The Necessity of Planning a Traverse

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The Necessity of Pleading a Traverse.—In a recent West Virginia case, originating in a justice’s court, the Supreme Court of Appeals decided that it would not reverse the judgment of the circuit court merely because an issue had not been made up on an affirmative pleading. Almost in the same breath, in another case, originating in the circuit court, an opposite conclusion was reached. Each of these decisions is fortified by a long line of fairly consistent local authorities. Is the distinction between the rules of practice in the two different forums warranted? If so, is it dictated by the practical demands of justice or is it based on technical principles of procedure?

It is a fundamental rule of common-law pleading that the parties must arrive at an issue before a case is ready for trial. The record must show a dispute—an issue. Something must be asserted on one side and denied on the other, or there is nothing to try. This principle has been exemplified in numerous Virginia and West Virginia decisions. For instance, it is erroneous to try a case when no plea to the declaration has been filed; when the plaintiff has filed no replication to an affirmative plea; or where the defendant has failed to rejoin to an affirmative replication. Such a trial is not only erroneous in its inception, but it is held that the judgment growing out of it is reversible. Hence the whole proceeding is abortive, and furnishes, rightly or wrongly, an example of the “law’s delay,” which has come in for so much lay criticism in recent years.

The fundamental and uniform reason given for reversing these cases is the statement that there can not be a trial without an issue joined on every material pleading in the case. The extent to which the cases go in enforcing the dry letter of the rule is very well illustrated in Ruffner v. Hill. In this leading West Virginia

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1 Stallard v. Stepp, 112 S. E. 184 (W. Va. 1922).
3 McCoy v. Dixon, 2 Call 379 (Va. 1800); Taylor v. Huston, 2 H. & M. 163 (Va. 1808); Sydner v. Burke, 4 Rand. 151 (Va. 1826); K'Million v. Dobbs, 9 Leigh 422 (Va. 1838); Rowans v. Givens, 10 Grat. 250 (Va. 1853); Baltimore & Ohio R. Co. v. Gettle, 3 W. Va. 374 (1869); Galathea's Heirs v. Haywood's Heirs, 4 W. Va. 1 (1870); Baltimore & Ohio R. Co. v. Christie, 5 W. Va. 325 (1872); Williams v. Knight's, 7 W. Va. 335 (1874); Marion Machine Works v. Craig, 18 W. Va. 559 (1881); Ruffner v. Hill, 21 W. Va. 152 (1882); Brown v. Cunningham, 23 W. Va. 109 (1883); Stevens v. Friedman, 52 W. Va. 79, 44 S. E. 163 (1903); Good v. Town o Chester, 65 W. Va. 13, 63 S. E. 615 (1906).
6 21 W. Va. 152 (1882).
case—leading seemingly because of its unadulterated adherence to orthodox principle—the bare letter of the rule seems to have prevailed over all practical considerations. The case was one in ejectment. The defendant had entered no plea, and hence the record failed to show an issue. Nevertheless the jury was sworn to try the issue joined, a plain indication that the parties intended to try an issue, and evidence was introduced, to all intents and purposes as if an issue had been joined. Notwithstanding the fact that the statute allows only one plea—not guilty—in ejectment, so that the law practically enters the plea for the defendant, the judgment was reversed, on the ground that there could not be a trial without an issue. Bearing in mind the application of the rule as made in Ruffner v. Hill and other cases coming before and after that case, and considering the rigid self-sufficiency allotted to it, it is difficult to conceive that it could have any consistent exception. If the the record fails to show an issue, that would seem to settle the matter. Hence when, in an earlier case, the court says that failure to file rejoinders to special pleas of the statute of limitation is cured by the statute of jeofails, it is believed that the holding is inconsistent with Ruffner v. Hill and the great weight of authority grouped around the latter case. Likewise, when the court refused, in a later case, to set aside a verdict at the instance of a plaintiff who had failed to reply to a plea of the statute of limitations, basing its refusal on the ground that the plaintiff was attempting to take advantage of his own omission, it is submitted that the holding is inconsistent. If, as emphasized in numerous other decisions, lack of an issue expressed on the record is alone sufficient to vitiate a judgment, what should it avail to seek for the fault back of the omission? These two decisions, contrary to the great weight of authority are a plain confession that the court can try a case in which all the issues are not made up on the record. Moreover, in the Ruffner Case, a verdict for the plaintiff was set aside at the instance of the defendant, although the defendant was the party who had failed to plead. It has already been noted that a more liberal rule of practice is recognized in cases originating before a justice of the peace, although tried de novo in the circuit court. Likewise, the same liberality prevails in proceedings by way of motion for judgment under

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8 Henry v. Ohio River R. Co., 40 W. Va. 294, 21 S. E. 263 (1895). Also, see State ex rel, Matheny v. County Court, 47 W. Va. 672, 678-9 (1900).
chapter 121 of the Code, although such proceedings are a substitute for common-law actions and are started in the circuit court.\footnote{Collins v. White Oak Fuel Co., 69 W. Va. 252, 71 S. E. 277 (1911). See Burks, Pleading and Practice, §100.}

It may be conceded that a trial court should not try a case in any instance until issue has been joined on all the pleadings; or rather, until the pleadings, in each series, if more than one series, have ended in a traverse or traverses.\footnote{Not even in the liberal proceeding by motion will an issue be dispensed with provided the lack of it is noticed before trial. See Burks, Pleading and Practice, §100, citing Preston v. Salem Improvement Co., 91 Va. 583, 22 S. E. 486 (1895).} An important and practical function of an issue is to control and limit the introduction of evidence. Parties may assume an imaginary issue, and so limit the evidence without an issue of record, but it would not be expedient for the court to assume in advance that such would be done. A carpenter may, without measuring, by chance saw his board the proper length; but the fact that such may happen, or has happened, should not excuse him from measuring, providing the propriety of doing so occurs to him, or is called to his attention, at the proper time. However, it is believed that the situation is entirely different if a trial has taken place without the court’s attention having been called to the absence of an issue.

When the matter has been affirmed by a pleading and has not been met by a subsequent pleading, and the case goes to trial, two possible situations, among others, may result: (1) The affirmative matter may be entirely ignored in the evidence; or (2) the parties may introduce evidence as if the affirmative matter had been traversed. The most usual instance is that where the defendant has pleaded the general issue and an additional special plea. If the affirmative matter which lacks a traverse has been introduced by the plaintiff and has been ignored in the evidence, there is no reason why the plaintiff should not have a judgment by \textit{nil dicti} as to such matter, at any stage of the proceedings, leaving the issue or issues joined to the jury. On the other hand, if the affirmative matter lacking a traverse has been introduced by the defendant, although ignored in the evidence, it is said that it is at all times sufficient to defeat a recovery, and the plaintiff is nonsuited on the ground that he has failed to prosecute his case. The effect of the rule is most frequently observed in the statement that one good plea is sufficient to defeat a recovery. Such reasoning, beyond a doubt, is technically correct, but does it always lead to practical justice? For instance, suppose that the defend-
ant has pleaded the statute of limitations, that the plaintiff has failed to reply to it, and that the only evidence introduced goes to the general issue, also pleaded. In such a case, would it be unjust to assume that the defendant had abandoned his plea of the statute of limitations? If he has abandoned it, why reverse a judgment on account of it? If he did not abandon it, it is fair to assume that he must have been conscious of it, before and at the time of the trial. He must have known that he had a perfect right at any time to have the action discontinued, provided the plaintiff had continued in default after the court’s attention had been directed to the absence of a replication. Is it not encouraging “sharp practice,” if not fraud and deception, to permit a defendant to remain silent under such circumstances and later to take advantage of the situation, when, for all that the court knows, he may have had no evidence to support his affirmative plea? Suppose that the defendant should say that he was not conscious of his special plea during the trial; that he forgot to ask that the plaintiff be nonsuited; that he forgot to introduce evidence to sustain his plea. Should these suppositions make a different case? It would seem not. Apparently, he would equally have forgotten to sustain his burden of proof if his affirmative plea had been traversed. It is said that it is the plaintiff’s affirmative and positive duty to file a replication in such a case, and that the defendant should be placed under no obligatoin to remind him of such duty. This may be conceded. It is not urged that the defendant should be required to exercise any supervision over the prosecution of the plaintiff’s case, but that he promptly take advantage, if he elects to do so at all, of the failure to prosecute. His plea, not replied to, will avail him just as much before as after trial. There is nothing legitimate for him to wait for. Getting back to the original proposition, it may be conceded that one good plea is sufficient to defeat a recovery, but there is no inconsistency nor injustice in requiring the defendant to indicate at each appropriate stage of the procedure that he relies upon the plea.

Suppose, however, that, instead of ignoring the affirmative pleading, the parties have permitted evidence to be introduced and have submitted the case to the jury as if a traverse had been filed to the pleading. This has occurred frequently in West Virginia, especially in cases where the defendant has failed to plead to the declaration or where the plaintiff has failed to reply to an affirmative plea. It is perhaps true that in all these instances counsel and the trial court treated the case at the trial as if a
traverse had been filed to the last pleading in the series. That lack of an issue on the record did not hamper the introduction of evidence is plainly apparent. Otherwise, the court must inevitably have noticed the absence of an issue and halted the trial before verdict. The fact is that there can be no doubt that, in most, if not all, these instances, the missing issue was clearly defined and understood in the mind of everybody concerned in the trial, including the court and the jury, and that the trial took place precisely as if there had been an issue of record. In such cases, it is a substantial falsehood to say that there was no issue. The plain truth is that there was an issue, although the record fails to show it. The issue is plainly implied from the nature of the evidence and the conduct of the parties and they should be estopped to deny it. It can not be successfully maintained that the process of implication would place an unwarranted burden upon the court. It will be noted in most instances where a traverse has been lacking to a pleading coming after the declaration the matter set up in the pleading is of such a simple nature that its evidentiary status is comparatively simple, such as the statute of limitations, or a justification in assault and battery. Hence there can be little difficulty in surmising the assumed issue from the purport of the evidence. Certainly such a process would be less burdensome than a new trial, which is the only alternative. Then, should a judgment be reversed in such cases merely because an issue does not appear on the record, although it does appear in the evidence and in the conduct and intent of the litigants? Should the board be thrown away when it is a perfect fit, merely because it was sawed by chance? Why not mould an issue out of the evidence? Pleadings are readily amended to fit the evidence. Why not supply them to fit the evidence in such cases?

The writer is willing to risk the statement that no judgment in a common-law action should be reversed for lack of a traverse to a pleading when the parties at the trial either have ignored the pleading or have submitted evidence as if the pleading had been traversed, without any objection for lack of an issue. Such dispensing with formality may not appeal to those who revere the artistic phases of pleading, but it will satisfy those who believe in bending the processes of the law to the accomplishment of plain justice.

Perhaps the process of implication should be confined to traverses, as above indicated. To extend the process so as to permit pleading matter in avoidance to be implied from the evidence con-
-ceivably could lead to surprise and intolerable confusion, and there would not seem to be a very great need for such an extension. Perhaps in all instances, a failure to make up an issue is due to inadvertence on the part of one party, and usually on the part of both parties. In most cases the pleading inadvertently omitted is a traverse, presumably because a traverse, being more or less informal, may be more easily overlooked than a pleading by way of confession and avoidance.

As has already been noted, a judgment rendered in a circuit court on appeal from a justice of the peace, or a judgment rendered by the circuit court in a proceeding by motion under chapter 121 of the Code, will not be reversed merely because the record does not show an issue. No considerations of convenience would be sufficient to tolerate the suggestion that the liberality permitted in these instances does not serve the ends of justice. No supposed necessity for liberality in a forum where litigants lack technical guidance could in any event sanction a practice which did not accomplish justice. The bare fact that the technical rule is disregarded in those instances where the court is not bound by the formal shackles of the common law is alone sufficient proof of the expediency of the more liberal rule of practice. No practical reason can be urged why the same considerations of justice and expediency would not equally apply in a common-law action. It should be added that nobody has been more emphatic than the West Virginia Supreme Court itself in condemnation of the technical rule which the common law has imposed upon it. In Collins v. White Oak Fuel Co., Poffenbarger, J., says:

"The old common law rule, making a plea and joinder of issue essential to the trial of a case is still adhered to by this Court, in common law actions, but is always reluctantly applied, when it appears that the parties have treated the issue as having been made up and fully submitted their respective claims and contentions to the jury. If it were possible, consistently, to avoid reversals for such cause, the Court would cheerfully do so. It looks upon the rule with great disfavor."

A more scathing condemnation will be found in Simpkins v. White, in the language of Brannon, J.:

"This is the dryest and most hurtful technicality, reversing fair trials, delaying justice, and ruining parties from costs, and

12 Simpkins v. White, 43 W. Va. 125, 27 S. E. 361 (1897).
almost rendering the administration of justice a mockery. It is based only on the common law rule that there can be no issue without a plea, and unless an issue is made, which the parties alone can do, there can be no trial; but the parties have, in effect, made an issue by going to trial as on an issue.''

What has been said in this note is not intended as a criticism of the Supreme Court. The prevailing rule is so firmly based on fundamental, though technical, principles of common-law pleading, and has been followed so frequently in the earlier local decisions, that the court may very well urge that it could not be consistently asked to remedy the evil by judicial decision. It would seem that relief, if any, must come through legislative enactment. As a suggestion in this direction, the following tentative draft of a statute is offered. Although it should be found insufficient, it may serve as a step toward something better.

No judgment shall be stayed or reversed nor verdict set aside in any case because an issue has not been made up on matter alleged in any pleading, provided: first, that no evidence shall have been offered pertaining to such matter; or second, that it shall appear to the court that the only evidence offered pertaining to such matter is such evidence as would have been pertinent and material only upon the issue resulting if a traverse had been filed to such pleading; unless, in either instance, objection shall have been made because of the lack of such issue before the jury shall have retired to consider their verdict. If no evidence shall have been offered pertaining to such matter, and no objection shall have been made as aforesaid, such pleading, if filed by the defendant, shall be treated as having been waived and abandoned; but nothing herein shall impair or affect the right of the plaintiff at any time to have judgment by default or by nil dicit, when the defendant has failed to plead. If evidence pertaining to such matter shall have been admitted as aforesaid, and no objection shall have been made as aforesaid, it shall be assumed that a traverse was pleaded to said pleading, and the record may be amended or supplemented so to show.

—L. C.