelled to the conclusion that most of the confusion, not only with reference to the necessity of pleading capacity, but also with reference to other problems hereinafter noted, grows out of a difference of opinion, not always articulate, as to whether lack of representative capacity is essentially a defense in abatement or one in bar.

If the lack of capacity is to be considered matter in abatement, then logically it would seem that an allegation of capacity could for this reason be omitted from the declaration, and that the defense should be asserted by a plea in abatement, as in other cases of disability of the person.<sup>9</sup> On the other hand, if the defense is in bar, this normally should indicate that the fact of capacity is an essential element of the plaintiff's cause of action, and that he should be required to allege it in order to show a cause of action and keep his declaration from being demurrable. A reason frequently stated

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<sup>5</sup> *Collins v. Ayers*, 13 Ill. 358 (1851); *Foster v. Adler*, 84 Ill. App. 654 (1899). Most of the additional cases cited in 24 C. J. 826 were decided under practice codes.

<sup>6</sup> "At common law, in a suit by an executor or administrator, it was necessary that the declaration should show not only the capacity in which the plaintiff sued, but by what authority letters testamentary or of administration had been granted to him, and that profert of his letters should be made in a particular part of the declaration, to wit, immediately after the conclusion to the damage, &c., and before the pledges. Bac. Abr. Executors and Administrators, O. p. 442; 1 Chit. Plead. 420." *Ellis v. Appleby*, 4 R. I. 462 (1857).

<sup>7</sup> *Idem*.

<sup>8</sup> W. VA. REV. CODE (1931) c. 56, art. 4, § 15. In some jurisdictions, profert is still necessary. 24 C. J. 828-9.

<sup>9</sup> Although this is a reason frequently stated why the defense of lack of capacity must be asserted by a special plea or a traverse, there seems to be little conscious inclination to urge it as a reason for omitting the allegation of capacity from the declaration. See the cases cited and referred to in note 4 *supra*.

why the allegation must be made in the declaration, and assumed by the West Virginia court, is that the defendant is entitled to have the allegation in the declaration in order that he may have an opportunity to traverse it.<sup>10</sup> Generally no definite statement is made why the defendant should have such an opportunity. Ordinarily a defendant is entitled to traverse a fact alleged in a declaration because the fact constitutes an essential element of the cause of action, and this may be what the courts have in mind when the assertion is made.<sup>11</sup> Concededly, if the defendant desires to object on account of lack of the allegation, all that he can do under the common law practice is to demur. If he demurs, his ground of demurrer will be that the declaration, because of lack of the allegation, fails to show a cause of action, not that the declaration ought to contain the allegation in order that he may traverse it. In other words, it would seem, fundamentally, that the defendant is entitled to traverse the allegation because the plaintiff must make it, and not that the plaintiff is compelled to make it in order that the defendant may traverse it.

There may be a reason more obviously based on expediency why the courts, particularly in the earlier cases, deemed it proper to require the allegation in the declaration. The plaintiff's authority to sue in the representative capacity is based on the record of the court from which the letters of administration or of probate issue. The plaintiff was originally required, as heretofore noted, to make profert of this record. If he did not do so, the defendant could not craveoyer,<sup>12</sup> but the declaration was demurrable,<sup>13</sup> just as if, in an action of Covenant, the plaintiff failed to make profert of a deed. Since the question whether the plaintiff has representative capacity, based on proper proceedings in the probate court, will ordinarily depend upon and be triable by the record of the probate court

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<sup>10</sup> *Moss v. Campbell's Creek R. R.*, 75 W. Va. 62, 83 S. E. 721 (1914). "Defendant was entitled to the averment, because it is a traversable one. . . ." Probably the court means the same thing in *Austin v. Calloway*, 73 W. Va. 231, 80 S. E. 361 (1913), when it refers to "capacity, which is an issuable matter. . . ."

<sup>11</sup> See *Foster v. Adler*, 84 Ill. App. 654 (1899), criticizing the declaration because it lacked an allegation of capacity. "A general demurrer is sufficient to reach a defect in the substance of a declaration, which, in this case, consists in that it does not aver facts showing a right of action in appellant. . . ."

"Without the averment that is here lacking the issuable fact of letters granted would not be presented for the defendant to plead *ne unques* administrator to, nor could defendant craveoyer of the letters where they are not alleged to exist, nor profert made of them."

<sup>12</sup> STEPHEN, PLEADING (Andrews' ed. 1901) 205; *Ellis v. Appleby*, 3 R. I. 462 (1857).

<sup>13</sup> *Idem*.

showing the plaintiff's appointment,<sup>14</sup> it was expedient to permit the defendant to have oyer of the record and bring it before the court in which the action was pending, so that the whole question of the plaintiff's capacity might be settled on a demurrer to the declaration.<sup>15</sup> But of course it was not practicable to make profert, and hence to demand oyer, without facts in the declaration on which profert could be based. Hence the necessity that the plaintiff assert his representative capacity in the declaration.<sup>16</sup>

Apparently, as heretofore noted, until the decision of *Austin v. Calloway*, it had not been the practice in this state to allege the appointment or qualification of a personal representative, although, of course, it was necessary to indicate in some way that the plaintiff was suing in that capacity.<sup>17</sup> In *Austin v. Calloway*, a demurrer to the declaration was sustained by the supreme court and the case was reversed because the declaration lacked such an allegation.

It will be noted that the practice prior to *Austin v. Calloway* avoided most of the problems involved in the confusion heretofore noted. There was no question of the necessary form or substance of an allegation stating capacity; there was no doubt that the defense of lack of capacity must be raised by a plea, and could not be asserted under the general issue;<sup>18</sup> and it was plain that this plea must be a special plea and could not be a common or specific traverse, because there was no allegation in the declaration to traverse. In short, only one of the problems mentioned above which have troubled other courts was involved — whether the plea was in abatement or in bar.<sup>19</sup> Consequently, the effect of the new rule was to impose a shift from a practice involving a minimum of con-

<sup>14</sup> See *Moss v. Campbell's Creek R. R.*, 75 W. Va. 62, 83 S. E. 721 (1914), cited *supra* notes 2 and 10.

<sup>15</sup> *Collins v. Ayers*, 13 Ill. 358 (1851); *Vickery v. Beir*, 16 Mich. 50 (1867).

<sup>16</sup> *Foster v. Adler*, 84 Ill. App. 654 (1899), quoted *supra* n. 11.

<sup>17</sup> These two requirements, liable to be confused, are separate and distinct. The second one was not lacking in *Austin v. Calloway*. "While it appears from the form of the declaration that the plaintiff sues in a representative capacity, the declaration does not aver the fact of plaintiff's appointment and qualification as administrator."

There is much confusion in the cases as to the manner of conforming to this requirement. For instance, is "John Doe, Administrator," in lieu of "John Doe, as Administrator," sufficient? Or must the declaration go still further and positively allege that the plaintiff sues as administrator? See 24 C. J. 821. Since there is nothing in *Austin v. Calloway* that would modify this requirement, it will be omitted from further discussion.

<sup>18</sup> *McDonald v. Cole*, 46 W. Va. 186, 32 S. E. 1033 (1899).

<sup>19</sup> *Idem*. Although the point actually decided in this case was that a special plea, referred to as *ne unques* administrator, was necessary to put capacity in issue, and it was not necessary to decide the nature of the plea, Judge Brannan expressed the view that the plea is in abatement.

troubling problems to one involving the maximum. For this reason, it may be somewhat surprising that, whether resulting from a comfortable inertia on the part of the bench and the bar surviving from the former practice, or from lack of recognition of the full consequences of the new rule, the decisions since *Austin v. Calloway* have not found it necessary to deal with the newly created problems, as have courts in other jurisdictions.

The first of the new problems, the existence of which does not seem to have been noted in any of the local decisions, is the manner in which the representative capacity may be alleged in the declaration. The decisions in other states are by no means in accord on this question. In some jurisdictions general allegations which amount to legal conclusions are tolerated.<sup>20</sup> In other jurisdictions, such a form of allegation is condemned as violating the rule against pleading conclusions of law, and the plaintiff is required, in varying degrees by different courts, to allege facts showing how he was appointed and how he qualified.<sup>21</sup> Although apparently this problem has not yet been presented to the supreme court of this state for decision, it appears from the records of cases which have been reviewed there that practitioners have been indulging in a general form of allegation that may be subject to criticism as amounting to a legal conclusion.<sup>22</sup> Whether this general form of allegation has

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<sup>20</sup> "Duly appointed" sufficient. *Bowden v. Jacksonville Electric Co.*, 51 Fla. 152, 41 S. E. 400, 7 Ann. Cas. 859 (1906). Also see *Knight v. Le Beau*, 19 Mont. 223, 47 Pac. 952 (1897).

<sup>21</sup> *Hamilton v. McIndoo*, 81 Minn. 324, 84 N. W. 118 (1900); *Dodson v. Srooggs*, 47 Mo. 285 (1871); *Beach v. King*, 17 Wend. 197 (N. Y. 1837), holding "duly appointed" a legal conclusion; *Sheldon v. Hoy*, 11 How. Pr. 11 (N. Y. 1855); *Secar v. Pendleton*, 47 Hun 281 (N. Y. 1888). The majority of these cases were decided under practice codes, but legal conclusions, except where tolerated under the guise of pleading legal effect, are equally objectionable at common law. See *Central Branch Union Pacific R. R. v. Andrews*, 37 Kan. 162 (1887). The minimum usually required is allegation that the letters were issued to the plaintiff by a designated court at a stated time. A more complete allegation, being a composite of details taken from forms pursued by pleaders in the various cases, might state the death of the person represented; where he dies testate, the existence of the will, the appointment of plaintiff as executor, and probate of the will, designating the court and the time of the proceedings; where he dies intestate, the appointment of plaintiff as administrator by a designated court at a stated time; in either case, the facts constituting qualification, *e. g.*, giving the bond and taking the oath; and, finally, entering upon and continuing performance of the duties. The case last cited illustrates the use of most of these facts.

<sup>22</sup> For example, see the record of the case of *Chafin v. Norfolk & Western Ry.*, 80 W. Va. 703, 93 S. E. 822 (1917), where the allegation is as follows: "Was duly appointed administratrix of said C. C. Chafin, deceased, that she qualified as such administratrix and hath ever since been acting as such and is still the duly appointed and qualified administratrix of the said C. C. Chafin, deceased."

escaped condemnation because it has met with the tacit approval of the court, possibly as a compromise between the requirements of the old and the new practice, or because the court has not been called upon to decide its sufficiency, does not appear. However, it may be well for those who would rely upon such a manner of allegation to remember that, apparently, the entire absence of an allegation in any form was tolerated until *Austin v. Calloway* only because the omission had not until then been expressly urged as a ground of error.

It might be surmised that the method of controverting the representative capacity would fundamentally depend upon what has been alleged in the declaration. As would be expected, in those jurisdictions where no allegation of capacity is required in the declaration, it is uniformly held that the defendant must resort to a special plea, whether in abatement or in bar, because there is no allegation in the declaration to which a traverse could respond. But, as might not be expected, it has generally been held in those jurisdictions where an allegation of capacity is required in the declaration that the defendant must resort to a specific pleading, and that a plea of the general issue alone admits the plaintiff's representative capacity.<sup>23</sup> Reference is usually made to the ancient plea of *ne unques administrator* (or executor). It is referred to indiscriminately by the different courts as a traverse or as a special

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<sup>23</sup> *Macon & Western R. R. Co. v. Davis*, 18 Ga. 679 (1855); *Kenan v. Dubignon*, 46 Ga. 259 (1872); *Hazelhurst v. Morrison*, 48 Ga. 397 (1873); *Meritt v. Cotton States Life Ins. Co.*, 55 Ga. 103 (1875); *Collins v. Ayers*, 13 Ill. 358 (1851); *Foster v. Adler*, 84 Ill. App. 654 (1899); *Craig v. Norwood*, 61 Ind. App. 104, 108 N. E. 395 (1916); *Henderson's Adm'r v. Clark*, 4 Bibb 391 (Ky. 1816); *Cheek v. Wheatly*, 11 Humph. 556 (Tenn. 1851); *Marble Co. v. Black*, 89 Tenn. 118, 14 S. W. 479 (1890); *Cheatham v. Riddle*, 12 Tex. 112 (1854); *Thynne v. Protheroe*, 2 M. & S. 553, 105 Eng. Rep. R. 488 (1814).

This was the rule in West Virginia prior to *Austin v. Calloway*. See *McDonald v. Cole*, 46 W. Va. 186, 42 S. E. 1033 (1899).

Some courts permit lack of capacity to be shown under the general issue when proof of capacity is essential to show that the defendant's act was a direct violation of the plaintiff's property or possessory right, as where an administrator or an executor who has had no actual possession of the property belonging to the estate sues for a conversion committed after the death of the person represented. In such a case, the plaintiff must rely upon his constructive possession, which rests upon title, which in turn depends upon the plaintiff's representative capacity. If the plaintiff's actual possession is invaded, of course he can sue in his own personal capacity, regardless of the fact that his right to possession is based on the representative capacity, and an allegation of the representative capacity is superfluous. If the conversion occurred during the lifetime of the person represented, then of course neither the actual nor the constructive possession of the plaintiff was invaded. See *Macon & Western R. R. v. Davis*, *Henderson's Adm'r v. Clark*, both *supra* n. 23. But see *Cheatham v. Riddle*, 12 Tex. 112 (1854), criticizing the distinction on which this exception is based as hypercritical.



plea, and there is a division of opinion as to whether it is in abatement or in bar.<sup>24</sup> Whether it is essentially a traverse or a special plea would seem to depend upon whether the plaintiff has alleged capacity in his declaration. If capacity has been so alleged, then the plea should be in effect a traverse, with only addition of a *similiter* by the plaintiff, dispensed with by statute in this state,<sup>25</sup> necessary to complete an issue. On the other hand, if the plaintiff has not alleged capacity in his declaration, since the plea then must be considered a special plea introducing new matter, the course of pleading is more extended. The plaintiff will reply, alleging his capacity and making profert (if profert is required by the law of the jurisdiction) of the record of his appointment, the replication, since it introduces new matter — the facts showing the capacity — concluding with a verification. The defendant then rejoins by way of traverse and addition of the *similiter* completes the issue.<sup>26</sup>

The assertion by the courts, including the West Virginia court, that the plaintiff should be required to allege capacity in the declaration because the defendant is entitled to traverse it,<sup>27</sup> implies that the proper way to assert the defense of lack of capacity is under a traverse. This implication naturally leads to the question whether

<sup>24</sup> It is in abatement. *Childress v. Emory*, 8 Wheat. 642, 5 L. Ed. 705 (U. S. 1823); *Kane v. Paul*, 14 Pet. 33, 10 L. Ed. 341 (U. S. 1840); *Craig v. Norwood*, 61 Ind. App. 104, 108 N. E. 395 (1915); *Hazelhurst v. Morrison*, 48 Ga. 397 (1873); *Clark v. Pishon*, 31 Me. 503 (1850); *Brown v. Nourse*, 55 Me. 230, 9 Am. Dec. 583 (1867); *Hummel v. Brown*, 24 Pa. 310 (1855); *Glass v. Stovall*, 10 Humph. 435 (Tenn. 1850); *Spann v. Glass' Ex'r*, 35 Tex. 761 (1871); *McDonald v. Cole*, 46 W. Va. 186, 42 S. E. 1033 (1899), dicta; *Winn v. Fletcher*, 1 Vern. 473, 23 Eng. Rep. R. 598 (1687).

It is a plea in bar. *Sorrell v. Craig*, 15 Ala. 789 (1849), no affidavit necessary; *Watson v. Collins' Adm'r*, 37 Ala. 587 (1861); *Cotton v. Ward*, 45 Ala. 359 (1871); *Logan v. Central Iron & Coal Co.*, 139 Ala. 548 (1903), no affidavit necessary; *Lyon v. Evans*, 1 Ark. 349 (1837-9); *Codding v. Whitaker*, 5 Blackf. 470 (Ind. 1840); *French v. Frazier's Adm'r*, 7 J. J. Marshall 425 (Ky. 1832); *Vickery v. Beir*, 16 Mich. 50 (1867); *Thomas v. Cameron*, 16 Wend. 579 (N. Y. 1837); *Shown's Ex'rs v. Barr*, 33 N. C. 296 (1850).

It may be either in abatement or in bar. *Noonan v. Bradley*, 9 Wall. 394 (U. S. 1869); *Cunningham v. Rodgers*, 171 Fed. 835, 96 C. C. A. 507 (C. C. A. 9th, 1909); *Langdon v. Potter*, 11 Mass. 312 (1814).

A reason stated in many of the cases why the plea cannot be in abatement is that it cannot give the plaintiff a better writ. See *Taylor v. Virginia-Pocahontas Coal Co.*, 78 W. Va. 455, 88 S. E. 1070 (1916). To the effect that this is not always a sufficient test, see the last two cases cited in the preceding paragraph. Also see *Boston Type & Stereotype Foundry v. Spooner*, 5 Vt. 93 (1833).

For an attempt to explain why the courts have not agreed as to whether various matters constitute defenses in abatement or in bar, and why some courts permit an election as to such matters, see Note (1921) 27 W. VA. L. Q. 355.

<sup>25</sup> W. VA. REV. CODE (1931) c. 56, art. 4, § 44.

<sup>26</sup> *Ellis v. Appleby*, 4 R. I. 462 (1857).

<sup>27</sup> See note 10 *supra*.

the defendant should now be permitted to assert the defense under the general issue (or at least under such broad general issues as *non assumpsit* or not guilty in case), since the common law special traverse and common or specific traverse are obsolete in practice. This possibility, discussed pro and con among members of the bar, has not been directly decided in this state, although statements appear in the decisions which indicate that the court assumes that the old plea of *ne unques* is still the proper plea.<sup>28</sup> Whether the court indulges in this assumption because it recalls the plea of *ne unques* as the traditional method of defense under the former practice, and has not been called upon to consider definitely whether *Austin v. Calloway* has changed the possibilities, or whether it has had in mind considerations which consciously establish a preference for the plea *ne unques* in lieu of the general issue, must await an answer until a defendant attempts to assert the defense under a general issue. However, it is possible to call attention to considerations by which the ultimate decision may be influenced or controlled.

If the defense is to be considered one in abatement, of course a specific plea, whether labeled a special plea or a traverse, would be necessary, because matter in abatement could not be asserted under the general issue. A plea of the general issue waives matter in abatement.<sup>29</sup> Prior to *Austin v. Calloway*, it seems to have been the view that *ne unques* was a plea in abatement.<sup>30</sup> Since *Austin v. Calloway*, the declaration being demurrable without an allegation of capacity, it might be surmised that the fact of capacity should be considered an essential element of the cause of action, and therefore that a plea controverting it would be one in bar. In the one case found in which the court has considered the question, it seems to be in doubt, giving reasons pro and con, seeming to lean toward a conclusion that the plea is in bar, but suggesting the possibility that the subject matter might be pleaded either in bar or in abatement, as has been decided in other jurisdictions.<sup>31</sup>

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<sup>28</sup> See *Austin v. Calloway*, 73 W. Va. 231, 80 S. E. 361 (1913); *Moss v. Campbell's Creek R. E.*, 75 W. Va. 62, 83 S. E. 721 (1914).

<sup>29</sup> This is a reason frequently stated by the courts which hold that the defense must be asserted in abatement why it is waived by a plea of the general issue.

<sup>30</sup> See *McDonald v. Cole*, 46 W. Va. 186, 32 S. E. 1033 (1899).

<sup>31</sup> *Taylor v. Virginia-Pocahontas Coal Co.*, 78 W. Va. 455, 88 S. E. 1070 (1916). There are four particular reasons why it may be important to decide whether the plea is in abatement or in bar. (1) A plea in abatement must be filed at rules. W. VA. REV. CODE (1931) c. 56, art. 4, § 33. (2) It cannot be received after the defendant has demurred, pleaded in bar or answered. *Idem*.

If the court should ultimately decide that the defense is one in bar, it nevertheless may still insist, on the basis of precedent alone, that lack of capacity must be asserted under the plea *ne unques* in lieu of the general issue. It has been held in more than one jurisdiction that, in spite of the fact that the declaration contains an allegation of capacity, the defense must be asserted under the plea *ne unques*, and that a plea of the general issue admits the capacity.<sup>32</sup>

Finally, disregarding the formal technique of pleading, a practical reason may be urged why it would be desirable to segregate the fact of representative capacity from other matters to be put in issue. Unquestionably, it would be expedient to decide such a question preliminary to a trial of the other essentials of the cause of action, for the same reason that it is expedient to try ordinary matters in abatement before matters in bar. This is an advantage which in this state would result automatically from treating the lack of capacity as matter in abatement, since our statute provides that matters in abatement shall be tried before matters in bar,<sup>33</sup> and it has been decided that they are waived unless so tried.<sup>34</sup> If the defense should be treated as one in bar and tried under the general issue, of course there would be no preliminary trial. All matters in bar would be tried at the same time. If the defense, understood as one in bar, should be asserted through the medium of a specific traverse, *e.g.*, *ne unques*, it is possible that the result might be the same. There is no statute requiring that such an issue must be tried before other matters in bar. But it certainly would be within the discretion of the court to require a trial of the special issue prior to a trial on the final merits under the general issue, particularly since it would ordinarily, like an issue on a plea of

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(3) It must be verified by oath. W. VA. REV. CODE (1931) c. 56, art. 4, § 32.

(4) It is subject to demurrer for formal defects. W. VA. REV. CODE (1931) c. 56, art. 4, § 37.

In the case last cited, the court argued that the plea *ne unques* administrator, although a plea in abatement, could be filed at any time when a plea in bar could be filed, because the statute requiring pleas in abatement to be filed at rules related only to pleas in abatement to the jurisdiction of the court, and the plea *ne unques* does not go to the jurisdiction. Whatever the former law, this distinction would not be valid under the Revised Code. The statute now requires all pleas in abatement to be filed at rules. See W. VA. REV. CODE (1931) c. 56, art. 4, § 33, and the Revisers' Note thereto.

<sup>32</sup> See the cases cited in note 23 *supra*.

<sup>33</sup> W. VA. REV. CODE (1931) c. 56, art. 4, § 38.

<sup>34</sup> *Maupin v. Scottish Union & National Ins. Co.*, 53 W. Va. 557, 45 S. E. 1003 (1903); *Houseman v. Globe & Rutgers Fire Ins. Co.*, 78 W. Va. 586, 89 S. E. 269 (1916).

*nul tiel record* in an action of Debt on a record, be tried before the court on the record.<sup>35</sup>

If there is particular merit in requiring the question of representative capacity to be settled as a preliminary matter, it should be profitable to note that the new requirement imposed by *Austin v. Calloway* offers an opportunity, where validity of the appointment rests solely on the probate record, for settlement of the matter even before the filing of a plea of any sort. The declaration is now demurrable unless it contains an allegation of the representative capacity. The question of capacity is triable before the court on the record of appointment by the probate court. There would seem to be no reason why, as in days of old, the defendant could not craveoyer of the probate record and demur to the declaration if the record does not support the allegation of appointment.<sup>36</sup>

An appraisalment of the general merits of the new rule established by *Austin v. Calloway* may be aided by a brief statement in the way of a debit-credit inventory of the results. Certainly the plaintiff has received nothing to mark down on his side of the ledger, unless the shortening of the pleading process hereinafter noted should be considered to be in his favor. The new rule has loaded him with an extra burden and has subjected him to the penalty of a demurrer if he does not bear it or bears it lamely. In fact, the court frankly avows that the new rule is intended for the benefit of the defendant—in order that he may have an opportunity to traverse the allegation in the declaration. The assumption that he would get some peculiar benefit from a traverse naturally suggests the intention that he should be entitled to rely upon the general issue. If he cannot rely upon the general issue, he must resort to a specific traverse which, so far as his pleading activities are concerned, may impose upon him practically the same burden as when he was compelled to rely upon *ne unques* as a special plea under the former practice. In fact, as heretofore noted, the court seems to assume that he must still resort to the same plea as formerly, by suggesting *ne unques* as the proper plea. It is true that the

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<sup>35</sup> The possibility of a preliminary trial on the special issue is frequently mentioned by courts of different jurisdictions as a reason why the defense should not be asserted under the general issue. To the effect that the West Virginia court contemplates a preliminary trial, see *Moss v. Campbell's Creek R. E.*, 75 W. Va. 62, 83 S. E. 721 (1914).

<sup>36</sup> See cases cited in note 15 *supra*. "The reason for holding the defendant precluded from disputing the plaintiff's right to sue when he has pleaded to the merits is, that the plea is interposed after the profert of the letters has enabled him to judge of their sufficiency." *Vickery v. Beir*, 16 Mich. 50 (1867).

pleading process may in some respects be curtailed and time may be saved (a result generally supposed to be a benefit to the plaintiff rather than the defendant). If *ne unques* operates as a traverse, it produces an issue without further pleading; while if it operates as a special plea, as under the former practice, an issue, as explained by the Rhode Island case,<sup>37</sup> does not result until a replication is traversed by a rejoinder. Neither party gets any advantage from any shifting of the burden of proof. In either case the burden of proof rests upon the plaintiff: in the one instance, upon a traverse of the allegation in his declaration; in the other instance, upon a traverse of an equivalent allegation in his replication. To a suggestion that the new rule shortens the pleading process by way of dispensing with a replication and a rejoinder, it may be argued that this advantage is offset by the necessity of additional pleading in the declaration. To a suggestion that a specific traverse, in lieu of the general issue, will segregate the issue of representative capacity for purposes of a preliminary trial, it may be replied that the same result was accomplished under the former practice when *ne unques* was treated as a special plea. It remains to credit the defendant with one advantage not mentioned by the court as a reason for the new rule. He should now be permitted to *crave oyer* of the probate record and demur to the declaration if the record is not sufficient.

If there is merit in dispensing with pleading generally, possibly the balance should be struck in favor of the old rule. It is probable that in a great majority of the cases the defendant has no ground for contesting the representative capacity, and would not attempt to do so by a demurrer or a plea of any sort, regardless of what is or is not alleged in the declaration. In such cases it should be immaterial to him that the declaration is silent as to capacity. Yet the new rule requires the plaintiff *in all cases* to indulge in the allegation and face the hazards of a demurrer, either because he has omitted the allegation or because he has not properly framed it, in order that the defendant, in a minority of the cases, may have an opportunity to resort to a traverse in lieu of a special plea, although he files what is designated as the same plea, *ne unques*, in any event.<sup>38</sup>

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<sup>37</sup> *Ellis v. Appleby*, 4 R. I. 462 (1857), note 26 *supra*.

<sup>38</sup> "And no reason is perceived for requiring the plaintiff to prove his representative character, unless it is controverted by the pleading of his adversary. In the great majority of cases an opposite practice would devolve on the plain-