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EDITORIAL NOTE

FUNCTION OF AFFIDAVITS AND PLEAS IN PROCEEDING FOR JUDGMENT ON NOTICE OF MOTION

Two recent West Virginia cases have introduced into the statutory proceeding for judgment on notice of motion two principles which perhaps will be considered novel by many practitioners.

In the first case,[1] the plaintiff sought recovery on eight promissory notes, each for the sum of two thousand dollars, an itemized open account for merchandise amounting to two thousand twenty-four dollars and seventy-three cents, and an account for money advanced for the use and benefit of the defendant in the sum of five hundred twenty-seven dollars and thirty-seven cents. The plaintiff served upon the defendant and filed the

[1] Bluefield Supply Company v. Waugh, 106 W. Va. 67, 145 S. E. 584 (1928).

notice and the affidavit of merits prescribed by the statute.[2] Upon the execution of a "writ of inquiry", the defendant, without having filed any counter affidavit or plea, insisted upon the right to cross-examine the plaintiff's witnesses and to introduce evidence of his own for the purpose of reducing the recovery. The court conceded that he would have this right upon the execution of a writ of inquiry in a common-law action but held that no such right exists in the statutory proceeding. An intelligible discussion of the grounds upon which the court bases the differentiation requires a limited review of the common-law background.

It is fundamental law that, in an action sounding in damages, the trial of the case involves two separate and distinct inquiries: (1) Is there a right to recover? (2) If so, what should be the amount of the recovery? The first inquiry is always, in the first instance, a pleading problem and is subject to the test of a demurrer or the challenge of a plea in bar. On the other hand, the amount of the recovery — the damages — is wholly an evidentiary matter. Damages (except when damages are of the gist of the cause of action) are not an element of the cause of action, but are the result or consequence of the existence of a cause of action.[3] If there is a cause of action, it necessarily results that there are at least nominal damages, but the existence of a right to recover implies no more. Hence when a defendant fails to plead, as on default or *nil dicit,* he thereby admits only a cause of action and its necessary consequence, nominal damages.[4] If the plaintiff desires to recover more, he must resort to evidence on a writ of inquiry. However, if the sum involved in litigation is liquidated and certain, so that there may properly be a recovery for only one certain amount, no writ of inquiry is necessary. In such a case, the defendant, on default or *nil dicit,* admits not only the right to recover, but also the amount of the recovery.[5] There is nothing to inquire into after the default.

Practical and important consequences result from this distinction between the cause of action and the damages. The only proper function of a demurrer or of a plea in bar is to attack the cause of action — to challenge the right to recover or some

[2] W. VA. REV. CODE (1931) c. 56, art. 2, § 6.
[3] Jenkins v. Montgomery, 69 W. Va. 795, 72 S. E. 1087 (1911).
[4] Bates v. Loomis, 5 Wendell 134 (N. Y. 1830); Havens v. Hartford and New Haven Railroad Company, 28 Conn. 69 (1859); Hickman v. Baltimore & Ohio Railroad Company, 30 W. Va. 296, 4 S. E. 654 (1887).
[5] McAlister v. Clark, 33 Conn. 253 (1866).

part of it. Mere abatement of the damages does not in any sense operate by way of reducing the cause of action or eliminating any part of it, but only by way of subtracting from its consequences. Hence it is improper to demur[6] or to plead[7] to the damages; or, as it is frequently stated, to demur or plead in reduction of damages. As a corollary to the last proposition, it must necessarily result that, after default or *nil dicit*, a defendant, on a writ of inquiry, must be permitted in the evidence to contest the amount of the damages, as to any recovery above nominal damages, without the necessity of interposing a plea,[8] since the absence of a plea could be taken as admitting only what it might controvert if pleaded. These distinctions and principles are fundamental in common law pleading.

However, a distinction must be made between matters which constitute separate items or portions of damages and matters which constitute separable parts of a cause of action. It is always permissible to demur[9] or to plead[10] separately to a separable part of a cause of action. Where the promise sued on is one for the payment of money, each unit or portion of the money constitutes a separable part of the cause of action. In fact, when an action involving such a promise is brought, the relief sought is essentially *specific performance* of the promise to pay money, rather than damages for the breach. The truth of this proposition is more readily apparent in an action of debt, where the verdict and the judgment are for the debt; but the situation is substantially the same in an action of assumpsit or of covenant on a promise or covenant to pay money, where, although the verdict sounds in damages, nevertheless the breach laid in the declaration is non-payment of the money promised and the sum recoverable may in fact be liquidated. In such cases, specific performance is sought under the guise of recovery of damages for non-performance of the promise, but the measure of the damages is the amount of the sum payment of which would have constituted performance of the promise. Hence the verdict and the judgment, under the guise of awarding damages, really award specific performance of the promise.

A true test whether the sum recoverable in assumpsit or

[6] Note (1925) 31 W. VA. L. Q. 214 *et seq.*
[7] *Idem.*
[8] Havens v. Hartford and New Haven Railroad Company, note 4 *supra.*
[9] 1 CHITTY, PLEADING (16 Am. ed. 1879), 696 *et seq.*
[10] *Idem,* 549 *et seq.*

covenant really stands as a measure of the cause of action itself, or merely as a measure of damages awarded as wholly alternative to performance of the promise, is the nature of the breach laid in the declaration. If the breach is non-payment of money, then the sum alleged as an element of the breach is a measure of the cause of action; but if the breach is failure to do something else (*e. g.* failure to build a house), then the sum alleged in the *ad damnum* clause is descriptive of the mere consequences of the cause of action.[11]

Propriety of the plea of part-payment (part-performance) rests upon these distinctions. Such a plea is directed to a separable part of the cause of action. Otherwise, it would be bad as a plea in reduction of damages. Of course, the plea is directed at the sum alleged in the breach and not at the sum stated in the *ad damnum* clause alleging the amount of the damages. A reduction of the sum alleged in the breach as measuring the cause of action will necessarily be reflected in the amount recoverable as damages under the *ad damnum* clause, but this is merely an indirect result of the operation of the plea upon the cause of action and not a direct attack by the plea upon the amount of the damages.[12]

The place which the statutory remedy and the decision under discussion should take in the background of the general distinctions and principles stated will be largely determined by the scope of the remedy. It will be noted that the remedy is applicable only to contract claims. It is available only to a "person entitled to recover money by action on any contract." This language, ambiguously, is sufficiently broad to cover all claims that might be litigated in a common-law contract action, but it has not been so construed. The remedy has been confined to promises to *pay money.*[13] The promise need not be express. It may be quasi-contractual and implied by law,[14] provided it be a promise to pay money. The sum need not be certain and liquidated in the sense that evidence in the nature of an inquiry of damages may be dispensed with,[15] but the inquiry is for the purpose of aiding specific execution of the promise to pay, and not for the purpose of

[11] Non-payment of damages does not constitute the breach and it is improper to allege non-payment of damages. Davisson v. Ford, 23 W. Va. 617 (1884).

[12] Other pleas directed at a part of the cause of action, *e. g.*, a plea of release, are subject to the same observations.

[13] White v. Conley, 108 W. Va. 658, 152 S. E. 527 (1930).

[14] Lambert v. Martin, 111 W. Va. 25, 160 S. E. 223 (1931).

[15] See BURKS, PLEADING AND PRACTICE (2d ed. 1920) 181-2.

supplying a measure of damages to be awarded in lieu of performance, as in a tort action or in a contract action where the promise is to do something other than to pay money. Any attempt to reduce the recovery, whether in the pleadings or in the evidence, will constitute an attack upon the cause of action or some part of it. Hence, in such a case, if the defendant intervenes in the evidence for the purpose of reducing the amount of the recovery, whether he has pleaded or not, he is essentially undertaking to controvert a portion of the cause of action, and not merely to reduce damages which flow from the cause of action. Such being so, particularly when the summary nature of the remedy is taken into consideration, it may very well be conceived that it was not the legislative intent to grant the defendant such a privilege in the absence of a counter affidavit and a plea.

That the decision of *Bluefield Supply Company v. Waugh*[16] was influenced by consideration of any such distinctions or principles does not expressly appear, although the opinion divulges a general concept of the theory of the remedy which is in harmony with, and suggests, some such inarticulate conception. The statute is quoted at length by the court for what it "seems to contemplate". If reference is had here to the mere verbal import of the statute, as distinguished from the general nature and purpose of the remedy, it would seem a little difficult to discover anything in this statute which would differentiate it from the statute[17] which regulates the procedure in common-law actions, where the court concedes a contrary practice prevails. The language of the two sections would indicate that the one was adopted almost literally from the other. There is, however, one substantial distinction between the two sections. The motion section provides that the plaintiff in his affidavit shall state "distinctly the several items of the plaintiff's claim", while the section regulating the procedure in common-law actions has no such provision. Such a statement in the plaintiff's affidavit amounts to a bill of particulars, gives definite and specific notice to the defendant, not of items of damages but of separate items or portions of the cause of action itself, and, therefore, if the defendant has any evidence to interpose, renders all the more inexcusable his failure to file a counter affidavit and plead.

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[16] *Supra* n. 1.
[17] W. VA. REV. CODE (1931) c. 56, art. 4, § 51.

The argument based on the supposed nature and purpose of the remedy is summed up as follows:

> "Instead of making the statute a quick, informal and expeditious way for the assertion of such money claims arising out of contract, (the evident design and purpose of the statute), it would tend to make it cumbersome and prevent suitors claiming such moneys from proceeding under it."

In the second of the two cases mentioned at the beginning of this discussion, *Nichols v. Island Gas Company*,[18] it was held that the defendant's counter affidavit denying generally liability on the note sued on might be treated as the general issue for the purpose of supporting a notice of recoupment.

> "The statutory affidavit of a defendant upon a notice of motion for judgment denying any indebtedness to the plaintiff may be treated as in effect a plea of the general issue."

Bluefield Supply Company v. Waugh is cited as the sole authority in support of this proposition.

> "We said in Bluefield Supply Co. v. Waugh, 106 W. Va. 67, 71, 145 S. E. 584, that an issue was made up by the defendant's affidavit."

As has already been noted, what was actually decided in *Bluefield Supply Company v. Waugh* was that the defendant could not, on a writ of inquiry, cross-examine the plaintiff's witnesses or introduce evidence of his own unless he had filed a counter affidavit *and a plea.* The only statement in the latter case which might be taken as intimating that a defendant may rely on his counter affidavit in lieu of a plea is the following:

> "Moreover, it is the apparent object of this statute that where the defendant desires to controvert any part of the plaintiff's claim, an issue as to that part must be made up by the counter affidavit, and the issue tried by a jury."

One would have surmised that the statement quoted was intended only to be a loose way of saying that, since the plaintiff had served and filed an affidavit of merits, it was necessary that the defendant file a counter affidavit as a condition precedent to filing a plea making up an issue. It would seem to require a stretch of the imagination to accept *Bluefield Supply Company*

[18] 170 S. E. 912 (W. Va. 1933).

v. Waugh, on the face of the reported opinion, as authority for the proposition that the counter affidavit might stand as a substitute for a plea. Moreover, such a function of the counter affidavit would seem to be foreign to the contemplation of the express provisions of the statute. The counter affidavit seems to be required merely as a sanction of good faith conditionally precedent to the filing of a plea. It seems to have been designed primarily to serve an evidentiary, rather than pleading, function. However, in spite of lack of prior authority and of the intent of the statute, the innovation, as an original proposition, may be justifiable as a permissible irregularity.

In view of the nature and purpose of the statutory proceeding and of the general liberality which has been accorded to its functioning, it is believed that the holding in *Nichols v. Island Gas Company* is logical and correct and wholly in accord with the court's prevailing attitude toward the remedy. The remedy has always been treated with the greatest of liberality in its procedural details. Substance has never been sacrificed to form.[19] Moreover, to permit the counter affidavit to stand as a traverse does no violence even to the principles of common law pleading. It contains the same measure of negation and gives the same measure of notice as the general issue in a common law action. If (as in *Nichols v. Island Gas Company*) it denies the whole claim, it may be treated as the general issue going to the whole cause of action. If (as apparently would have been the case if the counter affidavit had been filed and treated as a plea in *Bluefield Supply Company v. Waugh*) it denies only a part of the claim, it may be treated as the general issue going to a part of the cause of action. It is ordinary practice at common law to plead the general issue to a separable part of a cause of action. Enough has already been said to indicate that, owing to the narrow scope of the statutory remedy, such a treatment of the counter affidavit would not amount to pleading in reduction of damages.

—LEO CARLIN.

[19] For instance, in Peoples State Bank of Crown Point, Indiana v. Jeffries, 99 W. Va. 399, 129 S. E. 462 (1925), it was decided that the notice might be supplemented by the plaintiff's affidavit.