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## NUL TIEL Corporation a Plea in Bar

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“accidental” discussed. One case<sup>19</sup> arose in 1916, before the amendment, so the problem was not involved. It is not apparent when the facts in the other case<sup>20</sup> occurred. Inasmuch as the court used the text of the act in the Code Supplement of 1918<sup>21</sup> they probably took place prior to the amendment. At any rate, it seems clear that the court never had the point before it. The question is, therefore, still an open one upon which it is desirable that the legislature express itself clearly.

—G. E. O.

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*NUL TIEL CORPORATION A PLEA IN BAR.*—At common law, comprehensively speaking, all defensive matter is pleaded either (1) in bar of the action or (2) in abatement or suspension of the action. Since in West Virginia<sup>1</sup> the “parol” will no longer “demur” on account of infancy,<sup>2</sup> the members of the profession ordinarily speak only of pleas in bar and pleas in abatement, using the latter term to cover pleas to the jurisdiction. It is usual to state that defensive matter which bars the very *right of action*, and therefore all possible actions in which the right might be asserted, should be pleaded in bar; and that matter which, ignoring the *right*, merely abates the *particular action* to which the plea is filed should be pleaded in abatement. So far, very well. But a moment of reflection brings the realization that a right of action may be considered as barred with reference to any one of three different elements which are always inherent in every right of action: (1) the right itself; (2) the party entitled to assert the right; (3) the party against whom it may be asserted. In other words, it is possible to classify pleas in bar as (1) those going to the subject matter of the action, and (2) those going to the person. Whether it is appropriate to do so is another question. On the other hand, a typical plea in abatement undertakes to interpose a bar with reference to neither the subject matter nor the person, but merely undertakes to stop the action. Courts are agreed that matter extinguishing the right in so far as it reposes in the subject matter of the action should be pleaded in bar. Likewise, it is conceded that matter which will not prevent

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<sup>19</sup> *Miller v. United Fuel Gas Co.*, 106 S. E. 419 (W. Va. 1921).

<sup>20</sup> *Zinn v. Cabot*, 106 S. E. 427 (W. Va. 1921).

<sup>21</sup> *Zinn v. Cabot*, *supra*, 428.

<sup>1</sup> CODE, c. 125, §13.

<sup>2</sup> ANDREWS, *STEPHEN'S PLEADING*, 130.

the same person in the same capacity from asserting the same subject matter against the same defendant in the same capacity in another action should be pleaded in abatement. But with reference to that defensive matter which, ignoring the subject matter in which the right reposes, merely attacks the plaintiff's capacity to sue, or the defendant's capacity to be sued, *not only in the action at bar but in all actions*, as might have been expected, there is much confusion and contrariety in the decisions. Some courts, emphasizing the fact that such matter does not determine the question of the defendant's or some defendant's ultimate liability, say that such matter is true matter in abatement and should be so pleaded.<sup>3</sup> Other courts, realizing that such matter effectively bars all actions for or against a party in a particular capacity, have looked upon pleas asserting it as pleas in bar.<sup>4</sup> Still others, conceding that the problem is susceptible of alternative solutions, and conceivably attempting to reach a result which will dispense with technical distinctions, have held that a defendant has the option to plead such matter either in abatement or in bar.<sup>5</sup>

Although there is no substantial objection to permitting the option, which in practical effect extends no broader rights to the defendant than if he were confined to a plea in bar, it is believed that true legal theory points to a plea in bar as the appropriate method of asserting such defenses. Such defensive matter effectively bars the particular plaintiff either in the particular defective capacity in which he sues as plaintiff or in the particular defective capacity in which he sues the defendant; and it should not be forgotten that any plea in bar can bar an action only with reference to the particular parties to the action in which it is filed. It is not a bar against the world; it is not a bar against a third party who may assert a cause of action against the defendant based upon the same facts; nor is it a bar against a different defendant. Essentially, the same person suing in a different capacity is a different plaintiff, and the same person defending in a different capacity is a different defendant. No particular cause of action can exist without a *specific plaintiff*, a *specific right* and a *specific defendant*.

<sup>3</sup> Cyc. 171, and cases cited; 1 R. C. L. § 53, as to *nul tiel* corporation, see 10 Cyc. 1356 *et. seq.*; 1 C. J. 115; 14A C. J. 828; 5 STANDARD PROC. 645 *et seq.*, 655 *et seq.*

<sup>4</sup> See same citations.

<sup>5</sup> *Idem*; Boston Type, *etc.* Co. v. Spooner, 5 Vt. 93 (1833). The dual nature of a plea asserting such matter is recognized in Taylor v. Virginia-Pocahontas Coal Co., 78 W. Va. 455, 88 S. E. 1070 (1916).

It takes no broad stretch of imagination to say that, if a different party sues, or a different party is sued—and different party may include the same person in a different capacity—the right asserted in the second suit is a different right, although based upon the same subject matter. Concededly, matter extinguishing the right bars the plaintiff. Then why does not matter barring the plaintiff's or defendant's capacity extinguish the right? If A sues B for libel, ought there to be any difference in effect between denying the existence of the libel and denying the existence of A or B?

In West Virginia, seemingly the Supreme Court of Appeals has usually looked upon this matter in controversy as constituting proper matter for a plea in bar.<sup>6</sup> Prior to Acts of 1882,<sup>7</sup> under the general issue, a plaintiff was compelled to prove the existence of a corporation or partnership, whether plaintiff or defendant, a fact clearly indicating that the non-existence of such a party was considered matter in bar.<sup>8</sup> By Acts of 1882, denial of the existence of a corporation or a partnership was required to be under oath.<sup>9</sup> The same statute which prescribed the necessity of the oath likewise authorized a special form of plea. As original propositions, two questions seem fairly to be suggested by this statute: (1) Is the special plea prescribed by the statute exclusive of all other pleas? (2) Is it a plea in bar or a plea in abatement? That there has not been a uniform consensus of legal thought upon the subject is indicated by the fact that Mr. Hogg has treated these pleas as pleas in bar;<sup>10</sup> while Judge Kittle classifies them as pleas in abatement.<sup>11</sup> Judge Kittle can find much respectable authority for his position in the decisions of other states.<sup>12</sup> Likewise, it may be said that, since, if these special pleas are pleas in bar, they amount to the general issue, the legislature must have meant them to be pleas in abatement. On the other hand, it has been the recognized practice in this state and in Virginia to permit a defendant to deny the ex-

<sup>6</sup> In *Taylor v. Virginia-Pocahontas Coal Co.*, *supra*, the court virtually recognizes the plea of *ne unques* administrator as a plea in bar which view is in accord with the recent line of decisions beginning with *Austin v. Calloway*, 73 W. Va. 231, 80 S. E. 361, ANN. CAS. 1916E, 112 (1913), holding that the appointment and qualification of a personal representative are issuable facts and should be alleged in the declaration. Where a receiver is sued, the general issue compels proof of the appointment of the receiver. *Hudkins v. Bush*, 69 W. Va. 194, 71 S. E. 106 (1911). But see HOGG, PLEADING AND FORMS, 165, and cases cited.

<sup>7</sup> W. VA. CODE, c. 125, §41.

<sup>8</sup> *Anderson v. Kanawha Coal Co.*, 12 W. Va. 526 (1878); *Central Land Co. v. Calhoun*, 16 W. Va. 361 (1880).

<sup>9</sup> Note 7, *supra*.

<sup>10</sup> HOGG, PLEADING AND FORMS, 420, 421; *idem*, 699 (index); *idem*, 165.

<sup>11</sup> KITTLE, MODERN LAW OF ASSUMPSIT, 544.

<sup>12</sup> Note 3, *supra*.

ecution of a writing either by the general issue supported by an affidavit, or by a special verified plea, and the latter plea has never been suspected of being a plea in abatement.<sup>13</sup> Hence the legislature may very well be understood as having intended merely expressly to authorize a similar practice in denying the existence of a partnership or a corporation. Moreover, the position taken by Mr. Hogg is in harmony with the attitude of the Supreme Court prior to the enactment of the statute.

In a recent case, the Supreme Court has definitely decided that these statutory pleas are pleas in bar, by way of refusing to permit a trial on the general issue after a verdict in favor of the defendant on a plea of *nul tiel* corporation.<sup>14</sup> In the same case, the court suggested that defenses of *nul tiel* corporation and *nul tiel* partnership may be asserted under the general issue, provided that an affidavit be filed with the general issue denying the existence of the corporation or the partnership.

—L.C.

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<sup>13</sup> HOGG, PLEADING AND FORMS, 178; BURKS, PLEADING AND PRACTICE, 99-100. *Tower v. Whip*, 53 W. Va. 158, 44 S. E. 179, 63 L. R. A. 937 (1903).

<sup>14</sup> *Mitch v. United Mine Workers of America*, 104 S. E. 292 (W. Va. 1920).