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ANOMALOUS FEATURES OF DEMURRERS TO THE  
EVIDENCE IN WEST VIRGINIA.

By LEO CARLIN\*

Demurrers to the evidence in England, appearing shortly after the advent of the jury system, are now obsolete.<sup>1</sup> They are used only in a minority of the American states, and in these not very frequently.<sup>2</sup> As recently as the year 1909, in making a comparison between demurrers to the evidence and motions to direct a verdict, the West Virginia Supreme Court of Appeals, in *Soward v. American Car Company*,<sup>3</sup> referring to the practice in West Virginia, speaks of "the largely disused demurrer to the evidence". Expressions of a like import may be found in the earlier decisions and perhaps in the more recent ones. In the year 1902, in *White v. Hoster Brewing Company*,<sup>4</sup> the West Virginia Supreme Court, apparently for the first time, recognized in its full application the doctrine of directing verdicts upon a preponderance of the evidence, thus according to this important trial expedient the maximum efficiency which it enjoyed elsewhere. Considering the results in other jurisdictions, one might have expected the expansion in West Virginia of what is recognized as the modern substitute for demurrers to the evidence to have coincided with a decadence in the practice of demurring to the evidence. Seemingly the contrary has occurred. There are indications that the demurrer to the evidence has absorbed new vitality from the expansion of its rival. One who has read the West Virginia decisions handed down within the last few years can not escape the impression that the practice of demurring to the evidence in this state, instead of being obsolescent, is becoming even more popular.

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<sup>1</sup> THAYER, PRELIMINARY TREATISE ON EVIDENCE, 234-235.

<sup>2</sup> 15 HARV. L. REV. 738. Doubtless, in many of the states, what is called a demurrer to the evidence is largely so in name only. THAYER, EVIDENCE, 238. "This method of procedure, it is said, has been expressly recognized and allowed in nineteen of the States. In the other States, the courts direct non-suits or order verdicts, and thereby, in effect, accomplish the same results." BURKS, PLEADING & PRACTICE, §256.

<sup>3</sup> 66 W. Va. 266, 66 S. E. 329 (1909).

<sup>4</sup> 51 W. Va. 259, 41 S. E. 130 (1902).

The practitioner in Virginia or West Virginia who has had occasion to investigate, even casually, the law of demurrers to the evidence in either state can not have failed to notice that the decisions of these two states rest upon doctrines peculiarly their own.<sup>5</sup> Congenital deformities are accepted more or less as a matter of course. Hence, doubtless, many who are aware of such peculiarities have not paused to consider nor taken time to investigate how radical they are, and to what extent they are a departure from true legal principle. An attempt will be made in this article to point out some of the anomalous features of practice, principally as illustrated in the West Virginia decisions. In order to do this intelligently, it will be necessary briefly to review a few of the fundamental principles relating to demurrers to the evidence.

In its logical and consistent application, a demurrer to the evidence is more essentially a pleading process than a trial process. It primarily involves the law of the case.<sup>6</sup> It has a very close analogy to a demurrer to a pleading.<sup>7</sup> The facts of the case, or the items of evidence from which these facts may be deduced, through the necessity of principles hereinafter discussed, are admitted. Nothing is in dispute. The court simply declares the *legal effect* of admitted facts or evidence. It is true, as will be noted later, that in some jurisdictions only the truth of the evidence is admitted by the demurrer and the court has the task of deducing the facts from the evidence, a function ordinarily devolving upon the jury; but even here, the basis upon which the facts rest is admitted. In those jurisdictions where the demurrant is compelled to admit the facts on the record, the court, in passing upon a demurrer to the evidence, exercises precisely the same functions as in ruling upon a demurrer to a pleading. The only difference is that in a demurrer to the evidence the facts considered are one step farther removed from the law of the case which they are intended to support. A demurrer to a pleading tests the sufficiency of pleading facts to meet the requirements of the law in view of which the pleading is filed. A demurrer to the evidence, in its true application, tests the sufficiency of evi-

<sup>5</sup> *Bowman v. Dewing & Sons*, 50 W. Va. 445, 40 S. E. 576 (1901).

<sup>6</sup> "Such demurrers, like others, raised only an issue of law." THAYER, EVIDENCE, 234.

<sup>7</sup> See *MINOR, INSTITUTES*, 748; *BURKS, PLEADING & PRACTICE*, §256; 38 *CYC.* 1541, and cases cited. Under the original practice in England, which, it will be noted later, always has been the practice in Virginia and West Virginia, a demurrer to the evidence differed from a demurrer to the pleading in the fact that the court *inferred facts* from the evidence. THAYER, EVIDENCE, 234.

dentary facts to sustain pleading facts. Hence, indirectly, a demurrer to the evidence inquires into the sufficiency of evidentiary facts to sustain the law supporting the pleading. A demurrer to the evidence, in its purest concept, may be looked upon merely as a demurrer to an expanded pleading. In any event, the court merely determines the legal effect of undisputed facts. Pleading facts and evidentiary facts, in their ultimate object, have a precisely similar function: to establish in law the existence or non-existence of a right to recover. The only distinction between them in this respect is that pleading facts are few and large, while evidentiary facts are ordinarily numerous and small. In either case, a determination of the legal sufficiency or insufficiency is a judicial function and not a function of the jury. The function of the jury is to determine the existence or nonexistence of facts, particularly in a conflict of opposing testimony, and not to interpret the application of such facts nor to determine their legal effect. What has been said applies literally in those jurisdictions where the demurrant admits the facts on the record and largely in those jurisdictions where the court deduces the facts from the evidence. The court, in passing upon the collective sufficiency or insufficiency of admitted evidentiary facts, no more usurps the province of the jury than in ruling upon a demurrer to a pleading. When the court deduces facts, although from admitted testimony, it must be conceded that the court exercises a function regularly performed by the jury;<sup>8</sup> but this function is far removed from that of passing upon the truth and veracity of witnesses and the preponderance of conflicting testimony in general. The latter is the primary and important function of the jury, as illustrated in the law pertaining to motions to direct verdicts and motions for new trials. The former, perhaps, is largely a fortuitous and incidental function. It might very well be doubted whether we would have had any jury if we had had nothing for it to do but deduce facts from testimony the truth of which was admitted.<sup>9</sup>

It is believed that the law of demurrers to the evidence, worked out more or less upon the principles stated above, has been conceived and moulded on two primary considerations, each distinct

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<sup>8</sup> THAYER, EVIDENCE, 234-239.

<sup>9</sup> Sustaining the general principles stated, see *Higgs v. Shehee*, 4 Fla. 332 (1852); *Miller v. Franklin Insurance Co.*, 8 W. Va. 515 (1875); *Allen v. Bartlett*, 20 W. Va. 46 (1882); THAYER, EVIDENCE, 235 *et. seq.*; 38 Cyc. 1542-1544, and cases cited; 7 STANDARD PROC. 9. Also, see cases cited in note 15, *infra*.

in its concept, yet both reaching back to the same fundamental basis: (1) that a demurrer to the evidence is very little different from a demurrer to a pleading; (2) that the court, in passing upon a demurrer to the evidence, cannot consider a conflict in the evidence, cannot determine a preponderance, because to do so would be to invade the province of the jury. Apparently, the vacillating decisions of the West Virginia Supreme Court have resulted from an attempt to follow these principles and at the same time unnaturally to expand the functions of the remedy. The full meaning of this statement will be developed later.

From this fundamental concept of a demurrer to the evidence emerge various rules defining and limiting the scope of the remedy and the method of its application. For purposes of this discussion, it will be necessary to bear in mind principally the rationale of the rules fixing the following things: (1) the status of the parties who may demur; (2) the nature of the evidence which may be the subject of a demurrer; and (3) the proper method of applying the demurrer to the evidence. These propositions will be considered briefly in the order stated.

Most frequently, it is said that only the party having the negative of the issue may demur to the evidence. Reversely stated, a demurrer can be interposed only to the evidence of the party having the affirmative of the issue. Another statement of the rule is that a demurrer can be interposed only to the evidence introduced by the party having the burden of proof.<sup>10</sup> Perhaps in most of these instances the terms "affirmative of the issue" and "burden of proof" are used synonymously. Normally, the burden of proof follows the affirmative of the issue.

Such a rule is consonant with pure legal theory and is justified by expediency. Evidence supporting the affirmative of an issue reaches back through some pleading, at least imaginary if not actual, to the law of the case. Hence, a demurrer truly tests the legal sufficiency of such evidence to support the law of the case. But evidence supporting the negative of an issue merely denies other evidence. Strictly speaking, it neither supports nor controverts any pleading. It is pertinent and relevant only in connection with the evidence supporting the affirmative of the issue. Its sufficiency could be tested only in terms of denial, with such denial directed toward the opposing testimony, and not toward a

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<sup>10</sup> *Bennett v. Perkins*, 47 W. Va. 425, 35 S. E. 8 (1899). See 38 *Crc.* 1541, and cases cited.

pleading. Hence a demurrer to such evidence would involve necessarily a consideration of conflicting testimony, and thus would invade radically the province of the jury. The propriety of the rule would seem to be apparent, but it must be conceded that there are difficulties in its application.

Normally, the affirmative of the issue and the burden of proof rest with the plaintiff upon any traverse to a declaration. It ordinarily rests with the defendant when he relies upon an affirmative plea. Of course, it may be shifted back and forth by subsequent affirmative replications, rejoinders, *etc.* Moreover, it must always be understood that either party may affirm a negative and thus have the burden of proof upon negative allegations, although practically he has the affirmative of the issue as understood in this discussion. Again, it is conceivable that a party may on the face of the pleadings have the negative of the issue and yet with reference to his evidence practically have the affirmative of an issue. In many instances, notably in case and *assumpsit*, the general issue is very broad and includes numerous defences that are essentially affirmative in nature and normally and rationally should be asserted under a special plea. In such instances, although the general issue ostensibly places the affirmative of the issue with the plaintiff, no substantial principle would be violated, even according to the most orthodox rule, in permitting him to demur to that part of the defendant's evidence which supports the affirmative defence. Under the circumstances, it is consistent to assume an imaginary affirmative plea which the defendant's evidence supports, and thus to say that he has the affirmative of an issue.<sup>11</sup>

The logic of this argument may be carried entirely beyond those instances in which plainly affirmative defences are obscured in the general issue. There is no reason based on principle or ex-

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<sup>11</sup> By way of illustration, suppose that A sues B in case for personal injuries, alleging negligence. A makes a *prima facie* case by proving that B was negligent. Thereupon, B, in no way controverting anything A has proved, undertakes to prove that A was guilty of contributory negligence. In Alabama it is necessary to assert such a defense under a special plea. *Kansas City, etc. R. Co. v. Crocker*, 95 Ala. 412, 11 So. 262 (1891). Of course the evidence supporting this plea, under proper circumstances, would be subject to a demurrer. In West Virginia, the defence of contributory negligence may be asserted under the general issue, but the burden of proving it rests on the defendant. See *Woodell v. West Virginia Improvement Co.*, 38 W. Va. 23, 47-48, 17 S. E. 386, 395 (1893). See also cases cited in 10 ENCYC. DIG. VA. & W. VA. REP. 406; *Southern R. Co. v. Rice*, 115 Va. 235, 78 S. E. 592 (1913). Notwithstanding the fact that there is no special plea in West Virginia covering the defence, the defendant, to all intents and purposes, has the burden of proof and is in the same position as if he had the affirmative of an issue resting upon a special plea, and a demurrer to his evidence, under proper circumstances, should be entertained. Cf. *Wood v. Phillips*, 117 Va. 879, 86 S. E. 101 (1915). Many additional illustrations may easily be imagined.

pediency why any evidence introduced by either party by way of admission and avoidance may not be demurred to, always provided that such evidence exclusively avoids and does not deny. Such a practice may practically involve a true shifting of the burden of proof.<sup>12</sup> As opposed to such a conclusion, it is said that the party having the affirmative of the issue (meaning, of course, the original affirmative imposed by the pleadings) can not be allowed to assume that he has made out his own case.<sup>13</sup> Why not? No such objection can be raised when a plaintiff demurs to a plea. The fact that the declaration is, or may be, bad does not prevent a demurrer to a plea. The only effect is, if the plaintiff demurs, to visit the plaintiff's demurrer upon his own defective declaration. Why not use a similar process in demurrers to the evidence? Of course, all that has been said assumes that a trial process of admission and avoidance in the evidence has virtually abandoned the original affirmative fixed by the pleadings and practically substituted a new affirmative resting upon the evidence. It should be carefully noted that such a practice would be a thing entirely different from considering the evidence of both sides upon a demurrer, and not open to objection upon that ground. The question here involved is not what evidence may be considered upon the demurrer, but upon whose evidence the demurrer may be visited.

The true rule, based upon principle and the great weight of authority, is that, upon a demurrer to the evidence, only the evidence of the demurree can be considered.<sup>14</sup> It has already been

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<sup>12</sup> The practice is perfectly demonstrated in *Hall v. Webb*, 21 W. Va. 318 (1883) and *Wilson v. Braden*, 56 W. Va. 372, 49 S. E. 409 (1904). Each of these cases was an action in ejectment, in which the plaintiff proved a paper title and the defendant, not controverting the paper title, undertook to show title by adverse possession. The plaintiff demurred to the defendant's evidence and the defendant joined in the demurrer without objection. No question was raised as to the propriety of the demurrer, but likely, if necessary, the court would have compelled a joinder therein. Possibly Judge Brannon, in *Hollandsworth v. Stone*, note 54, *infra*, may have had in mind an indefinite idea as to the shifting of the burden of proof by admission and avoidance in the evidence, but the facts of the latter case can not be adjusted to this principle.

Those instances wherein the burden of proof as to certain facts is imposed upon the party in a position to have peculiar knowledge of those facts, regardless of whether he have the affirmative or the negative of the issue, are exceptional. They are based upon expediency and necessity, and not upon principle. Yet, since the burden is just as emphatic and its scope just as clearly defined as if it rested upon the affirmative of an issue, there is no practical reason why the evidence supporting it may not be subjected to a demurrer.

<sup>13</sup> *Bennett v. Perkins*, *supra*.

<sup>14</sup> See 38 Cyc. 1542, and cases cited. The language in 7 STANDARD PROC. 6-7, clearly intimates that the evidence of the demurrant not conflicting with that of the demurree may be considered. The Virginia and West Virginia cases cited, by virtue of the peculiar doctrines prevailing in these states, sustain the proposition. So do the Federal cases cited, because they were decided in West Virginia, and hence conformed to the West Virginia practice. It is believed that the only other case cited tending to sustain the proposition is *Fink v. Kansas City Southern R. Co.*,

sufficiently explained why this is so where the evidence of the demurrant conflicts with that of the demurree.<sup>15</sup> On principle, it is equally objectionable to consider evidence of the demurrant which does not conflict. To do so would be to consider a speaking demurrer to the evidence. Speaking demurrers to pleadings have been universally and unhesitatingly condemned, as repugnant to the fundamental concept of demurrers.<sup>16</sup> The same reasoning should apply to demurrers to the evidence. In most jurisdictions, in harmony with this principle, a party is not allowed to demur to his opponent's evidence after he has introduced his own evidence.<sup>17</sup> In other jurisdictions, he may still demur, but, as we have just seen, his own evidence can not be considered and is understood to be withdrawn or waived. Only in Virginia and West Virginia, it has been said, may a demurrant have any benefit from his own evidence.<sup>18</sup>

Under the original English practice, it appears, the effect of a demurrer to the evidence was to admit the truth merely of the demurree's evidence and not of the facts which this evidence tended to prove.<sup>19</sup> In the year 1793, a decision was handed down from the House of Lords to the effect that a demurree would not be compelled to join in a demurrer to the evidence until the demurrant had admitted on the record the facts which the evidence of the demurree tended to prove.<sup>20</sup> As appears from the previous discussion, such a practice eliminates all question of invading the province of the jury and more nearly approximates the pleading analogy; but at the same time that it rendered the procedure more definite, it likewise rendered it more perilous for the demurrant. This decision, it is said, gave the death blow to demurrers to the evidence in England.<sup>21</sup> The doctrine of this case was an innovation, a fact which has evoked surprise that many of the American

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161 Mo. App. 314, 143 S. W. 568 (1912), and in this case the point is not directly decided. The great majority of the cases cited clearly hold to the contrary view. The "conflict" in the evidence referred to in many of the cases plainly refers to a conflict in different phases of the demurree's evidence.

In Illinois, it is held that evidence brought out by cross-examination of the demurree's witnesses is waived. *Pratt v. Stone*, 10 Ill. App. 633 (1882).

<sup>15</sup> *Fink v. Kansas City Southern R. Co.*, *supra*; *Shaw v. White*, 28 Ala. 637 (1856). Also see authorities cited in note 9, *supra*.

<sup>16</sup> *Graham's case*, 1 Ct. Cl. 183 (U. S. 1865). See 31 Cyc. 322-323, and the great multitude of cases there cited.

<sup>17</sup> See 38 Cyc. 1545, and cases cited; 7 STANDARD PROC. 14.

<sup>18</sup> *Bowman v. Dewing & Sons*, 50 W. Va. 445, 40 S. E. 576 (1901); *Bowers v. Bristol Gas etc. Co.*, 100 Va. 533, 42 S. E. 296 (1902). See 38 Cyc. 1542, where the Virginia and West Virginia rule is referred to as "an anomalous and indefensible rule of procedure."

<sup>19</sup> THAYER, EVIDENCE, 234-239.

<sup>20</sup> *Gibson v. Hunter*, 2 H. Bl. 187 (1793).

<sup>21</sup> THAYER, EVIDENCE, 234-235.



states should have adopted it under the impression that it was the original English rule. Perhaps the surprise should not be so great when it is considered that the English decision was handed down when American law was in its early formative period, and when it must have been realized that the new rule tended more securely to limit the demurrer to the evidence to its proper pleading function and thus to eliminate any question that otherwise might have existed as to its invading the province of the jury.<sup>22</sup> Of course, in those jurisdictions where the demurrant admits no absolute facts, but only the truth of his opponent's evidence, only the evidence is inserted in the demurrer, and the court must deduce the facts from the evidence.<sup>23</sup> In jurisdictions where the facts are admitted on the record, it seems that both the facts and the evidence of the demurree are inserted in the demurrer.<sup>24</sup>

It is believed that the state of the local law may best be considered by reversing the order used in the general discussion and considering first the evidence to which the demurrer is applied.

In Virginia and West Virginia, it has always been the custom to insert the evidence in the demurrer, and not the facts which the evidence tends to prove.<sup>25</sup> Likewise, by the decisions of both states, the rule was early established that the evidence of both the demurree and the demurrant must be incorporated in the demurrer,<sup>26</sup> a practice which seemingly has prevailed in no jurisdiction outside of these two states.<sup>27</sup> Obviously, it would be a worse than useless process to insert evidence of the demurrant in the demurrer unless such evidence should receive some consideration upon a hearing of the demurrer. The practice of incorporating such evidence in the demurrer is such a radical departure from principle that one could easily expect from it the most startling results. In Virginia, however, the unorthodox practice has been con-

<sup>22</sup> *Ibid.* It is interesting to note that, although the early Virginia and West Virginia cases refer to Gibson v. Hunter as expounding the orthodox, and apparently the original, English rule, nevertheless they follow, unconsciously, the English rule prevailing prior to Gibson v. Hunter. Green v. Judith, 5 Rand. 1 (Va. 1827); Miller v. Franklin Insurance Co., 8 W. Va. 515 (1875).

<sup>23</sup> Hansbrough's Exr. v. Thom, 3 Leigh 147 (Va. 1831).

<sup>24</sup> See 38 Cyc. 1545, and cases cited. It is expedient to insert both the facts and the evidence in the demurrer so that the appellate court may examine the evidence and decide as to the propriety of the facts which the demurrant is compelled to admit without necessity of bringing the evidence into the record by a bill of exceptions. BURKS, PLEADING AND PRACTICE, §257.

<sup>25</sup> Hansbrough's Exr. v. Thom, *supra*; Miller v. Franklin Insurance Co., *supra*. For the reason for the local rule, see BURKS, PLEADING & PRACTICE, §257.

<sup>26</sup> Perhaps the best review of the early cases in Virginia on this subject will be found in Green v. Judith, *supra*. See Muhleman v. National Insurance Co., 6 W. Va. 508 (1873), and cases cited in preceding note.

<sup>27</sup> See authorities cited in note 18, *supra*. A good example of a demurrant's evidence that does not conflict with that of the demurree, and hence may be considered, will be found in Bowers v. Bristol Gas, etc., Co., *supra*.

ceded only the minimum of possible effect. The demurrant is held to waive all his contradicted evidence. Hence, of course, only the uncontradicted evidence of the demurrant can be considered.<sup>28</sup> In West Virginia, a result has been reached which is so radical and complicated that it deserves special and extended consideration.

In the earlier West Virginia decisions, the Virginia rule was adopted and applied.<sup>29</sup> The first deviation from this rule seemingly had its inception in what is believed to have been an unnecessary construction placed upon a statutory amendment. In the year 1891, section 9 of chapter 131 of the West Virginia Code was amended and reenacted. Prior to this amendment, upon any question of appellate relief involving the weight of the evidence, except in cases of demurrers to the evidence, it had been the practice to certify to the Supreme Court the facts of the case instead of the evidence upon which the facts were based.<sup>30</sup> The amendment required the evidence to be certified and further directed that the whole of the evidence so certified should be considered by the Supreme Court. The first fruits of the amendment appeared in 1894, in *Johnson v. Burns*,<sup>31</sup> where the Supreme Court reviewed the action of a circuit court in overruling a motion to set aside a verdict and grant a new trial. It was held that the Supreme Court, in considering whether the verdict was sustained by the evidence, was bound to take into consideration and give effect to all the evidence in the case, whether introduced by the plaintiff or the defendant and whether conflicting or uncontradicted.

It is believed that this amendment, whatever its effect upon motions for a new trial, was never intended to change the practice regarding demurrers to the evidence. It certainly made no change in respect to certifying the evidence, because it had always been the custom in West Virginia to insert all the evidence, not the facts of the case, in the demurrer.<sup>32</sup> Nor did it necessarily add anything with reference to considering all the evidence, for the court had always, in a certain sense (the sense intended by the statute, it is believed), considered all the evidence upon a demurrer to the evidence, merely refusing to give any effect to con-

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<sup>28</sup> BURKS, PLEADING & PRACTICE, §261.

<sup>29</sup> *Allen v. Bartlett*, 20 W. Va. 46 (1882), and cases cited.

<sup>30</sup> *Johnson v. Burns*, 39 W. Va. 658, 663, 20 S. E. 686 (1894).

<sup>31</sup> *Ibid.*

<sup>32</sup> Note 26, *supra*; *Gunn v. Ohio River R. Co.*, 42 W. Va. 676, 690, 26 S. E. 546, (1896).

tradicted evidence of the demurrant. It is pertinent to notice that, although all the evidence must be *considered*, the amendment says nothing about what *effect* shall be given to any of the evidence when it is considered. The statute was likely intended merely to introduce a new expedient in appellate procedure and not to work any change in the fundamentals of trial practice. Such an intention is indicated by the fact that the language of the act is directed to the Supreme Court and not to the trial courts. It is submitted that there is nothing in the language of the statute which makes it incumbent upon even the Supreme Court to give effect to the conflicting evidence of both parties upon a demurrer to the evidence; and it would seem unusual to infer such a radical innovation from anything but express language.<sup>33</sup> Nevertheless, the Supreme Court felt impelled by the statute to apply the rule of *Johnson v. Burns* to demurrers to the evidence.

The first utterance in this respect came in 1896, in *Mapel v. John*.<sup>34</sup> Since this is the first definite statement of what must be considered a new and radical doctrine, it is worth while to quote the precise language of the court:

“By demurring to the evidence the demurrant is now, under section 9 of chapter 131, not held to waive any of his competent evidence; but where it conflicts with that of the other party it will be regarded as overborne, unless it manifestly appears to be clearly and decidedly preponderant. He admits the credit of the evidence demurred to, and all inferences of fact that may be fairly deducible from the evidence, but only such facts as are fairly deducible; and refers it to the court to deduce such fair inferences.”

Not quite a year later, in *Young v. West Virginia, etc. R. Co.*,<sup>35</sup> and *Talbott v. West Virginia, etc. R. Co.*,<sup>36</sup> the same rule is repeated in identical language. The opinions in the latter case and *Mapel v. John* were written by Judge Holt. Hardly was the ink dry on Judge Holt's opinion in *Talbott v. West Virginia, etc. R. Co.*, when Judge Brannon, in *Gunn v. Ohio River R. Co.*,<sup>37</sup> subjected the rule of *Mapel v. John* to a pointed criticism. The ques-

<sup>33</sup> The radical nature of the new rule and its dangers are clearly recognized by Judge Dent in *Akers v. De Witt*, 41 W. Va. 229, 23 S. E. 669 (1895). See Hogg, PLEADING & FORMS, 533n.

<sup>34</sup> 42 W. Va. 30, 24 S. E. 608 (1896).

<sup>35</sup> 42 W. Va. 112, 121, 24 S. E. 615 (1896).

<sup>36</sup> 42 W. Va. 560, 26 S. E. 311 (1896).

<sup>37</sup> Note 32, *supra*.

tion seems next to have come before the court four years later, in *Shaver v. Edgell*,<sup>38</sup> decided in 1900. The opinion in this case is likewise by Judge Brannon and is a plain repudiation of the doctrine of *Mapel v. John*. Not long afterward, in *Teel v. Ohio River R. Co.*,<sup>39</sup> Judge Dent assumes the burden of the discussion. Basing his argument upon the previous opinions of Judge Holt and his own analysis of the statute, he reaches conclusions directly opposed to the views of Judge Brannon previously expressed. When, finally, in *Bowman v. Dewing & Sons*,<sup>40</sup> decided in 1901, the new rule was adopted in the full purport of its radical effect, it was not again to be questioned.<sup>41</sup> The opinion in the latter case was written by Judge Dent, and he openly recognizes the isolation of his doctrine. Perhaps the practical effect of the new rule is nowhere better stated than in *Barrett v. Raleigh Coal & Coke Co.*,<sup>42</sup> the next case in which it is fully discussed, where the opinion is again written by Judge Dent:

“On the subject of the conflict of evidence the rule then would be that all the evidence of the demurrant in conflict with the evidence of the demurree should be rejected unless the conflicting evidence of the demurrant so plainly preponderates over the evidence of the demurree, that if there were a verdict in favor of the latter it would be set aside, and in such case the demurrer must be sustained. For if the evidence, although conflicting, plainly preponderates in favor of the demurrant, judgment should be entered accordingly.”

All the later cases uniformly sustain the new rule, although the court is not always consistent in the citation of authorities.<sup>43</sup>

To understand the attitude of the court as evidenced in *Maple v. John* and the later cases in accord, it is necessary to bear in mind the purport of decisions handed down prior to *Johnson v. Burns*. A close analogy always had been recognized between the status of the evidence upon a motion for a new trial and the

<sup>38</sup> 48 W. Va. 502, 37 S. E. 664 (1900).

<sup>39</sup> 49 W. Va. 85, 38 S. E. 518 (1901).

<sup>40</sup> 50 W. Va. 445, 40 S. E. 576 (1901).

<sup>41</sup> *Stewart v. Lyons* 54 W. Va. 665, 47 S. E. 442 (1903), seems to adhere to the old rule, and in this respect cites *Shaver v. Edgell*; but at the same time the inconsistent case of *Bowman v. Dewing & Sons* is cited and approved.

<sup>42</sup> 55 W. Va. 395, 398, 47 S. E. 154, 155 (1904).

<sup>43</sup> *Wilson v. Braden*, 56 W. Va. 372, 49 S. E. 409 (1904); *Mannon v. Camden Interstate R. Co.*, 56 W. Va. 554, 49 S. E. 450 (1904); *Kelley v. Ohio River R. Co.*, 58 W. Va. 216, 52 S. E. 520, 898 (1905); *Robinson v. Sheets*, 63 W. Va. 394, 61 S. E. 347 (1908); *McNeer v. Chesapeake & Ohio R. Co.*, 76 W. Va. 803, 86 S. E. 887 (1915); *Miller v. Johnson*, 79 W. Va. 198, 90 S. E. 677 (1916); *Robinson v. Brotherhood of Railroad Trainmen*, 80 W. Va. 567, 585, 92 S. E. 730, L. R. A. 1917E, 995 (1917); *Chafin v. Norfolk & Western R. Co.*, 80 W. Va. 703, 93 S. E. 822 (1917).

status of the evidence upon a demurrer to the evidence. Frequent comparisons had been made. It was frequently said that the movant made the same concessions with reference to the evidence upon a motion for a new trial which a demurrant is compelled to make upon a demurrer to the evidence. The party in whose favor the verdict stood was said to occupy the same position as a demurree, and *vice versa*.<sup>44</sup> However, it is submitted that only an analogy was recognized, and this merely as a matter of convenience. No rule of law said that the practice must be the same in both instances. In application of the analogy, the rule growing out of motions for a new trial was not looked upon as dictating the rule applied to demurrers to the evidence. The two things were, under the state of the law as it existed then, merely similar by coincidence, and neither absolutely controlled the other. However, Judge Dent, instead of considering that the motion for a new trial under the amended statute had simply lost its previous status (if such a conclusion was necessary), seems to have looked upon the analogy as a necessity that could not be abandoned,<sup>45</sup> while at the same time he did violence to the inevitable and fundamental analogy which exists between a demurrer to the evidence and a pleading. Whether, as Judge Dent thought, expediency, based upon considerations of uniformity in practice, justified the new rule, is a different question. Even so, it is none the less a departure from principle.

The effect of the rule announced in *Maple v. John* was to distort the entire concept of demurrers to the evidence. Consequently, it is not surprising that the unbalancing agitation of the new doctrine should draw into question the status of the parties who may demur to the evidence. We have here again a period of vacillation, which, in this instance, has ended in uncertainty.

In the earlier West Virginia cases, it is frequently asserted that "either party may demur to the evidence."<sup>46</sup> Such an assertion is true in the sense, and to the extent, that either party, plaintiff or defendant, may have the negative of the issue.<sup>47</sup> In this sense,

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<sup>44</sup> An attempt will not be made to collect the numerous cases in which the analogy has been recognized. It will be sufficient to note the ultimate effect, which may be seen in *Teel v. Ohio River R. Co.*, 49 W. Va. 85, 86-89, 38 S. E. 518 (1901), and *Barrett v. Raleigh Coal & Coke Co.*, 55 W. Va. 395, 47 S. E. 154 (1904).

<sup>45</sup> *Ibid.*

<sup>46</sup> See cases cited in *Bennett v. Perkins*, *supra*. A search of the reports will reveal many others.

<sup>47</sup> In 6 ENCYC. PL. & PRAC. 440, quoted in the case last cited, it is said: "Either party has a right to demur to the evidence, but the demurrer is only applicable to the evidence of the party holding the affirmative of the issue."

it is nothing more than a truism. However such statements may have been intended, there is reason to believe that eventually they served to create the unnecessary impression that either party might demur to the evidence in any case, regardless of whether he had the affirmative or the negative of the issue.<sup>48</sup> If such an impression existed, it either amounted to a conviction or else was in a nebulous state; for no question growing out of it seems to have come before the court for decision in the earlier cases. Moreover, since, prior to the rule laid down in *Mapel v. John*, the demurrant was compelled to waive all his evidence which conflicted with that of the demurree, in most instances it would not have been expedient for a party having the affirmative of the issue to have demurred, even though not prohibited from so doing by the mere fact that he had the affirmative of the issue.

There is very little in the earlier decisions to throw light upon the subject. In *Allen v. Bartlett*,<sup>49</sup> decided in 1882, the plea was *non assumpsit*. The plaintiff demurred to the defendant's evidence. Since the defendant voluntarily joined in the demurrer, the court was not called upon to decide the propriety of the demurrer. Moreover, the defendant's evidence practically corroborated the plaintiff's evidence and only a pure question of law was submitted to the court. The latent attitude of the court may very well be surmised from the opinion in *Low v. Settle*,<sup>50</sup> decided not long afterward. A plaintiff in ejectment demurred to the defendant's evidence. The trial court sustained the demurrer. The case was reversed on other grounds, but the Supreme Court clearly indicates a doubt as to the propriety of the demurrer. In an earlier case, *Merchants & Mechanics' Bank of Wheeling v. Evans*,<sup>51</sup> decided in 1876, is a plain intimation by way of *dictum* that the court considered a demurrer to the evidence applicable only to the evidence of the party having the burden of proof.

Basing conclusions upon these rather unsatisfactory decisions, in the absence of more definite authority, it may be assumed that the rule announced in *Mapel v. John* is a departure from the pre-

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<sup>48</sup> *Bennett v. Perkins*, *supra*. This is the rule now adhered to in Virginia. *Bonos v. Ferries Co.*, 113 Va. 495, 75 S. E. 126 (1912); *Wood v. Phillips*, *supra*. But since the demurrant must waive all his conflicting evidence, it is rare that one having the affirmative of the issue or the burden of proof will find it expedient to demur. See note 28, *supra*.

<sup>49</sup> 20 W. Va. 46 (1882).

<sup>50</sup> 22 W. Va. 387 (1883).

<sup>51</sup> 9 W. Va. 373 (1876). In *Hall v. Webb*, 21 W. Va. 318 (1883), a plaintiff in ejectment demurred to the defendant's evidence, but it is possible to reconcile this case with principle. See note 12, *supra*.

vious attitude of the court. In this revolutionary decision the court for the first time positively and definitely decided that a party having the affirmative of the issue might demur to the evidence and have his own contradicted evidence considered upon a hearing of the demurrer. A few months later, a plaintiff in ejectment demurred to the evidence without having his right to do so questioned.<sup>52</sup>

As has already been noted, this new conception of a demurrer to the evidence was not to be accepted without a struggle. With reference to which party has a right to demur, the most emphatic reaction will be found in *Bennett v. Perkins*,<sup>53</sup> decided in 1900, in which McWhorter, President, delivered the opinion. The plaintiff in this case had the affirmative of the issue and undertook to demur to the defendant's evidence. In no uncertain terms, the Supreme Court held that the defendant could not be compelled to join in the demurrer. The court bases its opinion upon fundamental principles, disregarding mere questions of expediency. The case of *Mapel v. John* is ignored, and it is interesting to note that the authorities cited are chiefly from other jurisdictions. Plainly, either *Bennett v. Perkins* or *Mapel v. John* had to fall. We have already seen that, in respect to what evidence may be considered upon the demurrer, the doctrine of *Mapel v. John* survived. It likewise seemingly was to prevail in fixing the status of the parties who may demur, although the result in this respect is uncertain and was reached by devious pathways.

The first assault upon *Bennett v. Perkins*, coming less than three months later, in *Hollandsworth v. Stone*,<sup>54</sup> was delivered, unintentionally it seems, by Judge Brannon. The plaintiff in the latter case, who had the affirmative of the issue and the burden of proof, was permitted to demur to the defendant's evidence, on the assumption that he had made a *prima facie* case on his proofs and thus had shifted the burden of proof to the defendant. Apparently, the defendant's evidence conflicted with that of the plaintiff, instead of purporting to admit and avoid it. It seems that Judge Brannon mistook what is variously termed the "weight of the evidence", the "burden of the evidence", the "burden of the case" or the "burden to proceed" for the true burden of

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<sup>52</sup> *Arnold v. Bunnell*, 42 W. Va. 473, 479, 26 S. E. 359 (1896).

<sup>53</sup> 47 W. Va. 425, 35 S. E. 8 (1900).

<sup>54</sup> 47 W. Va. 773 35 S. E. 864 (1900).

proof as applied in the law of demurrers to the evidence.<sup>55</sup> He seemed wholly oblivious of the fact that to permit a party having the affirmative of the issue to demur to the evidence merely because he has made a *prima facie* case will in most instances involve a consideration of conflicting evidence. That he did not intend to recede from the stand which he had taken in *Gunn v. Ohio River R. Co.*,<sup>56</sup> and which he later took in *Shaver v. Edgell*,<sup>57</sup> is evidenced by the fact that he cited *Bennett v. Perkins* to sustain his views in *Hollandsworth v. Stone*. Although *Mapel v. John*, in so far as it holds that conflicting evidence may be considered upon a demurrer, is criticised in *Shaver v. Edgell*, it should be noted that the plaintiff in the latter case had a right to demur, because the defendant had the burden of proof based on affirmative pleas. Finally, in *Bowman v. Dewing & Sons*,<sup>58</sup> the court unequivocally abandoned the views announced in *Bennett v. Perkins* and held that a party having the affirmative of the issue—in this case a plaintiff in ejectment—may demur to the evidence, upon the sole condition that he shall have made a *prima facie* case. Of course, it mattered not to Judge Dent, who delivered the opinion, that all the evidence of the demurree might—in this case did—conflict with that of the demurrant; for any objection in this behalf had been eliminated by the decision of *Mapel v. John*. In *Robinson v. Sheets*,<sup>59</sup> decided some few years later, a plaintiff in ejectment again demurred to the evidence, and apparently the court decided the demurrer upon conflicting evidence.

Consistently, the controversy should have been considered settled by the decision of *Bowman v. Dewing & Sons*.<sup>60</sup> So long as the court was going to hold that conflicting evidence could be considered upon a hearing of the demurrer, it was not illogical to hold that the party having the affirmative of the issue could demur, after having made a *prima facie* case. The logic of demurrers to the evidence had been killed in *Mapel v. John*, and expediency had been substituted. Thereafter, the logic of the situation should have dictated a complete surrender to expediency. Nevertheless, in *Stewart v. Lyons*,<sup>61</sup> in 1903, Judge Brannon, still clinging to

<sup>55</sup> *Harris v. Welch*, 104 S. E. 277 (W. Va. 1920); 1 WORDS AND PHRASES 904-7; KITTLE, MODERN LAW OF ASSUMPSIT, §515.

<sup>56</sup> 42 W. Va. 676, 26 S. E. 546, (1896). See note 37, *supra*.

<sup>57</sup> 48 W. Va. 502, 37 S. E. 664 (1900). See note 38, *supra*.

<sup>58</sup> 50 W. Va. 445, 40 S. E. 576 (1901).

<sup>59</sup> 63 W. Va. 394, 61 S. E. 347 (1908). As to the status of *Wilson v. Braden*, where a plaintiff in ejectment demurs to the defendant's evidence, see note 12, *supra*.

<sup>60</sup> Note 58, *supra*.

<sup>61</sup> Note 41, *supra*.



his original views, says that "a party on whom rests the burden can not demur", and cites the logical but now discredited case of *Shaver v. Edgell*<sup>62</sup> as authority. Finally in *Reiniger v. Piercy*,<sup>63</sup> decided in 1915, seemingly the last case in which the question is discussed, the court lays down the following rule:

"While the rule is that a demurrer to the evidence should never come from the party on whom the burden of proof lies; nevertheless when the plaintiff has fully sustained by proof the issues on his part, he may of right demur to defendant's evidence offered in support of affirmative defences interposed by him."

What does the court mean by "burden of proof?" That it means the true burden of proof based upon the affirmative of the issue is indicated by the circumstances of the case and by the fact that *Bennett v. Perkins*<sup>64</sup> is cited to sustain the rule. On the other hand, *Bowman v. Dewing & Sons*,<sup>65</sup> is also cited, a fact indicating that the court had in mind that supposed burden of proof recognized by Judge Brannon in *Hollandsworth v. Stone* which is shifted by a *prima facie* case or by a preponderance of the evidence. Likely, if called upon to decide the question, the court would have indicated the latter conception as the one intended.

It is believed that the present status of demurrers to the evidence in West Virginia may best be considered by dividing all possible cases into three general classes: (1) Cases where the primary consideration is whether the evidence of the demurree supports the affirmative of an issue or the burden of proof, and no conflicting evidence is considered. (2) Cases where the demurrer, if entertained, would necessarily involve a consideration of conflicting evidence so as to decide the case upon a preponderance of the evidence, and the preponderance is not plain. (3) Cases where the demurrer involves a consideration of conflicting evidence, and the preponderance is decidedly in favor of one party. The first class may be subdivided into those instances (a) where there is no evidence in the case except that of the demurree; and (b) where both the demurree and the demurrant have introduced evidence, but the demurrant waives his contradicted evidence.

<sup>62</sup> Notes 38 and 57, *supra*.

<sup>63</sup> 77 W. Va. 62, 86 S. E. 926 (1915).

<sup>64</sup> Note 53, *supra*.

<sup>65</sup> Note 58, *supra*.

Cases falling within the first division of the first class would, by the force of circumstances, be governed by the orthodox principles stated in the preliminary discussion. Likewise, would cases falling within the second division of the first class, with the comparatively minor qualification that uncontradicted evidence of the demurrant would be considered on the demurrer. In the second class of cases, even by the terms of the rule announced in *Mapel v. John*,<sup>66</sup> a demurrer never could be interposed. In such a case, a party could not demur without waiving his contradicted evidence, in which event the case would fall within class one. In the third class of cases, independently of any principles which have heretofore been considered, the court would exercise its discretion so as to prevent the party having the lighter weight of evidence from demurring;<sup>67</sup> but, according to the doctrine of *Mapel v. John* and the cases in accord, the party having the great preponderance of the evidence, in spite of the fact that it may conflict with that of the demurree, and regardless of the fact that such party may have the affirmative of the issue, should always be allowed to demur. Any doubt that may be cast upon the latter assertion by the statements in *Reiniger v. Piercy*<sup>68</sup> would seem to be inconsistent with the theory of the new rule.

The result is that *Mapel v. John*, in the third class of cases mentioned above, has added an entirely new field to the local law of demurrers to the evidence. The old field still exists and still is governed strictly by principles announced in the early cases.<sup>69</sup> Cases in the new field are entirely anomalous, and much confusion will be avoided if no attempt is made to make them conform to the principles governing true demurrers to the evidence. The rationale of the new rule is that the court, in order to forestall useless procedure which may lead to an improper verdict and a new trial, should entertain and sustain a demurrer to the evidence upon a mere preponderance of conflicting evidence, provided that such preponderance is so great that a verdict contrary thereto would be set aside. Clearly, this is a pure doctrine of expediency, and it takes but a glance to see that it is based upon a

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<sup>66</sup> Note 34, *supra*.

<sup>67</sup> See numerous cases cited in 4 ENCYC. DIG. VA. AND W. VA. REP. 531.

<sup>68</sup> Note 63, *supra*.

<sup>69</sup> Following are some of the many cases where the old rule still is recognized as applicable: *Meeks v. Ohio River R. Co.*, 52 W. Va. 99, 105, 43 S. E. 118 (1902); *Vance v. Ravenswood, etc. R. Co.*, 53 W. Va. 338, 44 S. E. 461 (1903); *Gregg v. City of Morgantown*, 77 W. Va. 171, 87 S. E. 77 (1915). Also, see cases cited in notes 34, 29, 40, 42, and 43, *supra*.

new analogy, that of directing a verdict upon a great preponderance of conflicting evidence. The fact is that this new and anomalous practice is nothing more nor less than a plain and arbitrary engrafting of the doctrine of directing verdicts upon the law of demurrers to the evidence. In this connection, it is interesting to note the development of the practice of directing verdicts upon motion.

It has always been the practice in West Virginia, when the party having the affirmative of the issue has rested his case, to entertain a motion to exclude his evidence on the ground that he has failed to make a *prima facie* case. If such motion be sustained, the court thereupon, as a matter of course, directs a verdict in favor of the other party.<sup>70</sup> But not until 1902, in *White v. Hoster Brewing Co.*,<sup>71</sup> it seems, did the court, without excluding any evidence, direct a verdict upon a plain preponderance of conflicting evidence. It may be a mere coincidence that this decision was handed down in the midst of the controversy started by *Mapel v. John*, but the significance is apparent.<sup>72</sup>

Although the new practice in demurrers to the evidence may be looked upon as a substitute for a motion to direct a verdict, it is distinguished by one important and peculiar feature impressed upon it by the law of demurrers to the evidence. Reversal of a judgment upon a motion to direct a verdict ordinarily results in a new trial;<sup>73</sup> but a proper joinder in a demurrer to the evidence usually irrevocably withdraws the case from the jury and prevents the possibility of a new trial except as to the *quantum* of the damages.<sup>74</sup> In this respect, the new phase of demurrers to the

<sup>70</sup> A close analogy had always been recognized between this practice and that of demurring to the evidence. *Dresser v. Transportation Co.*, 8 W. Va. 553 (1875); *James & Mitchell v. Adams*, 16 W. Va. 245 (1880); *Johnson v. Baltimore & Ohio R. Co.*, 25 W. Va. 570 (1885); *Schwarzbach v. Ohio Valley Protective Union*, 25 W. Va. 622 (1885); *Franklin v. Geho*, 30 W. Va. 27, 3 S. E. 168 (1887); *Nuzum v. Pittsburgh, etc. R. Co.*, 30 W. Va. 228, 4 S. E. 242 (1887).

<sup>71</sup> 51 W. Va. 259, 41 S. E. 180 (1902).

<sup>72</sup> Doubtless, the analogy previously recognized as existing between a motion to exclude the evidence and direct a verdict and a demurrer to the evidence tended to cause a predisposition to recognize a similar analogy between a motion to direct a verdict on a preponderance of the evidence and a demurrer to the evidence.

<sup>73</sup> There is much conflict and uncertainty in the decisions on this point; but the rule now prevailing seems to be that a new trial will be granted unless the court can affirmatively see that the defendant in error could not make a better case on a new trial. *Ruffner Brothers v. Dutchess Insurance Co.*, 59 W. Va. 432, 53 S. E. 943 (1906), and cases cited; *Soward v. American Car Co.*, 66 W. Va. 286, 66 S. E. 329 (1909); *Weeks v. Chesapeake & Ohio R. Co.*, 68 W. Va. 284, 69 S. E. 805. In most, if not all, the cases, the court seems to have lost sight of the objection, whether technical or substantial, that, in setting aside the verdict and entering judgment above, the court is entering a judgment which is not based on any verdict in a case which has not been withdrawn from the jury by agreement or by a demurrer to the evidence.

<sup>74</sup> *Metropolitan Life Insurance Co. v. Rutherford*, 2 Va. Dec. 707, 35 S. E. 719 (1900); *Gregg v. City of Morgantown*, *supra*; *Chafin v. Norfolk & Western R. Co.*, *supra*.

evidence more radically interferes with functions of the jury than does a motion to direct a verdict.<sup>75</sup> Perhaps this very fact adds to its popularity. The new practice is entirely anomalous and can not be reconciled with principle. Whether it is justified by considerations of expediency is another question.

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<sup>75</sup> In *Akers v. De Witt*, 41 W. Va. 229, 23 S. E. 669 (1895), Dent, J., says: "So it requires but one more stroke of the pen on the part of this Court, in construing this legislative enactment, to render the right of trial by jury, as preserved by the Constitution, abortive, and to reduce the jury system, so far as civil trials are concerned, to the condition of a mere useless excrescence on judicial procedure; and in such event the sooner it is pared off by the legislative scalpel the better it will be for the simplification, if not for the purification and betterment, of civil trials. But who is to act sponsor for the probity, impartiality, uprightness of conduct, and freedom from undue influence of those who may be called upon to exercise the extraordinary prerogatives of both Judge and jury? They are but men—mere men—and not, like Portia, always above suspicion. . . . Some more ruthless hand must rob the right of trial by jury of its last citadel of defense, and reduce it to a condition of useless existence—a mere name, without substance."