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SOME ANOMALIES AND UNCERTAINTIES IN MINNESOTA PLEADING

By G. W. C. Ross*

Notwithstanding Mr. Dunnell's protest,¹ it must be taken as settled law in Minnesota that payment, e. g., in the ordinary action for goods sold and delivered, or against the maker on a promissory note, is an affirmative defence.² That means, that the complaint in such case need not allege non-payment; payment may first be alleged by defendant as new matter in his answer, to be denied, if disputed, by plaintiff's reply. But such complaints in Minnesota practically always do allege non-payment. Does the allegation tender issue as to the fact?

First State Bank of Grand Rapids v. Utman,³ was an action against the endorser of a promissory note, who, however, had waived demand, notice and protest. The complaint alleged that the note was unpaid. The answer was a general denial, qualified by admission of the execution of the note and its endorsement by defendant. Plaintiff's demurrer to this answer was sustained by our supreme court, Dibell, C., on the ground that the answer did not put the fact of payment in issue. The court indulged in no argument; they merely cited the dictum in First Nat. Bank of Shakopee v. Strait.⁴ But the theory obviously is, that since the complaint need not have alleged non-payment the allegation thereof was "immaterial" and hence tendered no issue on the point, and therefore the denial did not join issue on it. The further logic of that holding of course would be, that if the answer had explicitly alleged payment the same would have stood, not as a contradiction (denial) of the complaint's allegation, but as new matter, which would therefore stand admitted of record unless the plaintiff denied it over again by reply. But this latter identical state of pleading was presented to the Minnesota court by the early case of McArdle v. McArdle,⁵ and the court held flatly contra. One of the causes of action there sued on was a promissory note. The complaint alleged non-payment; the answer al-

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¹Dunnell, Minnesota Pleading, 2d ed., 594, 831.
²First Nat. Bank of Shakopee v. Strait, (1898) 71 Minn. 69, 73 N. W. 645; First State Bank of Grand Rapids v. Utman, (1917) 136 Minn. 103, 161 N. W. 398.
³(1917) 136 Minn. 103, 161 N. W. 398.
⁴(1898) 71 Minn. 69, 73 N. W. 645.
⁵(1866) 12 Minn. 98.
leged payment; there was no reply; and defendant accordingly moved for judgment on the pleadings, for that the fact of payment stood admitted by the failure to reply. But the motion was held properly denied; on the ground that the allegation of payment in the answer amounted merely to denial of the complaint's allegation of non-payment and hence joined issue thereon and no reply was needed. Denial of payment by reply would be simply a repetition of the allegation in the complaint; and that is the standard test of the necessity for reply. The McArdle Case, however, probably proceeds, not on the ground that an allegation in the complaint needlessly anticipating a defence nevertheless tenders issue thereon, but rather on the ground that the allegation of non-payment is a necessary one in the complaint. The opinion does not say that; but the only case the court cite is based explicitly on that ground. In so far, therefore, the McArdle Case is probably no longer good authority in Minnesota.

But the statement that such an allegation, as non-payment in the complaint is "immaterial" contains an ambiguity. In the Utman Case, the complaint contained, besides the allegation of non-payment, the further allegation that payment had been demanded and refused. That was a truly immaterial allegation; i.e., the fact alleged was immaterial. It made no difference to the rights of the parties whether payment had ever been demanded or not. Hence it would properly be said, that the general denial did not put such a fact in issue. But incidentally, that is just what the court in the Utman Case did not say. On the contrary, in the same opinion in which they say the general denial did not put the allegation of non-payment in issue, they say that it did put in issue the allegation of demand. That surely is the height of absurdity. In the Utman Case it was "error without prejudice," so to speak; because the court went on to note that the fact of demand was immaterial anyhow, and so the joinder of issue on it was immaterial. This is merely an awkward and roundabout way of saying that no real issue was joined. In truth, of course the general denial could not put such a fact in issue. If the complaint had not alleged demand, but the answer first had alleged that no demand ever was made, such allegation would have tendered no issue on the point, and a specific denial or counter-allegation in reply would not have joined issue on it. By no form of pleadings can a truly immaterial fact be

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*7(1917) 136 Minn. 103, 161 N. W. 398.
put effectively in issue. But the allegation of non-payment is not immaterial in that sense. The statement that it is "immaterial" means only that it is unnecessary in the complaint; the complaint would state a good (prima facie) cause of action without it. But to allege non-payment is to allege a material, nay, a crucial fact. It is strictly an issuable fact. Is there any reason why effect should not be given to the allegation? Is there any good reason in the basic logic or principles of code pleading why parties should be forced to put such a fact in issue only by answer and reply, and be disabled from doing so by complaint and answer?

Undoubtedly at common law such an unnecessary allegation in a declaration could not be traversed by the plea. The common law regarded all unnecessary allegations as "immaterial" and did not discriminate between the allegation of an inherently immaterial fact and an allegation needlessly anticipating a defence. But why should this sort of technicality be perpetuated under the codes? The common law was a stickler for its precise formalities. There is the oft-cited illustration of the man alleged to be dead, and a plea alleging him to be alive is said to be no good traverse. The way to deny that he was dead, is to "deny that he is dead," or, perhaps, to allege that he is "not dead," but to allege him to be alive was argumentative and so no effective traverse. But that sort of hair-splitting is not code pleading. Argumentative denials, while not deemed artistic, are effective under the code, if sufficiently complete in scope and unequivocal. Code pleading is concerned with the substance, the clear actual intent of the pleaders and the speedy administration of justice according to the underlying merits, rather than with form and technicality of pleading for its own sake. So when parties by any form of pleading have made unequivocal and flatly contradictory statements about any issuable fact, why should not that fact be deemed at issue? As noted above, the usual test for the necessity of a reply is, that reply is not necessary when it could only re-iterate the allegations of the complaint; yet the logic of the Utman Case makes the plaintiff do just that. What is at stake, that the defendant should be required first to allege his defences, and that if plaintiff has needlessly denied them by anticipation, he must nevertheless re-iterate his denial in a reply?

Engel v. Bugbee, (1889) 40 Minn. 492, 42 N. W. 351.
(1917) 136 Minn. 103, 161 N. W. 398.
Authority for this view is not wanting in Minnesota. In the case of Dennis v. Johnson, complaint for libel needlessly alleged plaintiff's good reputation. In answer the defendant averred his lack of any knowledge or information sufficient to form a belief as to plaintiff's reputation. Under this answer defendant was held entitled to offer evidence of plaintiff's bad reputation. Admitting that the complaint's allegation of plaintiff's good reputation needlessly anticipated matter of affirmative defence, the court held that since it alleged a material fact it tendered issue thereon; which accordingly was well joined by the answer. It is true that this case might be distinguished on the ground, that plaintiff's bad reputation in libel action is matter, not strictly of defence, but rather merely in mitigation of damage and hence might be held provable without any explicit pleading on it at all, by either party. But the court, while they note this position, prefer not to so hold, but deliberately pass by that point and decide the case squarely on the other ground. They say:

"The purpose of pleadings is to disclose the facts relied upon for recovery or in defence. For this purpose no particular form of words is necessary. . . . Of course, the affirnance and denial of immaterial matters does not present an issue to be tried. But a plaintiff may unnecessarily aver in his complaint a material fact. . . . concerning which the burden of pleading and proof would ordinarily rest upon the defendant, and by so doing enable the defendant, by specific denial of such averment, to raise an issue as to the fact. . . . When we regard the purposes of pleadings it can make no possible difference whether, the complaint containing no such averment, the defendant were to affirmatively and specifically state in his answer that the plaintiff's reputation was bad, or, the complaint alleging specifically that his reputation was good, the defendant were to specifically deny the fact thus averred. In either case the defendant unmistakably puts in issue the material fact. It is no answer to say, that the plaintiff need not have alleged his good reputation. He having done so, it enabled the defendant to put the fact in issue by a pleading in the language of a denial."

It is submitted, that this reasoning is good common sense and is in harmony with the true spirit and intent of code pleading.

The same question of pleading is presented in personal injury actions, in relation to the matter of plaintiff's due care or contributory negligence. A personal injury complaint need not allege the plaintiff to have been in the exercise of due care, as we

11(1891) 47 Minn. 56, 49 N. W. 383.
12Italics the author's. [Ed.].
shall see. But suppose it does so allege; does it thereby tender issue thereon? The early Minnesota cases appeared to hold that in personal injury actions generally the plaintiff's contributory negligence is provable under answer by way of general denial; on the theory that the complaint (necessarily) alleges defendant's negligence to have been the sole cause of the injury, and hence the general denial puts that fact in issue and evidence of plaintiff's contributory negligence goes merely to controvert it. This of course misconceives the substantive law concerning this tort. But the question finally was given extended consideration by the Minnesota court in the case of Hill v. Minneapolis Street Ry Co. Here the complaint did not negative plaintiff's contributory negligence. The answer was a general denial. At the trial the issue of contributory negligence was submitted to the jury and verdict for the defendant resulted; but on appeal, an order denying a new trial was reversed; the court holding that contributory negligence was not in issue under the pleading. They review the early cases above cited and declare that in those cases the complaints did in fact deny plaintiff's contributory negligence, or allege his due care, thus (needlessly) anticipating the defence; and that it is in such cases, and in such cases only, that issue is joined on the point by answer consisting of general denial. They say that contributory negligence is an affirmative defence, to be so pleaded first by the defendant, "unless the plaintiff had tendered the issue by alleging that the plaintiff was without fault. It must be definitely understood, that the decision in" St. Anthony Falls Water Power Co. v. Eastman merely holds that a general denial puts plaintiff's negligence in issue when the complaint alleges that he is free from negligence, and that" Hocum v. Weatherick simply holds that under such a state of pleadings the burden is still on the defendant to prove the contributory negligence of plaintiff." A more explicit repudiation of the rule of the Utman Case, and recognition of the principle this article is contending for, it would be hard to find. Hill v. Minneapolis Street Ry. Co. was approved in the case of Lee v. Leighton Co. And compare the vigorous dissenting opinion of Hobson, J., in

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12St. Anthony's Falls Water Power Co. v. Eastman, (1874) 20 Minn. 277; Hocum v. Weitherick, (1875) 22 Minn. 152, 156.
13(1910) 112 Minn. 503, 128 N. W. 831.
14(1874) 20 Minn. 277.
15(1875) 22 Minn. 152.
16(1911) 113 Minn. 373, 376, 129 N. W. 767.
the Kentucky case of *Louisville & Nashville Ry. Co. v. Paynter's Adm'x.*

It is possible, that in the *Utman Case* the Minnesota court meant to go no further than to hold that a *general* denial would not put the allegation of non-payment in issue; but that if the answer had alleged payment in affirmative terms they would have held that it did join the issue without reply, following *McArdle v. McArdle.* But they suggest nothing of the kind, and no such distinction can be supported on principle. For payment alleged affirmatively could be held to join the issue only on the ground that it constitutes merely an argumentative denial of the allegation of non-payment. Otherwise, it would not join the issue, but would tender it; to be joined only by reply. But an argumentative denial can hardly be more effective than an explicit denial. If payment alleged affirmatively can be given effect as denial of the allegation of non-payment, surely a specific denial of the non-payment must be equally effective against demurrer, though it might be assailable as indefinite on motion directed to that point. And a general denial is merely specific denial applied seriatim to each (traversable) allegation of the complaint.

The Minnesota cases do disclose one possible reason, perhaps of some practical cogency, in favor of the rule of the *Utman Case* and against that of *Dennis v. Johnson* and *Hill v. Minneapolis Street Ry. Co.* It is suggested by the extract quoted above from the opinion in the *Hill Case,* last mentioned; where the court say that the earlier, *Weitherick Case* simply holds that under a personal injury complaint alleging plaintiff's due care and an answer by way of general denial, while the plaintiff's contributory negligence is at issue, yet “under such a state of pleadings the burden is still on the defendant to prove the contributory negligence of plaintiff.” Shortly after the court had decided the case of *Dennis v. Johnson,* the case of *Lotto v. Davenport* came up. *Lotto v. Davenport* also was a libel action, with the same state of pleadings as in *Dennis v. Johnson.* And relying on the (then) recent decision in *Dennis v. Johnson,* the defendant in *Lotto v. Davenport* offered no evidence as to plaintiff's bad reputation; contending, that since plaintiff had tendered the issue on his reputation and

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19 (1891) 47 Minn. 56, 49 N. W. 383.
20 (1910) 112 Minn. 503, 128 N. W. 831.
21 (1875) 22 Minn. 152.
22 (1891) 47 Minn. 56, 49 N. W. 383.
23 (1892) 50 Minn. 99, 52 N. W. 130.
defendant had merely joined it by denial, the burden was on plaintiff to prove, or at least to go forward with the evidence, of his good reputation. But the court immediately corrected this false impression and explained that the rule of *Dennis v. Johnson* was a rule of pleading purely; but that, though the issue was effectively made up by complaint and answer instead of by answer and reply, yet the point at issue remained matter of (affirmative) defence, and notwithstanding the state of the pleadings the burden remained on defendant to prove or at least first adduce evidence of plaintiff's bad reputation. And so in the opinion as quoted, in *Hill v. Minneapolis Street Ry. Co.*, the court hasten to point out, that while plaintiff tenders issue by alleging his due care in his complaint, to be well joined by answer consisting of general denial, yet it remains for the defendant to prove plaintiff's contributory negligence. This suggests that the rule here advocated, allowing the issue to be anticipated, so to speak, in the pleadings, does conduce to a certain confusion. It tends to slur over the difference between necessary and unnecessary allegations and imposes on judges and lawyers the intellectual labor of knowing, *dehors* the pleadings, what are inherently matters of affirmative defence, and of remembering that regardless of how the issue may be framed by the pleadings, matters properly of affirmative defence remain such as far as the burden of proof or evidence is concerned. It would seem on the whole, however, that this degree of extra mental effort and penetration should not be beyond the caliber of the profession, on and off the bench, in Minnesota. It is submitted that the case of the *First State Bank of Grand Rapids v. Utman,* should be overruled by our court at its next opportunity, both as inconsistent with other leading Minnesota cases, and as out of harmony with the proper principles and fundamental intent of code pleading.

II.

The earliest Minnesota cases held, that in response to certain allegations (e.g., of value) an answer by way of general denial was bad as negative pregnant. These cases were properly overruled in *German-American Bank v. White.* But a specific denial may still be bad in Minnesota for pregnancy. Thus, in the...

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24(1917) 136 Minn. 103, 161 N. W. 398.
25Dean v. Leonard, (1864) 9 Minn. 190; Dunnell, Pleading, 2d ed., 323, note 75.
26(1888) 38 Minn. 471, 38 N. W. 361.
case of *Pullen v. Wright*,²⁷ in answer to a complaint on a promissory note the defendant counterclaimed for breach of warranties in connection with the sale of a stock of goods. The warranties alleged, were that the tea chest was full of tea and that the baking powder and molasses were in good condition. Plaintiff in reply "denied that he warranted that the tea chest was full of tea and that the baking powder and molasses were in good condition;" and on these pleadings it was held that the making of the warranties stood admitted, the attempted specific denial being pregnant. So far, so good. But this reply contained also a "qualified general denial" in usual form; wherefore the plaintiff urged, that if the warranties were not (effectively) specifically denied, they were put in issue by the qualified general denial. But held not so; but that the point was controlled by the attempted specific denial. The court say:

"Allegations thus specifically attempted to be denied are not included in a general denial in the same pleading, which assumes to deny each allegation not previously denied. A party cannot be permitted to experiment in this way. His intention as to such allegations is sufficiently indicated by the form of denial selected, whether it is construed to be good or bad."

And then comes along the case of *Fitzpatrick v. Simonson Bros. Mfg. Co.*²⁸ This was an action to quiet title. Defendant in answer set up two tax titles held by him. Plaintiff's reply began with a qualified general denial; then it specifically alleged that the two tax titles were "wholly void and of no force or effect." At the trial defendant refrained from proving his tax titles, claiming that they stood admitted on the pleadings. Under the rule of *Pullen v. Wright*,²⁹ they certainly did. The specific allegation of the reply in respect to the tax titles was clearly bad as setting up mere conclusion of law; a vice certainly as bad (i.e., ineffective) as pregnancy. But the supreme court affirmed judgment for the plaintiff; holding the tax titles in issue under the qualified general denial of the reply. Per Lovely, J.: "Specific averments, however, to control general statements in pleadings, must not only be sufficient for one, but for all legal purposes." Pleading the conclusion of law "is not only ineffective to traverse the tax judgments, but also worthless to limit the scope of the previous" qualified "general denial." Yet the court do not assume to overrule *Pullen v. Wright*. They do not mention it, or indicate that they

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²⁷(1885) 34 Minn. 314, 26 N. W. 394.
²⁸(1902) 86 Minn. 140, 90 N. W. 378.
²⁹(1885) 34 Minn. 314, 26 N. W. 394.
ever heard of it. Perhaps they never had; though it is not an iso-
lated case.  

The net result is, that in the next case that may come up, with
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duly called to their attention, it is impossible to be sure
which way our supreme court will jump; or whether they may
draw a fanciful distinction for this purpose between pregnancy and
pleading conclusion of law, so as to sustain both cases. To the
writer it seems unfortunate that the qualified general denial ever
was permitted in this state. It certainly has proved itself pro-
ductive of confusion, obscurity and uncertainty in pleading, and
all in high degree. It is used as a catch-all basket by the careless
and becomes a trap for the unwary practitioner. Its only benefit
is in furnishing the bench a convenient handle wherewith to
construe the pleading as closely or as loosely as their mood or the
exigency of the particular occasion may dictate. But the qualified
general denial has become firmly settled in our practice; and that
being so, the rule of the Fitzpatrick Case would seem more en-
lighted and in better accord with the fundamental maxim cf
liberal construction with a view to substantial justice, than the
technical holding of Pullen v. Wright.

III.

In the case of Meachem v. Cooper, the complaint alleged
breach of warranty on sale of a horse: "whereby the plaintiff has
sustained damage" to a stated sum. At the trial, plaintiff over
objection proved the horse's actual value (or valuelessness) and
what its value would have been had it conformed to the warranty;
and on appeal from an order denying new trial after verdict for
plaintiff, the order was affirmed. The court hold, that although
the complaint stated no facts measuring the damages, yet the gen-
eral damages, being the indicated difference in values, were prob-
able under the bare ad damnum. The opinion would indicate
that the complaint was wholly silent as to values. Examination
of the paper-book discloses, however, that the complaint did al-
lege that the horse was actually worthless, and also stated the
amount plaintiff paid for it. This last, however, of course does
not give the proper measure of damages; so the supreme court

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30 Compare Davenport v. Ladd, (1888) 38 Minn. 545, 38 N. W. 622.
31 (1902) 86 Minn. 140, 90 N. W. 378.
32 Compare Kingsley v. Gilman, (1867) 12 Minn. 515.
33 (1886) 36 Minn. 227, 30 N. W. 669.
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rightly say, that the complaint did not state facts measuring the damage. And in the case of *Ennis v. Buckeye Publishing Co.*, the complaint was entirely silent as to facts relating to damage; merely stating the making of the contract and its breach, “to the damage of the plaintiff in the sum of $3,100.” And the holding was the same, to-wit:- That under this bare ad damnum all general damages were properly provable and recoverable.

But then in the case of *Plano Mfg. Co. v. Richards*, the court undertake to define the “essentials” of a sufficient pleading for breach of warranty, and say that it must allege, inter alia, “the facts from which damage are to be inferred.” This appears to mean, that it must allege the facts showing (constituting) actual (substantial) damage and, i. e., measuring the same. The statement is reiterated, per P. E. Brown, J., in the later case of *Bradstreet Co. v. Four Traction Auto Co.* It is submitted this ignores the distinction between general and special damages; or else it confuses action for breach of warranty with action for deceit. It is true that in an action for deceit the facts constituting actual (substantial) damage must be specifically alleged. Such damage is “of the gist of” that particular tort (i.e., it is part of the very cause of action itself); or, in common parlance, it is no tort to lie to a man unless by your lying you cheat him out of some money or money’s worth; deceit as a tort thus differing in this regard from, e. g., assault. But action for breach of warranty is an action on contract; and in actions on contract it is regularly held that the breach of contract by itself constitutes a complete cause of action entitling plaintiff to nominal damages at least; and by the same line of reasoning, that “general damages” inhere in breach of contract and hence are recoverable under bare ad damnum, without being specially pleaded. The misleading statement in the *Plano Mfg. Co. Case* and the *Bradstreet Co. Case*, should be disapproved.

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34(1990) 44 Minn. 165, 46 N. W. 314.
35(1902) 86 Minn. 94, 90 N. W. 120.
36Per Lovely, J. at p. 96. Italics the author’s. [Ed.]
37(1912) 118 Minn. 454, 459, 137 N. W. 180.
38Compare Parker v. Jewett, (1893) 52 Minn. 514; 55 N. W. 56.
39Dunnell, Pleading, 2d ed., 623 and cases cited; and compare Burns v. Jordan, (1890) 43 Minn. 25, 44 N. W. 523; Cowley v. Davidson, (1865) 10 Minn. 392.