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PLEADING AND PRACTICE UNDER THE REVISED CODE

LAWRENCE R. LYNCH

In a paper of limited length such as this necessarily must be, it is impracticable to discuss or even to mention many of the changes in pleading and practice contained in the Revised Code. For that reason this discussion will be confined primarily to some important and interesting changes in Chapter 56, entitled "Pleading and Practice."

At the outset it may be said that the revisers have retained the common law system of pleading and procedure. They declined to follow in the steps of those jurisdictions which have adopted what is known as code pleading and practice. Such changes as the revisers made were designed to modernize our existing system and to eliminate some of the technicalities that heretofore have served no useful purpose except as traps for the unwary.

Venue in County Where Cause of Action Arose.

The first change of importance relates to venue, and is found in section 2, article 1, chapter 56 of the Revised Code. Section 2, chapter 123 of Barnes' West Virginia Code 1923, provided that an action might be brought in any county wherein the cause of action, or any part thereof, arose, although none of the defendants resided therein. But venue under that section was limited by § 2 of chapter 124, which provided that process against a defendant under the first mentioned section should not be directed to the officer of any other county than that wherein the action was brought, unless such defendant was a corporation. The result was that an individual defendant could not be sued in the county wherein the cause of action arose unless served with process in such county.

The revisers apparently did not deem it advisable that a jurisdictional statute should be limited and controlled by another statute governing the direction of process. They therefore eliminated the restriction contained in section 2 of chapter 124, and amended section 2 of chapter 123, Code 1923 (chapter 56, article 1, section 2), so as to provide that an action, suit or proceeding may be brought in any county wherein the cause of action, or any

*Address before the Annual Meeting of the West Virginia State Bar Association at Bluefield, July 29, 1930.
**Member of the Bar of Clarksburg, West Virginia.
part thereof, arose, although none of the defendants reside there- 
in, in the following instances:

"(a) When the defendant, or if more than one defendant, 
one or more of the defendants, is a corporation; 
(b) When the defendant, or if more than one defendant, 
one or more of the defendants, are served in such county with 
process or notice commencing such action, suit or proceed- 
ing."

The effect of this amendment is to permit an individual de- 
defendant to be sued in the county where the cause of action arose, 
although not a resident of that county nor served therein, if one 
or more of his codefendants is a corporation or is served with 
process in such county. As a result of this amendment, the county 
where the cause of action arose becomes as important as the county 
where one of the defendants resides, when the plaintiff is de- 
termining in which county he shall institute his suit. And as a 
matter of principle, it is as fair to compel an individual defen- 
dant to defend an action, suit or proceeding in the county where 
the cause of action arose as it is to compel him to defend in the 
county where one of his codefendants happens to reside. The 
former is the county in which the breach of legal duty occurred, 
whether it be ex contractu or ex delicto. It is the county with 
reference to which the parties contracted or within whose jurisdic- 
tional limits the tort was committed. Therefore, an individual 
defendant, although not served in the county in which the cause 
of action arose and suit is brought, has even less cause to com- 
plain at being compelled to defend in such county upon venue 
properly laid, than he would have if compelled to defend in a 
county where the only basis of venue is the residence of a code- 
defendant.

As the revisers state in their note to the section referred to, such 
procedure will prevent an unnecessary number of suits upon the 
same instrument or cause of action. Very frequently the party 
actually served may, as among the obligors, be a surety for others. 
in which event judgment should go against all of the obligors, so 
that if the person bearing the relation of surety be compelled to 
pay the debt or obligation, he will have the benefit of a lien against 
the person primarily bound.

Although the language of this section is broad and apparently 
unqualified, venue based thereon may be subject to a limitation or 
qualification requiring the proper joinder of the individual de- 
fendant upon whom service of process was had in the county.
where the cause of action arose. The case of Wolfe v. Jordan\(^1\) involved an action brought in Jackson County upon a cause of action arising therein. One of the individual defendants resided in the county and was served therein. Process against the other defendant was directed to Kanawha County and served there. Under the Revised Code venue prima facie could be laid in Jackson County either on the ground of the residence of one of the defendants therein or on the ground that the cause of action arose there. Under the Code of 1923 venue in Jackson County could be justified only upon the ground of the residence of one of the defendants therein. It appeared, however, that the defendant residing in Jackson County was a guarantor and therefore only secondarily liable, whereas the defendant residing in Kanawha County was primarily liable. The court held that, under section 1, chapter 123, Code 1923, basing venue upon the residence of one of the defendants, there could be no venue in Jackson County since the defendant residing there and served with process was only secondarily liable and therefore improperly joined with the defendant residing in Kanawha County who was primarily liable, and that the latter's plea to the jurisdiction should have been sustained. The court further held that venue in the county where the cause of action arose could not be sustained under section 2 of that chapter because section 2 of the following chapter forbade the service of process on an individual defendant without the county where the action was pending.

Although the revised section has changed the law in this latter respect, our supreme court may construe the section as it construed section 1, chapter 123, Code 1923, in the case cited, and may hold that the individual defendant served with process in the county where the cause of action arose must be properly joined as a defendant in order to sustain the venue of the action as against a defendant residing in another county.

It is true section 34, article 4, chapter 56 of the Revised Code, hereinafter discussed, provides that no action or suit shall abate or be defeated by the misjoinder or nonjoinder of parties, plaintiff or defendant, yet that is a section prescribing a rule of practice or procedure rather than a jurisdictional statute, and where an essential jurisdiction fact fails, to-wit, service of process upon a proper defendant in the county where the cause of action arose, the entire venue fails. Under said section 34, the misjoined defendant

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\(^1\) 93 W. Va. 42, 116 S. E. 132 (1923).
must be dismissed by the court, and with him goes the essential jurisdictional element upon which venue in that county is based.

Notice of Motion for Judgment.

Section 6, article 2, chapter 56 of the Revised Code, relating to notice of motion for judgment, retains the provisions of former statutes limiting the proceeding to the recovery of money on contract. It was not extended to include causes of action ex delicto as in Virginia. The revised section contains several important changes, however. It lays jurisdiction or venue of the motion in any court which would have jurisdiction of an action, and eliminates the exception of former statutes prohibiting venue in the county in which the cause of action arose. It requires the notice to be returned to the clerk's office "on or before the return day" thereof, instead of "fifteen days before the motion is heard", as under former statutes. If the term of court to which the notice is made returnable continues for a period of twenty days after the service of such notice, the revised section requires the motion for judgment to be heard during such term, "unless good cause for a continuance thereof be shown." It further provides that where the plaintiff has filed an affidavit and the defendant has failed to file his plea and counter affidavit, the court shall, on plaintiff's motion, and "without further proof," enter judgment for the plaintiff. The words "without further proof" were inserted in lieu of the last sentence in the first paragraph of Acts 1929, c. 39, which read: "And the affidavit of the plaintiff hereinbefore mentioned shall be legal evidence of plaintiff's claim." Before judgment is entered on any negotiable instrument, however, the court must require the plaintiff to file the same in such proceeding.

Service of Process on Corporations.

In article 3 of chapter 56, relating to writs, process and orders of publication, the most interesting and probably the most important changes are those relating to the service of process on domestic and foreign corporations, found in §§ 13 and 14 of said article. In these two sections the revisers have grouped and consolidated the numerous statutory provisions relating to service of process on corporations found in the Code of 1923, principally in chapters 39, 41, 50, 52, 53 and 124.

Section 13 of article 3 relates to service of process on domestic corporations and section 14 to service on foreign corporations. The former, after providing for service of process on a municipal-
ity, county court and board of education, greatly simplifies the law relating to service on private corporations by providing for service (a) on the state auditor, who is appointed statutory attorney for all corporations, both foreign and domestic, by another section of the Revised Code; or (b) on any person appointed by the corporation to accept service of process in its behalf; or (c) on its president or other chief officer, or its vice president, cashier, assistant cashier, treasurer, assistant treasurer, secretary, or any member of its board of directors; or (d) if no such officer or director be found, then on any agent of such corporation.

The revisers have eliminated all preferences among the various named officers of a corporation which heretofore have existed in matters of service of process. Even if the president or chief officer can be found, the process may be served on the secretary or any director. This will greatly simplify the form of return of process. Certain preferences are retained, however, such as the preference of an officer of a corporation to an agent. This is a proper distinction because the officers named above will naturally feel a greater responsibility than an agent in bringing process served on them to the attention of the proper corporate officer. On the other hand, the statute recognizes the fact that process may safely be served on an agent when a proper officer can not be found.

Section 14 of article 3, relating to service of process on foreign corporations, is new. It provides that if the foreign corporation is authorized to transact business in this state, process against it may be served in the manner provided in § 13 for service on private domestic corporations. If the corporation is not authorized to do business in this state, process against it may be served on any officer, director or agent of such corporation acting or transacting business for it in this state, without discrimination among them or preference of one over the others. The broad latitude thus given in serving process where the corporation is not authorized to transact business in this state was deemed advisable because service can not be had on the auditor in such cases. If no statutory attorney in fact, officer, director or agent can be found in this state upon whom service can be had as aforesaid, an order of publication may be awarded as provided by sections 23 and 24 of that article.

Heretofore, when process against a foreign corporation doing business in this state was served upon an agent of such corpora-

tion, under the provisions of section 35, chapter 50, and section 6, chapter 41, Code 1923, such service had to be made in the county in which the agent resided, and it was necessary that the return show this fact. The revised section, however, omits such requirement, thus making the law in this respect uniform as to both foreign and domestic corporations.

In order that the procedure in justices' courts may be the same as in other courts as regards service of process on corporation, sections 13 and 14 of said article 3 are repeated as sections 11 and 12, respectively, of article 3, chapter 50, except for slight modifications to conform to the territorial limitations on the jurisdiction and authority of a justice, as provided in § 28, article 8 of the Constitution. In addition, the revisers added a new section (§ 16 of said article 3, chapter 50), which expressly requires the auditor to accept service of any process against any corporation for which he is statutory attorney in fact, when such process is issued by any justice in this state or in any proceeding pending in any justice's court.

Transfer of Cases from Law to Equity and Vice Versa.

Section 11, article 4 of chapter 56, which is a new section, represents a departure from common law procedure made by the revisers. It was taken verbatim from the Virginia Code of 1919 and provides for the transfer of a case from law to equity, or vice versa, which had been instituted on the wrong side of the court.

Provision is made for the necessary changes in, or amendments of, the pleadings to make them conform to the proper practice made necessary by the transfer.

Statements of Particulars of Claim or Defense.

In order to assist in arriving at a more definite issue in advance of trial, the revisers have made provision whereby the court may require sworn statements of the particulars of the plaintiff's claim and of the defendant's defense. They have omitted section 46, chapter 130, Code 1923, relating to the same general subject, and have substituted in lieu thereof, with some slight amendments, the more comprehensive provisions of sections 62, 63 and 66, chapter 125, Code 1923. The sections last mentioned originally related only to statements of the particulars of the claim or defense in

\[2\] Ibid.

\[4\] For a similar federal statute see 28 U. S. C. § 397 (1926). See also federal equity rule 28.
actions on insurance policies, but the revisers have broadened them to cover all actions and motions. Under these sections the court may order the plaintiff, or defendant, to file a more particular statement of the nature of his claim, or defense, as the case may be, or of the facts expected to be proved at the trial. Such statement must be sworn to by the plaintiff, or defendant, as the case may be, or by some other credible person. If no statement, or an insufficient statement, is filed, the court may grant further time for filing the same, or permit the statement filed to be amended, or may, at the trial, exclude the evidence offered by the party in default as to any matter which he has so failed to state or has insufficiently stated, and which is not described in the pleading of such party so plainly as to give the adverse party notice of its character.

Amendments to Pleadings and Process.

In section 24, article 4, chapter 56, the revisers have made several important changes in the statute law relating to amendments. The revised section provides, among other things, that the court, "if in its opinion substantial justice will be promoted thereby, may, at any time before final judgment or decree, and upon such terms as it may deem just, permit any pleading to be amended, or material supplemental matter to be set forth in amended or supplemental pleadings, introducing a necessary party, discontinuing as to a party, eliminating from a multifarious bill all but one of the equitable causes of action alleged, or changing the form but not the cause of action, except that no proceeding by motion shall be converted by amendment into a formal action at law, or vice versa, and the court may allow any other amendment in matter of form or substance in any process which is not void, pleading or proceeding, which may enable the plaintiff to sustain the action, suit, motion or proceeding for the cause for which it was intended to be brought, or enable the defendant to make full and complete defense."

The provision giving the plaintiff the right to eliminate from a multifarious bill all but one of the equitable causes of action alleged changes the law as expressed in numerous decisions of the Supreme Court of Appeals of this state.

The changes in this section and in section 30 of the same article eliminate an ambiguity that heretofore has existed in § 15, c. 125,

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1 See Rev. Code, c. 56, art. 4, § § 19, 20 and 23.
Code 1923, and make it plain that process which is not void may be amended at any time, not only with reference to variances from the declaration, but also with reference to defects within the writ itself. Some doubt heretofore has existed with reference to the right to make a substantial amendment even in a writ that is not void, for in Fisher v. Crowley, our supreme court said: "Though by the common law, some writs were amendable, the power of amendment only existed as to slight and formal defects. Even in this respect, some writs were not amendable by the common law courts. * * * Sections 14 and 15 of chapter 125 of the Code provide for the correction of misnomers and variances in the writ and nothing more. Hence, it is probable that they are merely declaratory of the common law." Section 30 adds a further provision which makes it plain that it is not necessary, as asserted in Laidley's Administrator v. Bright's Administrator, to file a plea in abatement based upon such defect or variance as a condition precedent to the authority of the court to permit an amendment of the writ.

Section 24 expressly prohibits the amendment of void process, and, when read in connection with section 30, retains for a defendant any right which he has by the common law to move to quash such void process. Section 30 further provides that if the process be void, the suit or action shall be dismissed on motion of the defendant. The revisers state that this provision may result in changing the rule of decision in Danser v. Mallonoe, in which the court permitted a special appearance for the purpose of moving to quash a process (attachment and order of publication), but held that an additional motion to dismiss the case from the docket, made after the court had sustained the motion to quash, amounted to a general appearance.

Misjoinder and Nonjoinder of Parties.

Section 34, article 4, chapter 56, makes substantial changes in the law of this state relating to misjoinder and nonjoinder of parties, some phases of which were discussed in an earlier portion of this paper. The revised section provides, among other things, that "no action or suit shall abate or be defeated by the misjoinder or non joinder of parties, plaintiff or defendant". In the future, when such defects are made to appear by affidavit or otherwise, it

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*57 W. Va. 312, 316, 318, 50 S. E. 422 (1905).
*17 W. Va. 779, 793 (1881).
*77 W. Va. 26, 86 S. E. 895 (1915).
will be the duty of the court, of its own accord or upon motion, to order the misjoined parties to be dropped and non-joined or omitted persons to be made parties by proper amendment and process. This change, therefore, does away with both misjoinder and nonjoinder of parties as a ground for abating or defeating an action or suit. It dispenses with pleas in abatements for such defects, wherever such pleas have been proper heretofore, and probably changes the rule of decision of our supreme court in holding such defects to be grounds of demurrer when they are apparent on the face of the pleading.

In discussing the corresponding section of the Virginia Code of 1919, from which several provisions of our revised section are taken, Judge Burks says:

"Under the above statute it is believed that the proper remedy for a misjoinder is a motion to abate as to the parties improperly joined, and that as to nonjoinder the proper remedy is a motion to add the parties improperly omitted. The misjoinder or nonjoinder may be made to appear 'by affidavit or otherwise,' and this language would seem to indicate that it is desirable in every case to support the motion by an affidavit setting out the facts."

Sections 17 and 19, chapter 125, Code 1923, provided only for joinder of an omitted party who is a resident of the state. The revised section, however, eliminates this restriction and permits the joinder of a nonresident.

Section 18, chapter 125, Code 1923, required the determination of a preliminary issue as to whether the Statute of Frauds or the Statute of Limitations prevented the maintenance of the action against the person whose nonjoinder was suggested. If either or both were found to apply, the issue on the plea in abatement was determined against the defendant so pleading. The revised section eliminates this restriction because the defenses mentioned may be waived and not raised by the omitted parties when they are finally joined. If they had been named among the original parties defendant, no preliminary issue of such nature would have been necessary or proper until introduced by proper pleading, and the same course should be followed where those omitted are joined as parties by subsequent amendment.

§ 6102.

*Burk's Pleading and Practice* (2nd ed. 1920) 63.
Demurrers.

Sections 36 and 65, article 4, chapter 56, make substantial changes in the law governing demurrers. They establish the demurrer as the pleading to be used in all instances to test the legal sufficiency of other pleadings. Our decisions hold that exceptions to an answer, motions to quash, motions to strike out, and motions for the award of a peremptory writ of mandamus, are analogous to and treated as demurrers. For that reason the revisers deemed it advisable to authorize a demurrer to any pleading, directly rather than indirectly, where the pleader wishes to test the legal sufficiency of such pleading. The revised sections, therefore, abolish the practice of objecting to the filing of pleas and of excepting to answers. The result will be to require a party to await the filing of a pleading before testing its sufficiency. No advantages in time is lost by this course, for a party may demur immediately after a pleading is filed, and his demurrer must at once be set for argument.

Heretofore there has been some hesitancy in demurring to a plea, if the plaintiff's demurrer were overruled, it was doubtful whether he could reply without withdrawing his demurrer, unless the defendant were held to a recognition of the implied withdrawal of the demurrer by offering no objections to the subsequent filing of replications by the plaintiff. This defect was revealed in the case of *Camden Clay Co. v. Town of New Martinsville.* The revisers, however, in section 39, article 4, chapter 56, have, by amendment, given to the plaintiff the same right to demur and reply that the statute heretofore has accorded to the defendant in demurring and pleading.

All demurrers in civil cases are required to be in writing and must state specifically the grounds of demurrer relied upon. No grounds can be considered at the instance of the demurrant other than those so stated, but the court of its own accord may consider questions pertaining to the legal sufficiency of a pleading, even when not assigned as grounds of demurrer. The demurrant, however, may, by leave of the court, amend his demurrer by stating additional grounds, or otherwise, at any time before the trial at law or final hearing in equity.

Section 44, article 4, chapter 56, abolishes *simili ter s* and joiners in demurrer.

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67 W. Va. 525, 68 S. E. 118 (1910).
Time for Filing Answer in Equity.

Sections 56 and 57, article 4, chapter 56, permit a defendant to file his answer at any time before final decree, unless he has filed a plea or has demurred to the plaintiff's bill. If he has filed a plea or has demurred, and the court overrules the same, the defendant is required to file his answer within fifteen days after the overruling of such plea or demurrer, unless, for good cause shown, the time is enlarged by the court or the judge in vacation. The answer must be filed in court if in session, and, if not in session, provision is made for filing the answer in the clerk's office where it is given the same status and effect as if filed in term. If no answer is filed within such period, the plaintiff becomes entitled forthwith to a decree against the defendant for the relief prayed for in the bill, or the plaintiff, if he prefers, may have an attachment against the defendant or an order for him to be brought in to answer interrogatories. In view of the foregoing changes, the provision for a rule requiring the defendant to answer, formerly in the statute, is omitted.

Appearance of Corporation by Attorney.

Section 63, article 4, chapter 56, is new. Among other things, it provides than any corporation may appear, plead or answer by attorney or any legal proceeding as if it were a natural person. The effect of this change is to abolish the rule that an answer in equity filed by a corporation must be signed by the president and have the corporate seal attached. The revised section permits the answer to be signed by the attorney on behalf of the corporation and dispenses with the corporate seal. It also makes plain the right of a corporation to appear by attorney in any legal proceeding.

Special Plea of Set-Off.

Section 5, article 5, chapter 56, materially enlarges the matters which a defendant in an action on a contract may set-off against the plaintiff's claim. It permits the defendant in any such action to file a plea alleging (a) any such failure in the consideration of the contract, or (b) fraud in its procurement, or (c) any such breach of any warranty to him of the title to real property, or of the title or the soundness of personal property, involved in the contract, or (d) any other matter, as would entitle him (the defendant) either to recover damages at law from the plaintiff, or the person under whom the plaintiff claims, or to relief in equity,
in whole or in part, against the obligation of the contract. The words "or any other matter" constitute the amendment made by the revisers, and they state in their note at the end of the section that "the revised section as a whole contemplates the settlement of all differences that are connected with the subject matter of the plaintiff's claim."

The inquiry naturally arises, are the words "or any other matter" broader than the revisers' note indicates and will they permit a defendant to set off against the original contract claim a tort claim or a claim for damages arising out of an entirely unrelated transaction? This inquiry assumes special importance because of the right of a defendant to recover from the plaintiff any excess of his claim over the plaintiff's claim against him.

The words added by the revisers were taken from section 6145 of the Virginia Code of 1919, which in other respects is similar to our statute, and any construction or interpretation placed upon them by the Supreme Court of Appeals of Virginia prior to their adoption by the Legislature of West Virginia will have persuasive, possibly controlling, force in determining their scope and meaning in this state.

In the case of American Manganese Company v. Virginia Manganese Company the Virginia court held that the meaning of the words "or any other matter" used in the section is restricted by the numerous defenses which precede them, and hence no set-off can be pleaded by the defendant which does not grow out of the contract involved in the suit. Subsequent decisions of that court adhere to that construction.

It follows, therefore, that the statute will doubtless carry the same construction in this state, thus limiting it to the settlement of differences that are connected with the subject matter of the plaintiff's claim. Tort claims and claims arising out of unrelated transactions would therefore be excluded.

Failure of Plaintiff to "Sign" Judgment After Plea to Part of Plaintiff's Claim.

Section 9, article 6, chapter 56, is new. Its object is to prevent a case from being discontinued under the technical rule of the common law to the effect that if a plea professes to answer only part of the declaration, and is in truth but an answer to part, the plaintiff is entitled to "sign" or take judgment for the part not answered.

Failure of Plaintiff to "Sign" Judgment After Plea to Part of Plaintiff's Claim.

Section 9, article 6, chapter 56, is new. Its object is to prevent a case from being discontinued under the technical rule of the common law to the effect that if a plea professes to answer only part of the declaration, and is in truth but an answer to part, the plaintiff is entitled to "sign" or take judgment for the part not answered.

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91 Va. 272, 21 S. E. 466 (1895).
by the plea, and to demur or reply as to the part that is answered. If, however, he demures or replies to the plea without signing judgment for the part not answered, the whole action is discontinued because of the hiatus in the proceedings. Our court, apparently regards the rule as still existing.\(^{12}\) In order to change this common law rule, the revised section provides that, where a defendant has pleaded to a part of the plaintiff's claim and has left the residue unanswered, the case shall not be discontinued merely because the plaintiff has failed to "sign" judgment as to the unanswered residue, but the plaintiff may, before or after trial of the issue as to the part answered, take judgment by *nil dicit* as to such unanswered residue.

**Trial Juries.**

Section 11, article 6, chapter 56, permits the parties in any case except a case of felony, by consent entered of record, to have their trial before a jury composed of any number less than twelve. This is a departure from section 29, chapter 116, Code 1923, which provided only for a jury of seven when the customary jury of twelve was not desired. The revisers state in their note to this section that no reason is perceived why the parties may not be permitted to agree to any number of jurors less than twelve, especially where one or more of the original jury of twelve have become incapacitated and it is desired to conclude the trial with the remaining jurors.

This section also permits the plaintiff alone to dispense with a jury where the defendant has failed to appear.

**Instructions.**

Section 19, article 6, chapter 56, requires the action of the court upon every instruction, given or refused, to be noted on the margin thereof by the judge over his "signature", instead of over his "initials" as formerly required.

Section 20 of the same article makes every instruction in writing asked by any party, together with the notations thereon showing the action of the court with reference thereto, a part of the record of the case without the formality of a bill of exception, including instructions refused, as well as those given, by the court. The statute formerly made part of the record only instructions which had been read to the jury.

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Effect of Faulty Count Upon Verdict.

Section 26, article 6, chapter 56, makes some important changes in the law relating to this subject. The former statute provided that where there were several counts in a declaration, one of which was faulty, the defendant might ask the court to instruct the jury to disregard it; but if entire damages were given, the verdict would be good. The revised section, however, permits the defendant to "demur" to the faulty count or counts as well as to move the court to instruct the jury to disregard them. It further provides that if the defendant does neither and entire damages are found, the verdict will stand, if any count be good, unless the court can plainly see that the verdict could not have been found on the good count. If the defendant demurs to, or moves the court to instruct the jury to disregard, the faulty count, and his demurrer or motion is overruled, and entire damages be found, and it cannot be seen on which count the verdict was founded, then, if the jury has been discharged, the verdict shall be set aside unless it is manifest the verdict could not have been found on the bad count. But if the jury has not been discharged the court shall send it back with instructions to designate on which count of the declaration its verdict is found.

Recovery Against One or More Contract Defendants.

Section 32, article 6, chapter 56, makes some material changes in the law of this state relating to the right of the plaintiff to recover against one or more of several defendants in an action founded on contract. The statute heretofore relating to this subject was section 19, chapter 131, Code 1923, which reads as follows:

"In an action founded on contract, against two or more defendants, although the plaintiff may be barred as to one or more of them, yet he may have judgment against any other or others of the defendants against whom he would have been entitled to recover, if he had sued them only, on the contract alleged in the declaration."

Under the strict rule of common law pleading, where a joint action on contract was brought against several defendants, a judgment could be rendered only for, or against, all, unless one of the defendants was discharged by matter personal to himself, such for instance as infancy or a discharge in bankruptcy.

The foregoing statute was intended to relax the common law rule just referred to, but in the case of *Scott v. Newell*,10 our supreme court seemingly held that the statute had accomplished nothing. That case was an action of assumpsit against six persons as "Trustees of the First Presbyterian Church of Chester, West Virginia." It appears that some of the defendants were not trustees when the contract with the plaintiff was entered into, thus presenting to the court the question of the effect of the statute where there is a misjoinder of parties. In affirming a judgment for the defendants, our court declined to adopt the more liberal construction given to a similar statute by the Virginia court, and held that the statute did not change the common law rule in the case of a joint action against several defendants on an alleged joint promise, when the plea is joint, because proof that all did not make the promise would establish a fatal variance not curable by amendment. The court said: "Plaintiff cannot allege a joint promise and recover on proof of a promise as to some of the defendants only."

The Supreme Court of Virginia, construing a similar statute in *Bush v. Campbell*,11 reached a conclusion directly opposed to that of our court. The court held that the purpose of the statute was not merely to affirm the common law which permitted judgment against part of the defendants when the other had set up a "personal" defense, but was intended to apply "whenever the defense of one of several defendants is of such a character that the plaintiff might recover against the other if the suit was against that other only". As thus construed, the statute permits the plaintiff to recover judgment against those defendants liable in the pending action, instead of compelling him to sue the same defendants in a new action.12

The revised section attempts to meet this situation by providing that, in any action or motion founded on contract, if one or more of the defendants is found not liable on the contract, this "shall not prevent the plaintiff from having, as if the motion or action were an action founded on tort, verdict and judgment, or judgment alone, as the case may be, against any other defendant or defendants who are liable; nor shall the fact that a verdict is set aside as to one or more of the defendants in such action or motion

10 69 W. Va. 118, 70 S. E. 1092 (1911).
11 26 Gratt. 403, 425 et seq. (1875).
as contrary to the evidence prevent the plaintiff from having judgment on such verdict as to any other defendant or defendants found liable thereby."

This section supplements section 34, article 4, chapter 56, heretofore discussed, providing that no action shall abate or be defeated because of a misjoinder of parties. The purpose of the section is to permit recovery on the contract as proved and not on the contract is pleaded. It does not in any sense do away with the distinction between joint contracts and joint and several contracts, nor does it substitute joint and several liability, upon the parties to a contract who contract jointly, in lieu of the joint obligation created by the contract and to which the parties agree. The revised section provides merely that if any one or more of the defendants are found liable on the contract, the plaintiff may have judgment against the others who are found to be liable. It does not permit the plaintiff to take judgment against part of those so found liable and dismiss as to the others.

This paper already has attained such undue length as to make imperative its immediate termination. It has been impossible to discuss all of the interesting and important changes made by the revisers in chapter 56 of the Revised Code, or those in other chapters, which likewise are of great interest to the legal profession and the judiciary. It is believed, however, that these changes, when fully understood, will be recognized as steps tending toward greater simplicity of pleading, practice and procedure.