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The Anomaly of Payment as an Affirmative Defense

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I. INTRODUCTION

To the average student of pleading and practice, the origin and theory of payment as an affirmative defense is not only an anomaly in name, but also an anomaly in fact. While one eminent authority[1] seems to think that "According to the course of judicial decisions" the general rules regarding such a defense are clear and certain and that there is hardly a "dissent" as to the same, another writer, perhaps not so eminent, but at least to be highly respected, remarks: "The authorities are not at one as to whether the defense of payment is new matter to be specially pleaded, or whether it may be proved under a general denial."[2] The problem has been touched upon by numerous text-writers,[3] it has been the central theme of many decisions,[4] and of at least one very able opinion.[5]

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[1]Pomeroy's Code Remedies (4th ed.), sec. 541.

[2]Phillips on Code Pleading, sec. 363.

[3]Payment as an affirmative defense as treated in the digests and by the text-writers: (a) Digests: 1 Dec. Dig., Payment, 63; 2 Cent. Dig., Payment, 158; 2 L. R. A. (N. S.) 658; 16 L. R. A. (N. S.) 127; 5 Bac. Abr. Pleas and G. T. 2; 36 Am. Dec. 606; 38 Am. Dec. 594; 43 Am. Dec. 750; 61 Am. Dec. 58; 68 Am. Dec. 620; 69 Am. Dec. 696; 83 Am. Dec. 199; 88 Am. Dec. 396; 12 Am. St. Rep. 414; 82 Am. St. Rep. 756; 130 Am. St. Rep. 130; 137 Am. St. Rep. 912. (b) Text-writers: 4 Cyc. 353; 30 Cyc. 1251; 21 R. C. L., sec. 127; Abbot's Trial Brief (2d ed.), vol. ii, ch. xviii, sec. 365, p. 1535, n. 6, p. 1538; 16 Enc. Pl. & Pr. 164; 22 Am. & Eng. Enc. Pl. & Pr. 513; Bliss on Code Pl. (3d ed.), secs. 357, 357 n. 124, 126, 358, 358 n. 128; 1 Chitty on Pl. & Pr. (1st Am. ed.), vol. iii, p. 687; Chitty on Bills, 198; Chitty on Pl. (16th Am. ed.), vol. i, pp. 504, 505, 511, 514, 756; 3 Cooley's Bl. 303; Greenleaf on Evidence (15th ed.), vol. ii, p. 516; Hepburn's Development of The Code, secs. 285–291; Lawes on Pl. secs. 520 & 521; Maxwell's Code Pl. 8, 497; Phillips on Code Pl., secs. 349, 363, 437; Phillips on Evidence (5th Am. ed.), vol. i, 657, 825; Pomeroy's Code Remedies (4th ed.), secs. 535, 541, 569, 570, 572, 577, 658, 659, 776; Stephen's Common Law Pl. (2d ed.), p. 58, 418; Will's Gould on Pl. div. v, ch. 1, p. 499, 499n.

[4]Collection of American & English cases: (a) American cases by states or jurisdictions: *Alabama:* Pollak v. Winter, 166 Ala. 255 (1910). *Arkansas:* Jarvis v. Andrews, 80 Ark. 277 (1906). *California:* Frish v. Caler, 21 Cal. 71 (1862); Davanay v. Eggenhoff, 43 Cal. 395 (1872). *Colorado:* Bartholomew v. Emerson-Brantingham Implement Co., 68 Colo. 244 (1920). *Connecticut:* Elm City Lum-

In view of this divergence of opinion on the part of the authorities, plus the fact that the question has been before the courts on so many occasions, and is of constant recurrence, it might not be inappropriate to make of it a new study. This should be done, not so much in the hope of adding any new thought, as to collect and arrange in some comprehensive and systematic manner the most important material on the subject, to attempt an explanation of the anomaly, to work out the different situations which have been evolved thru variations from the general rule, and to draw, from an analysis of the cases, a conclusion as to whether such a defense ought to be abolished, or whether, despite the anomaly connected therewith, it should be retained as a matter of sound policy.[6]

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ber Co. v. McKenzie, 77 Conn. 1 (1904). *Delaware:* Klair v. Phila., B. & W. Railroad Co., 2 Boyce 274 (1910). *Florida:* International Harvester Co. of America v. Smith, 51 Fla. 220 (1906). *Georgia:* Dickson v. Wainwright, 137 Ga. 299 (1911). *Idaho:* First National Bank v. Bews, 3 Idaho 486 (1892). *Illinois:* Crews v. Bleakley, 16 Ill. 21 (1854). *Indiana:* Hubler v. Pullen, 9 Ind. 273 (1857); Baker v. Kistler, 13 Ind. 63 (1859). *Iowa:* Hardin Co. v. Wells, 108 Ia. 174. 108 (1899) *Kansas:* St. L., Ft. Scott & Wichita Ry. Co. v. Grove, 39 Kan. 731 (1888). *Kentucky:* Mills v. Lantrip, 170 Ky. 81 (1916). *Louisiana:* Chase v. New Orleans Gas Light Co., 45 La. Ann. 300 (1893). *Maine* :Burgess v. Denison Paper Mfg. Co., 79 Me. 266 (1887). *Maryland:* McCart v. Regester, 68 Md. 429 (1888). *Massachusetts:* Temple v. Phelps, 193 Mass. 297 (1906). *Michigan:* Dodge v. Stanton, 12 Mich. 408 (1864). *Minnesota:* Farnham v. Murch, 36 Minn. 328. *Mississippi:* Sivley v. Williamson, 112 Miss. 276 (1916). *Missouri:* State *ex rel.* Spaulding v. Peterson, 142 Mo. 526 (1897). *Montana:* Penwell v. Flickinger, 46 Mont. 526 (1913). *Nebraska:* Barker v. Wheeler, 62 Neb. 150 (1901). *New Jersey:* Axel v. Kraemer, 75 N. J. L. 688 (1908). *New Mexico:* Cunningham v. Springer, 13 N. M. 259 (1905). *New Hampshire:* McKeen v. Cook, 73 N. H. 410 (1905). *New York:* McKyring v. Bull, 16 N. Y. 297 (1857). *North Carolina:* N. C. Chemical Co. v. McNair, 139 N. C. 326 (1905); *North Dakota:* Bank v. Roberts, 2. N. D. 195. (1891). *Ohio:* Fewster v. Goddard, 25 Ohio St. Rep. 276 (1874). *Oklahoma:* Mulhall v. Mulhall, 3 Okla. 252 (1895). *Oregon:* Benicia Agricultural Works v. Creighton, 21 Ore. 495 (1892). *Pennsylvania:* Collins v. Busch, 191 Pa. 549 (1899). *Rhode Island:* Glaser v. Rounds, 16 R. I. 235 (1888). *South Carolina:* Parker v. Mayes, 85 S. C. 419 (1910). *South Dakota:* Fall v. Johnson, 8 S. D. 163 (1896). *Tennesee:* Gosset v. Southern Ry. Co., 115 Tenn. 376 (1905). *Texas:* Key v. Hickman, 149 S. W. (Tex. Civ. App.) 275 (1912). *United States:* Choate v. Hoogstraat, 105 Fed. 713 (1901). *Utah:* Heath v. White, 3 Utah 474 (1867). *Vermont:* Morrill & Co., v. N. E. Fire Ins. Co., 71 Vt. 281 (1899). *Virginia:* Whitley v. Booker Brick Co., 113 Va. 434 (1912). *Washington:* Palmer v. Parker, 91 Wash. 683 (1916). *West Virginia:* Shuman v. Shuman, 79 W. Va. 445 (1917). *Wisconsin.* Rossiter v. Schultz, 62 Wis. 655 (1885). (b) English Cases: Fits v. Freestone, C. B., 1 Mod. 210 (1675); Carr v. Hinchliff, K. B., 4 B. & C. 547 (1825); Brown v. Cornish, K. B., 1 Ld. Raym. 217 (1697); Paramore v. Johnson, K. B., 1 Ld. Raym. 566 (1700); Hatton v. Morse, 3 Salk. 273 (1702). Le Bret v. Papillon, K. B., 4 East 502 (1804); Goodchild v. Pledge, 1 M. & W. 363 (1836); Bussey v. Barnett, 9 M. & W. 312 (1842); Thomas v. Cross, 7 Exch. 728 (1852).

[5]See Pomeroy's Code Remedies (4th ed.), sec. 535, in which, in referring to McKyring v. Bull as the leading case on the subject, the author states: "The opinion of Mr. Justice Selden is so full, accurate and able an exposition of the subject that other judges have done little more than repeat his conclusions."

[6]It has been suggested that since the law never favors making one prove a negative, the burden of proving payment might have been placed on the party seeking to take advantage of it as a matter of sound policy, and in order to save

II. History of the Anomaly

Under the earlier common law pleading, the courts attempted to enforce the rule that under the general issue the defendant was limited to evidence tending to controvert the facts stated in the declaration and could not dispute anything which went to dispute liability. Hence, if his defense was new matter, he was required to plead it specially.

This strict and true theory of common law pleading never did fit the action of debt on a simple contract. This was due to the peculiar character of the plaintiff's allegations in that action. The declaration really stated a conclusion of law, which did not fairly apprise the defendant of the plaintiff's actual cause of action, and made it impracticable for him to plead specially. In fairness to the defendant, therefore, the courts early adopted the rule that the defendant, in an action of debt, could show anything under the general issue that had a tendency to show no debt. The situation was not the same in the action of general assumpsit. Mr. Justice Selden, in the course of his masterly opinion in the leading case of *McKyring v. Bull*,[7] attributed the distinction as to the results in the two forms of action (and no doubt correctly) to the difference in phraseology used in the two forms of action. He said:[8]

> "The declaration, in debt, averred an existing indebtedness, and this amount was traversed by the plea of *nil debet*, in the present tense; hence, nothing could be excluded which tended to prove that there was no subsisting debt when the suit was commenced. In assumpsit, on the contrary, both the averment in the declaration and the traverse in the plea were in the past, instead of the present, tense, and related to a time anterior to the commencement of the suit. Under non assumpsit, therefore, so long as the rule of pleading which excludes all proof not strictly within the issue was adhered to, no evidence could be received except such as would tend to show that the defendant never made the promise. That this was the view taken of these pleas in the earlier cases, is clear."

Such was the situation when the action of indebitatus assumpsit came in; that is, in all actions but debt, the strict theory that no defense was available under the general issue, except such as went in denial of the truth of the facts stated in the declaration. But the development of this action saw a wide departure from the strict

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the plaintiff from the necessity of proving a negative—nonpayment. Judge Edward Hinton, Prof. of Pleading & Practice, U. of C., Class-room Lectures on Code Pleading, Spring 1921–22.

[7] 16 N. Y. 297 (1857).

[8] At p. 299.

theory of pleading. "The first departure was in relation to the general issue in actions of indebitatus assumpsit."[9] As a matter of theory, where the action was based on an implied promise, it could be squared with the true theory of pleading, by reference to the peculiar nature of the action of indebitatus assumpsit. The promise on which the plaintiff relied was a mere fiction; it was an inference or conclusion of law, raised by the law from the "debt or legal liability",[10] alleged as its consideration. This being true, it followed that whatever operated to disprove a subsisting debt or legal liability, at the time of the commencement of the action, would go to disprove the promise alleged. And as the existence of the debt could be challenged by showing that it had been paid, its legal effect was to deny the promise, and hence it supported the plea of non assumpsit.[11] Speaking of this, Mr. Justice Selden said:[12]

> "But, notwithstanding the distinction adverted to * * * the admission of the evidence, even in actions of indebitatus assumpsit, was a plain departure from the issue upon non assumpsit, which was, in terms, that the defendant had not promised; a departure, however, supposed to be justified as a sacrifice of form to substance."

At this point, as indicated by one of the text-writers,[13] it is well to note that:

> "In the action of indebitatus assumpsit, the plea of non assumpsit, tho expressed in the past tense, does not mean that the defendant did not actually promise, as stated in the declaration (for the promise is not founded on a promise in fact); but that he is, at the time of pleading, not indebted to the plaintiff, or not in law liable to the demand, made in the declaration."

While the result achieved under the plea of non assumpsit in indebitatus assumpsit, where the promise was implied in law, might perhaps have been justified in legal theory, the same result in an action of assumpsit on express promises, could not have been justified, tho, as a matter of history, the end achieved was the same. Hence, special matters of defense, such as payment, were, on principle, inadmissible in the latter action. Such undoubtedly was the early common law rule.[14]

But the courts soon lost sight of the fact that the reasons for admitting payment and other affirmative defenses to be used under the

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[9] *Ibid.*, at p. 300.
[10] This has been called assumpsit in law; see the opinion in McKyring v. Bull, *supra*, n. 7.
[11] Will's Gould on Pl (6th ed.) div. iv, ch. v, p. 501.
[12] *Supra*, n. 7, at p. 300.
[13] *Supra*, n. 11.
[14] McKyring v. Bull, *supra*, n. 7; also n. 11.

general issues in debt and indebitatus assumpsit were inapplicable to the action of assumpsit upon an express promise, thru a failure to keep in mind the fundamental distinction between the two forms of action, and hence it is not surprising to find that the loose practices that prevailed in those forms of action, should be carried over into special assumpsit. Referring to this, Mr. Justice Selden said:[15]

> "By disregarding it [the distinction between the two forms of action], a manifest incongruity in pleading was produced. Tested by the language of the record, there was no difference in the issue formed by the plea of non assumpsit, whether the promise was express or implied. The courts, therefore, lost sight, after a time, of the distinction upon which special defenses were originally admitted in actions of indebitatus assumpsit alone, and, looking only at the record, took another stride, and admitted evidence of payment, release, arbitrament, &c., under non assumpsit, without regard to the nature of the promise."

As a result of this remarkable transition, prior to 1834, in the action of debt, indebitatus assumpsit, and special assumpsit, in fact, in all actions of trespass on the case, whether arising *ex contractu* or *ex delicto* under the general issue, any matter which would dispute the truth of the declaration or avoid the liability, could be shown.[16] This proved very unsatisfactory. The plaintiff could not tell whether the defendant was disputing a point of fact or denying liability, altho the main object of the pleadings was to bring the parties to a single, clear-cut, well-defined issue. As a result, there were constant surprises during the trial, the parties were put to greater preparation and additional expense, and new trials became more frequent. This confusion created a persistent demand for some change, but the courts had gone so far that they found it impossible to retrace their steps.[17]

To remedy the evils of this situation, it finally took an act of Parliament, which, by the act of 3rd and 4th William IV, ch. 42, sec. 1, conferred on the judges in Hilary Term, the authority to

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[15]McKyring v. Bull, *supra*, n. 7, at p. 301; see in that case the opinion of Mr. Justice Selden, where, in referring to this point, he said (p. 300): "That this was the reasoning originally resorted to is plain from some of the older cases on the subject. In Beckford v. Clarke, 1 Sid. 236, which was an action of assumpsit brought upon a special promise to secure goods from perils, those of the sea excepted, the court of King's Bench held that in assumpsit in fact, upon non-assumpsit pleaded, a release could not be given in evidence as a defense, but on assumpsit in law it might. So in the case of Fits v. Freestone, 1 Mod. (Eng.) 210, it was held: 'That in an action grounded upon a promise in law, payment before the action brought is allowed to be given in evidence upon non-assumpsit; but when the action is grounded upon a special promise, then payment or any other legal discharge must be pleaded.' "

[16]Will's Gould on Pl, *supra*, n. 13.

[17]McKyring v. Bull, *supra*, n. 7, p. 301.

formulate a new set of rules. The rules adopted in pursuance of that authority are now familiarly known as the Hilary Rules, and they provided, among other things, that in actions of assumpsit the plea of non assumpsit should operate where the promise was express, as a denial of the promise, and where it was implied, of the matters of fact upon which the promise was founded.

In regard to this, a great judge said:[18]

> "The object of this rule was to restore pleading in assumpsit to its original logical simplicity. It was obviously intended as a mere correction of previous judicial errors. It interprets the plea of non assumpsit strictly according to its terms, and thus plainly indicates that the courts had erred in departing from these terms. That this was the view of the judges, is shown by the different course taken in regard to the plea of *nil debet*. As this plea, construed according to its terms, included every possible defense within the issue which it formed, the judges did not attempt to change the import of those terms, but abrogated the plea. Rule two, under the head of "Covenant and Debt," provides that "The plea of *nil debet* shall not be allowed in any action;" and rule three substitutes the plea of *nunquam indebitatus* in its place. Thus the whole practice, which had continued for centuries, of receiving evidence of payment, and other special defenses under the plea of nil debet and non assumpsit, was swept away."

III. Theories as to How the Anomaly Developed

So much for the history of the anomaly. It consisted of three distinct periods: (1) The period in which the strict theory of pleading prevailed, or in which nothing could be shown under the general issue except that which went to dispute the truth of the declaration; (2) the period during which, under the general issue, not only matter tending to dispute the truth of the declaration, but also matter denying liability, could be shown; (3) and finally, the period during which, under the influence of the Hilary Rules, the old and strict theory of pleading, under which matter disputing the truth of the facts stated in the declaration, was all that could be shown under the general issue, was restored. But all this fails to explain the real anomaly of payment as an affirmative defense, how in debt on a simple contract, instead of the plaintiff having to prove nonpayment, the defendant had to prove payment, or the reason the defense of payment developed as it did. This is left in the dark. By way of explanation of how the anomaly developed, three theories have been advanced:

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[18] *Ibid.*, at p. 302.

THEORY NUMBER ONE

The first theory is based upon the nature of an action upon a common law bond. In such a bond the defendant acknowledged himself to owe and stand indebted to the plaintiff in a specified penal sum, the same to become void on the payment of a less amount at a future day. The plaintiff, in suing to recover the penalty, alleged a promise on the part of the defendant and a failure to pay. Suppose the defendant pleads that he has paid the same. His defense is not a defense of payment in the true sense; it merely goes to show that the bond is void, or offers an excuse for nonpayment. But this particular plea of payment, made to show the bond is void or to show no liability, was sometimes pleaded specially. It is submitted that the courts may have confused the plea of payment in a suit on a bond with the true plea of payment, and thus held that the true plea of payment had to be specially pleaded.[19]

THEORY NUMBER TWO

The second theory is based upon the supposition that perhaps the plea of payment may originally have been a specific traverse. Thus, suppose that the plaintiff sued the defendant for goods sold and delivered, at the defendant's request, and alleged nonpayment. Then, suppose that the defendant specifically traversed stating that he did pay. The defendant's plea is negative in effect, but affirmative in form. As a result of using a specific traverse, which was affirmative in form, the idea may have developed that the plea of payment was an affirmative plea.[20]

THEORY NUMBER THREE

The third theory is based on the question of how much of the burden of proof, as a matter of sound policy, ought to be placed on the plaintiff in order for him to establish his case. It has been suggested in this regard that the courts, not favoring the idea of forcing the plaintiff to prove a negative—nonpayment—a thing the law abhors, thought it good policy to place the burden of proving payment on the defendant, thus eliminating the necessity of the plaintiff having to prove nonpayment, even tho it was alleged.[21]

IV. Different Situations on Payment as an Affirmative Defense as Evolved from the Cases Through Variations From the General Rule

While the general rule, according to the weight of authority, is

[19]Class-room Lectures on Code Pleading by Professor Edward Hinton, U. of C., 1921–22.

[20]Hinton's Cases on Code Pleading (2d ed.), n. p. 525.

[21]*Supra*, n. 19.

clear, there have been a number of departures from it in the nature of contradictions, exceptions and variations. Altho no attempt is here made to give a complete list of these, it is believed that the most important ones will be found below:

THE GENERAL RULE

Neither payment nor any other defense which confesses and avoids the cause of action can in any case be given in evidence as a defense containing simply a general denial of the allegations of the complaint.[22]

CONTRADICTIONS, EXCEPTIONS AND VARIATIONS

1.

Payment may be shown under a general denial and need not be pleaded specially.[23]

2.

Payment may be shown under a general denial in a suit on an existing balance.[24]

3.

Payment may be shown under a general denial in a suit where the indebtedness is merely stated in general terms.[25]

4.

Payment may be shown under a general denial where the fact of nonpayment is alleged in the complaint as a necessary and material fact to constitute a cause of action.[26]

5.

Payment may be shown under a general denial where the goods have been paid for on delivery.[27]

6.

Payment may be shown under a general denial when no indebted-

[22]See the cases collected in 30 Cyc. 1253, n. 15; 1262, n. 5.

[23]For a collection of cases *contra* to the general rule, see 30 Cyc. 1262, n. 5.

[24]Fram v. Allen, 1 Mart. (La.) 567 (1814); Marley v. Smith, 4 Kan. 183 (1867); Quinn v. Lloyd, 41 N. Y. 349 (1869); Stevens v. Thompson, 5 Kan. 305 (1870); Parker v. Hays, 7 Kan. 412 (1871); White v. Smith, 46 N.Y. 418 (1871); McElwee v. Hutchinson, 10 S. C. 436 (1878); Knapp v. Roche, 94 N. Y. 329 (1884); Brown v. Forbes, 6 Dak. 273 (1889); Schwarzler v. McClenahan, 56 N. Y. S. 611 (1899); Robertson v. Robertson, 37 Ore. 339 (1900); Conkling v. Weatherwax, 181 N. Y. 258 (1905); Jones v. El-Reno Mill & Elevator Co., 26 Okla. 796 (1910); Parker v. Mayes, 85 S. C. 419 (1910); Acharan v. Samuel Bros., 128 N. Y. S. 943 (1911); Kimball State Bank v. Harker, 35 S. D. 276 (1915); Shuman v. Shuman, 79 W. Va. 445 (1917); *contra*, Bassett v. Lederer, 1 Hun (N.Y.) 274 (1874); see also 61 Am. Dec. 59, note; 2 Ann. Cases 740; Ann. Cases, 12 B, p. 487; Beaty v. Swarthout, 32 Barb. (N.Y.) 293 (1860); Howell v. Biddlecom, 62 Barb. (N.Y.) 131 (1862); 39 Cent. Dig., sec. 158; Dec. Dig. 63 (3).

[25]See the cases collected in 30 Cyc. 1263, n. 10.

[26]30 Cyc. 1262, n. 8.

[27]McDonald v. Faulkner, 2 Ark. 472 (1839); Hendrickson v. Hutchinson, 29 N. J. L. 180 (1861); Bussey v. Barnett, 9 M. & W. (Eng.) 312 (1842).

ness existed on account of money received and applied by the defendant.[28]

7.

Payment, in a suit against an administrator, may be shown by the administrator without pleading it specially.[29]

8.

Payment may be shown under a general denial if the defendant files with the plea a descriptive account of the payments alleged to have been made.[30]

9.

Payment may be shown under a general denial in an action on a contract by a vendor against a vendee.[31]

10.

Payment may be shown under a general denial in an action of conversion in order to show no conversion.[32]

11.

Payment may be shown under a general denial where it was made before the assignment of the contract.[33]

12.

Payment may be shown under a general denial, even in a state where the general rule is recognized, where no objection is made to the introduction of evidence concerning payment, the court treating it as a case where the pleading was proper.[34]

13.

An allegation of nonpayment is essential to a complaint, but is not placed in issue by a general denial.[35]

14.

An allegation of nonpayment is not essential to a complaint, and hence is not in issue under a general denial.[36]

15.

Payment constitutes new matter which necessitates a reply.[37]

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[28]Marvin v. Mandell, 125 Mass. 562 (1878).
[29]Gray v. Thomas, 12 S. & M. (Miss.) 111 (1849); but that the general rule in Mississippi is *contra*, see Sivley v. Williamson, *supra*, n. 4.
[30]Richmond City Ry. Co. v. Johnson, 90 Va. 775 (1894).
[31]Patterson v. J. Walter Gage Realty Co., 150 N. Y. S. 215 (1914).
[32]Albers v. Commercial Bank, 85 Mo. 173 (1884).
[33]Penwell v. Flickinger, 46 Mont. 526 (1913).
[34]Mulhall v. Mulhall, 30 Okla. 252 (1895).
[35]Lent v. N. Y. &. M. R. Co., 130 N. Y. 504 (1892).
[36]Rossiter v. Schultz, 62 Wis. 655 (1885).
[37]Hubler v. Pullen, 9 Ind. 273 (1857); Benicia Agricultural Works v. Creighton, 21 Ore. 495 (1892).

16.

Payment is not new matter which necessitates a reply.[38]

But the general rule and its contradictions, exceptions, and variations can be re-classified under the following main situations:

SITUATION NUMBER ONE

May payment be shown under a general denial?

1. Payment may be shown under a general denial and need not be pleaded specially.
2. Payment may be shown under a general denial in a suit on an existing balance.
3. Payment may be shown under a general denial in a suit where the indebtedness is merely stated in general terms.
4. Payment may be show nunder a general denial where the fact of nonpayment is alleged in the complaint as a necessary and material fact to constitute a cause of action.

Miscellaneous Cases in Which Payment May be Shown Under A General Denial

5. Payment may be shown under a general denial where the goods have been paid for on delivery.
6. Payment may be shown under a general denial where no indebtedness existed on account of money received and applied by the defendant.
7. Payment, in a suit against an administrator, may be shown by the administrator without plcading it specially; this is by statute.
8. Payment may be shown under a general denial if the defendant files with the plca a descriptive account of the payments alleged to have been made.
9. Payment may be shown under a general denial in an action on a contract by a vendor against a vendee.
10. Payment may be shown under a general denial to show no conversion.
11. Payment may be shown under a general denial where it was made before the assignment of the contract.
12. Payment may be shown under a general denial, even in a State which recognizes the general rule, where no objection is made to the introduction of evidence, the court treating it as a case where the pleading was proper.

[38]Frish v. Caler, 21 Cal. 71 (1862); Van Giesen v. Van Giesen, 10 N. Y. 316 (1852); State *ex rel.* Spaulding v. Peterson, 142 Mo. 526 (1897).

SITUATION NUMBER TWO

Is an allegation of nonpayment essential to a complaint?

1. An allegation of nonpayment is essential to a complaint, but is not placed in issue by a general denial.
2. An allegation of nonpayment is not essential to a complaint, and hence is not placed in issue by a general denial.

SITUATION NUMBER THREE

Is payment new matter which necessitates a reply?

1. Payment constitutes new matter which necessitates a reply.
2. Payment does not constitute new matter which necessitates a reply.

V. General Discussion of Each Particular Situation

SITUATION NUMBER ONE

Payment May or May Not Be Shown under a General Denial

The early common law recognized a distinction between the issues in debt and assumpsit, holding that in an action of debt any evidence was admissible which controverted the claim of an existing indebtedness, while in assumpsit only such testimony as went to show no liability had ever been assumed, which of course excluded proof of payment.[39] While payment might be proved without a special plea in an action of debt, a plea of payment was not thought objectionable as amounting to the general issue because it confessed the debt and avoided it by subsequent matter.[40] But this early distinction was early changed, so that evidence disputing the facts stated or seeking to avoid a liability, could be shown under the general issue in either debt or assumpsit.[41] And this is still the rule in some states.[42] In England, the practice was abolished by the Hilary Rules, and in this country most states have adopted statutory provisions designed to regulate the matter. As a result of this development at common law and the influence of these statutes, it has been repeatedly stated, *and without qualifications*, that the general rule is that payment is an affirmative defense which cannot be relied upon unless specially pleaded, and which cannot be shown under a general denial.[43] The leading case in support of this view is that of *McKyring v. Bull*,[44] in which Mr. Justice Selden gave such an able exposition of the sub-

[39] 16 Enc. Pl. & Pr. 170; 30 Cyc. 1269.
[40] See Hinton's Cases on Code Pleading (2d ed.), footnote, p. 521, and cases therein cited.
[41] See History of Anomaly, div. II, *post*, p. 271 *et seq.*
[42] Frish v. Caler, *supra*, n. 38.
[43] 16 Enc. Pl. & Pr. 167; 21 Standard Enc. of Procedure 244; 30 Cyc. 1253.
[44] *Supra*, n. 7.

ject that subsequent judges and writers have hardly dared to question his conclusions. Diametrically opposed to this view is a minority group of cases which have held, and also *without apparent qualification*, that payment is not an affirmative defense which must be pleaded specially in order to be relied upon, but that it may be shown under the general denial. The leading case in support of this position is that of *Wetmore v. San Francisco*,[45] in which Judge Crockett took the view that the situation was practically the same as at common law just prior to the inception of the Hilary Rules. In view of these antagonistic positions, plus the fact that there exist a great many exceptions to and variations from the general rule, it seems that little is to be gained or understood by mere statement of the general rule, without some qualification. Indeed, it is extremely doubtful whether the rule, as usually stated, can, in any true or accurate sense, be said to be the general rule. For as one writer stated:[46]

> "It can not be maintained, upon principle, that payment is always a defense of new matter, or, perhaps, that it may not, sometimes, be proved under a denial."

It may more accurately be said, as has been said,[47] that:

> "As * * * payment may or may not be new matter according to the circumstances of the case, it follows that no such general propositions as are constantly met with in the cases, can with propriety and a reasonable understanding of the principles involved, be made."

On a basis of strict analysis, what ought the rule to be? Suppose the plaintiff sues the defendant on a promissory note, alleging that the defendant made the note, transferred it to the plaintiff, and that it has not been paid. Plea, general denial. What is in issue? The general denial is said to put in issue all the material allegations of the complaint, or everything which the plaintiff must prove in order to establish his cause of action.[48] Certainly the breach of the contract—nonpayment—is material, and hence logically it should be in issue under the general denial.[49] This view has been taken in California.[50] But in answer to this contention, after admitting the necessity of the allegation of the breach, Brown, J., in *Lent v. N. Y. Ry. Co.*,[51] says:

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[45]44 Cal. 294 (1872).
[46]*Supra*, n. 2.
[47]See article on Payment by A. R. Watson, 16 Enc. Pl. & Pr. 164, 178.
[48]Griffin v. L. I. Ry. Co., 101 N. Y. 348 (1886).
[49]Van Giesen v. Van Giesen, 10 N. Y. 316 (1852); Krower v. Reynolds, 99 N. Y. 245 (1885); 1 Chitty Pl. & Pr. pp. 325-359.
[50]*Supra*, n. 23.
[51]*Supra*, n. 35, at p. 512.

> "That breach is always a fact, and it is of the very essence of the cause of action. The complaint must show facts, which if verified and not denied, prove to the clerk that the plaintiff is entitled to the judgment which he demands. It cannot be said that where the breach consists of nonpayment of an agreed sum, it is not an issuable fact, because payment cannot be shown under the general denial. The most that can be said is that that form of denial does not put that fact in issue, and to that extent, the rule that payment must be pleaded must be deemed to modify the rule of pleading under the Code in reference to a general denial."

But, after recognizing the inconsistency of this situation, the same judge still further remarks:

> "No reason is apparent how it can justify the omission from the complaint of a fact material to the plaintiff's cause of action, and essential to be proved to entitle the plaintiff to a judgment."

This amounts to saying that altho the breach must be alleged, there is an exception to the general rule that the general denial places all the material allegations of the complaint in issue. One is moved to ask: If there is no apparent reason for omitting the breach from the complaint, is there any apparent reason for creating an exception to the rule that the general denial puts in issue all the material allegations of the complaint? Clearly not. The creation of such an exception has been made necessary in order to support the arbitrary rule that payment is an affirmative defense, for if the courts favoring this view once admitted that the general denial put nonpayment in issue, they would be forced to admit proof of payment under the general denial as a matter of sound logic. They evade the conclusion by the simple expedient of saying that in this particular case the scope of the general denial has been narrowed by the rule that payment is an affirmative defense, and hence does not deny the allegation of nonpayment. One writer[52] very aptly expressed the situation in the following language:

> "The anomaly of this situation is that altho nonpayment is a material allegation and fact in the constitution of the plaintiff's right of action, the defendant is not permitted to deny it under the general denial and without special plea, though as has been seen the general denial puts in issue every material allegation of the complaint. Nor is the conflict of principles reconciled by the natural step from this position that unless the defendant interposes a special plea of payment, the plaintiff need not prove nonpayment at all, but may have judgment on the pleadings

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[52] *Supra*, n. 47, at p. 179.

by merely giving the contract in evidence and without any proof whatever of its breach."

This might prove disastrous and subversive to fundamental principles.[53]

The difficulty seems to lie in the fact that the courts have blindly attempted to follow the statutory provisions without any regard to the circumstances involved in each particular case, and on the theory that the situation in this country after the adoption of the codes was identical with the situation in England after the adoption of the Hilary Rules. This, no doubt, is due in a large measure to the influence of Mr. Justice Selden, who, in *McKyring v. Bull*,[54] after reviewing the history of the anomaly, declared:

> "There are several inferences to be drawn from this brief review, which have a direct bearing upon our new and unformed system of pleading in this state. The first is, *that no argument can be deduced from the former practice in this respect*, in favor of allowing payment, or any matter in confession and avoidance, to be given under a general denial, as this practice has been abandoned in England, not only as productive of serious inconvenience, but as a violation of all sound rules of interpretation."

With all deference to the learned judge, it would seem that this conclusion does not necessarily follow. The Hilary Rules were never adopted in this country. Hence, in the absence of statutory provisions, the natural course would have been for us to adopt the common law rule as it existed just prior to 1834. Then, too, these statutes which have been passed, have not dealt with the problem directly, but only by way of inference and implication,[55] thus leaving it as a matter of construction, whether under their influence, payment is always an affirmative defense. Since at common law payment came to be admissible in either debt or indebitatus assumpsit under the general issue, and since the question of whether payment is an affirmative defense under the statutes is a problem of construction, on which all authorities are not agreed, it is not so clear that no argument in favor of allowing payment to be given in evidence under

[53] "But if the plaintiff is not required to allege a breach of the contract, or state the amount due, as his verification would cover only the facts alleged, the clerk, under * * * the Code, would be authorized to enter judgment for the whole amount called for by the contract, and this without proof of the amount due thereon. This would be contrary to the whole spirit of the Code, and would require the clerk to presume a fact neither alleged or proved, viz., that no payments had been made. These views show how essential it is that the plaintiff should allege the breach of the contract of which he complains." Justice Brown, in Lent v. Ry. Co., *supra*, n. 35, at p. 512.

[54] *Supra*, n. 7, at p. 302.

[55] These statutes provide, in general, that new matter must be pleaded affirmatively, but they make no attempt to define what constitutes new matter; this leaves the matter one for construction on the part of the courts.

a general denial can be deduced from the former practice in England.

In substance, these statutes provide that the answer, among other things, must contain: "A statement of any new matter constituting a defense or counterclaim, in ordinary and concise language."[56] Such a statute, it will be noted, in no way defines what constitutes new matter, but leaves it as a matter for the uncertainty of construction and logic. Accordingly, we find the courts have divided on the question of what constitutes new matter, particularly in regard to the subject of payment. Thus, for example, in Indiana, under the influence of a local statute,[57] in an action on a bill of exchange, in which the plaintiff alleged nonpayment, evidence of payment was inadmissible under the general denial,[58] whereas in California, on the same fact basis, it was held admissible. One jurisdiction holds the plea of payment is new matter, regarding itself as bound by the statute; the other, looking more at the logic of the situation, holds it is not new matter.

New matter is generally agreed to be something in addition to and not involved in the issue raised by the general denial.[59] But as to what comes within the scope of this definition, there is no agreement. The conflict seems to wage about the point of whether nonpayment is or is not an essential allegation in the plaintiff's complaint. If it is, then it ought to be in issue under the general denial; if not, then it is not in issue under the general denial and is new matter which must be specially pleaded.[60]

This raises the question: When is nonpayment material? It has been suggested by one writer[61] that the allegation of nonpayment would be material in any case where nonpayment meant nonpayment at maturity, but that a general allegation that an obligation had not been paid would not be material, because under such an allegation it might be that payment was made after maturity or breach, which, of course, would mean that a liability once existed, and hence, under the statutory rule, would have to be specially pleaded. Under this view, it is contended that payment before breach or maturity would not be new matter even under the general denial of the code states, altho payment after breach would be new matter which would have to be available as a defense.

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[56]N. Y. C. P., sec. 500.

[57]The Indiana statute provided: "All defenses, except the mere denial of the facts alleged by the plaintiff, shall be specially pleaded." 2 Ind. R. S., sec. 66, p. 42.

[58]Hubler v. Pullen, 9 Ind. 273 (1857); Frish v. Caler, 21 Cal. 71 (1862).

[59]16 Enc. Pl. & Pr. 176.

[60]For a further discussion of this problem, see *infra*.

[61]*Supra*, n. 47.

As to when nonpayment is essential or non-essential, probably the most that can be said is that it depends upon the circumstances of each particular case. But for the purpose of determining this question, one judge[62] has offered the following helpful classification of cases:

CLASS NUMBER ONE

"In an action upon a contract for the payment of money only, where the complaint does not allege a balance due over and above all payments, it is sufficient for the plaintiff to allege and prove a breach of the obligation by the nonpayment thereof when it matured, as the presumption of nonpayment continues until met by the allegation of and proof of payment."

CLASS NUMBER TWO

"When the complaint sets forth a balance in excess of all payments, owing to the structure of the pleading, it is necessary for the plaintiff to prove the allegation as made, and this leaves the amount of the payments open to the defendant under a general denial."

CLASS NUMBER THREE

"When the action is not upon contract for the payment of money, but is upon an obligation created by operation of law, or if for the enforcement of a lien where nonpayment of the amount secured is part of the cause of action, it is necessary to both allege and prove the fact of nonpayment."

In two out of the three classes of cases, it is clear, according to Justice Vann, that the allegation of nonpayment is put in issue by the general denial.

In the same case, Cullen, C. J., admits the logic of his colleague's conclusions and of his classification, but takes refuge in the simple statement that altho the conclusions are logical, they do not represent the law.[63] He also admits that a legal paradox exists which ought not to exist, and says that if we were rearing a new system of jurisprudence, it should be carefully avoided.[64]

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[62]Vann, J., in Conkling, v. Weatherwax, *supra*, n. 24, at p. 268.

[63]"However logical this decision may be it plainly conflicts with the settled law of this state that payment, when the plaintiff declares on a specific obligation, must be pleaded, for that was expressly held in the *McKyring* case, and Judge Brown in the *Lent* case concedes the binding authority of the earlier decision." *Ibid.*, at p. 273.

[64]"I imagine, however, that the paradox is not confined to either that state [W. Va.] or our own, but exists to a greater or less degree in most jurisdictions which follow the common law. A legal paradox is not to be commended and if we were about to develop a new system of jurisprudence, should be carefully avoided. It does not, however, necessarily create a confusion in the law if the courts will only stand by their decisions." *Ibid.*, p. 277.

From the foregoing, perhaps the following conclusions may be drawn:

1. That the usual statement of the general rule, *without qualification*, is neither correct nor helpful.

2. But if a general rule must be stated, probably the most that can be said is this: Granted a case wherein nonpayment is an essential element in the complaint, a general denial puts payment in issue, and hence payment is not new matter which must be pleaded specially; but granted a case wherein nonpayment is not an essential element in the complaint, a general denial does not put payment in issue, and hence payment is new matter which must be pleaded specially.[65]

3. It would seem that the doctrine, that a general denial does not put the fact of payment when due in issue, and hence that the plaintiff need not prove nonpayment, is, on a strict basis of logic, extremely doubtful, if not entirely untenable.[66] As to whether the doctrine may be otherwise justified will be considered later.[67]

PAYMENT IN AN ACTION FOR AN EXISTING BALANCE

While it is true, generally speaking, that payment cannot be shown in defense of an action under the traverse alone, but must be specifically alleged as matter of avoidance to be available, to this rule there seems to be some well-settled exceptions. One of these is in the case of an action for an existing balance.[68] The rule as to this exception has been clearly stated in Ruling Case Law as follows:[69]

> "Where an allegation, not stated as a conclusion of law, is so framed that an issue is presented by the traverse on the fact of the amount due, proof of payment is admissible without an affirmative plea in the nature of a further defense. Thus, where a person sues to recover a balance due, which he alleges not merely as a conclusion of law but as a fact, and which he must prove in order to sustain his action, it is well-settled that the defendant may show payment under a general denial, because the amount of the indebtedness, being the only fact alleged by which it is said to exist, it is traversable, and being traversed, it is proper to show payment under the issue thus formulated, to refute the fact of its existence."

Probably the earliest American case of an action for an existing balance was the Louisiana case of *Fram v, Allen*,[70] decided in 1814, which was an action brought upon an account current, in which the plaintiff claimed a balance, and the defendant pleaded the general

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[65] *Supra*, n. 2.
[66] *Supra*, n. 47.
[67] See the discussion on this point, *infra*, p. 295 *et seq.*
[68] See the cases collected and arranged in chronological order, *supra*, n. 24.
[69] 21 R. C. L., sec. 127.
[70] *Supra*, n. 24.

issue. At the trial, the defendant offered to prove that the plaintiff had omitted certain credits in his favor, but the evidence was rejected on the ground that he had not pleaded payment specially. The plaintiff won below, but on appeal the court held that the evidence of payment should have been received. The court said:[71]

> "The subject of the inquiry here is not, whether the plea of compensation can be considered as included in the general issue; for it is a positive rule of our judicial proceedings that compensation must be pleaded specially. (Recop. de Cast. book 4, tit. 5, law 1.) The question is, whether this is a case in which compensation ought to have been pleaded at all."

The court then argued that payment took place only where mutual debts were liquidated, and since the plaintiff, instead of suing the defendant for the full price of the total amount of the goods furnished, undertook to oppose the defendant's claims to his by filing for the balance, and thus sought to compare the claims and arrive at a balance, it was clear that the amount due was not liquidated, but that the suit itself was to obtain liquidation. The court finally remarked:

> "In such a case, both accounts are put at issue, and evidence tending to support or contradict the correctness of either ought to be admitted."

This decision seemed for a time to have settled the law in Louisiana, but in the year 1834, in the case of *Gleises v. Faurie*,[72] in the same type of case the Louisiana court took the view that "Payment is a peremptory exception."[73] going to extinguish the action, and which may be pleaded at any stage of the case. It attempted to distinguish the case from that of *Fram v. Allen*,[74] but only by the statement that since the decision in that case, the Code had come into existence. So, in Louisiana while apparently the law is settled, it is *so* somewhat arbitrarily.

The next important case was that of *Marley v. Smith*,[75] which arose in Kansas, and in which the plaintiff alleged that the defendant was indebted to him on an account, and that the same was due and unpaid. The defendant filed a general denial, and at the trial offered to prove: (1) a set-off; (2) a counterclaim; and (3) payment. All three offers were rejected. On appeal the decision was reversed, the upper court holding that the lower court erred in refusing the evi-

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[71]At p. 567.
[72]6. La. Ann. 455 (1854).
[73]Expression taken from the Spanish law; see the explanation given in Gleises v. Faurie, *supra*, n. 72; see also Reimer's v. St. Ceran, 19 La. Ann. 207 (1867).
[74]*Supra*, n. 24.
[75]*Supra*, n. 24.

dence of payment, but that it was correct in excluding proof of the set-off and counterclaim. Speaking in support of its conclusions, the court, thru Kingman, J., declared:[75a]

> "And if the question were free from embarrassment, growing out of decisions and commentaries, it would seem equally obvious that payment could be proved under the issue as made up. The petition avers that at a certain time the defendant was indebted to the plaintiff, and that the indebtedness still continues. This is denied, and to sustain the denial, proof of payment is offered. Can any fact be plainer than, if payment was made, the indebtedness does not last? Can a man owe a debt he has paid? Can he be indebted when he has extinguished the indebtedness by payment? There can be but one answer to these questions, and this answer shows logically, and without any straining upon such a petition and answer, the proof of payment could legitimately be made."

The court then points out that the same question had been decided both ways in New York,[76] to be finally set at rest by the case of *McKyring v. Bull.*[77] But, says the court[77a]:

> "* * * the reasoning of the learned judge who delivered the opinion of the majority of the court, would sustain the admissibility of the evidence under such pleadings as are before us."

Between the first Kansas case,[78] decided in 1867, and the second,[79] decided in 1871, and to the same effect as the first, came the New York decision of *Quinn v. Lloyd*[80] in 1869. The substance of that case has been well-stated in the Encyclopedia of Pleading & Practice:[81]

> "This was an action to recover for work and labor. The complaint stated the contract, the performance of the services, the stipulated price, and that on a certain day named the defendant was indebted to the plaintiff in the sum of $333.00, *being the balance remaining due after sundry payments made by the defendant to the plaintiff.* The answer was a general denial under which the court held, that the plaintiff could offer proof of payments. In this case Lott J., said: 'The denial * * * involved an issue upon facts above stated and denied, not only of the agreement and of the time which the plaintiff worked, but necessarily of the different payments made, so as to determine what, in fact, was the balance of the defendant's debt. That balance could not be ascertained without an inquiry as to the amount of the payments as well as the value of the work performed.'

[75a] At p. 186.
[76] Quinn v. Lloyd, *supra*, n. 24, reversing Quinn v. Lloyd, 1 Sweeney (N.Y.) 253.
[77] *Supra*, n. 7.
[77a] At p. 186.
[78] *Supra*, n. 24.
[79] *Ibid.*
[80] *Ibid.*
[81] Vol. 16, ch. 18, sec. 365, n. 24.

> In the same case, Woodruff, J., says: 'It was not necessary for the plaintiff to sue for the balance as such. He might allege the contract, the performance on his part and claim payment; and then, if the defendant desired to prove payments he must allege payment in his answer. But were the plaintiff sues for a balance, he voluntarily invites examination into the amount of the indebtedness and the extent of the reduction thereof by payments.' "

In the course of its decision, the court felt the necessity of either admitting that the case of *McKyring v. Bull*[82] was *contra*, as has been held by at least one text-writer,[83] or attempting to distinguish it. Kingman, C. J., in the case of *Marley v. Smith*,[84] apparently accepted the view that the case of *McKyring v. Bull*[85] is directly *contra* to the line of cases holding that in an action for an existing balance the defendant may show payment under a general denial. In this, he is not without some authoritative support.[86] Lott, J., in *Quinn v. Lloyd*,[87] meets the difficulty by attempting to distinguish the cases on their facts. He says:

> "The case of McKyring v. Bull, relied on by the respondent, cannot be considered an authority to sustain the referee's decision and the judgment of the court below. In that case, the complaint alleged that the plaintiff entered into the employment of the defendant on a particular day, and continued there in doing work and labor for him to a specified and fixed date, and then averred that such work and services were worth the sum of $650.00, and then it concluded as follows: '*That there is now due to this plaintiff, over and above all payments and set-offs on account of said work, the sum of $134.00, which said defendant refuses to pay.*' It will be seen by this statement, that the term of service and its value were both alleged, from which it appeared that a much larger sum had become payable to the plaintiff than he claimed. The learned judge who gave the prevailing opinion in the case says, in reference to the allegation, that there was due to the plaintiff at the commencement of the suit, over and above all expenses, &c., the sum there named, is a mere legal conclusion from the facts previously stated. Its nature is not changed by the addition of the words, 'over and above all payments.' No new fact is thereby alleged. The plaintiff voluntarily limits his demand to a sum less than that to which, under the facts averred, he would be entitled. 'In the case under review, as I have before stated, no facts are alleged from which it can be known what the work, at the stipulated price agreed to

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[82] *Supra*, n. 7.
[83] *Supra*, n. 2.
[84] *Supra*, n. 24.
[85] *Supra*, n. 7.
[86] *Supra*, n. 2.
[87] *Supra*, n. 24, at p. 352.

be paid, was worth, and consequently there is nothing to show that the claim made was less than upon the facts stated he was entitled to."[88]

The distinction here attempted to be drawn has been widely accepted and acted upon, and perhaps correctly so, but on close inspection, it is not entirely clear that it can be demonstrated to be logically sound. To say the least, it seems rather blind, unless indeed, there is some reason of policy behind the position taken in *McKyring v. Bull.*[89] If Woodruff, J., speaking in *Quinn v. Lloyd,*[90] is right when he says it was not necessary for the plaintiff to sue for a balance as such, but that if he did, he must submit to an examination into the amount of the indebtedness and the extent of the reduction thereof by payment, or else sue for the entire amount due and not the balance, which would force the defendant to plead any payments specially, then Selden, J.,[91] must be wrong when he, in referring to the defendant's contention that the general denial put in issue the allegation "that there was due to the plaintiff at the commencement of the suit, over and above all payments, etc., the sum of $134.00", stated:

"But this allegation is a mere legal conclusion from the facts previously stated. Its nature is not changed by the addition of the words 'over and above all payments'. No new fact is alleged thereby. The plaintiff voluntarily limits his demand to a sum less than that to which, under the facts averred, he would be entitled."

It seems that the learned judge, out of his high regard for the writer of the opinion in *McKyring v. Bull,*[92] was too bent on finding some rational basis of distinction, and did not have the courage of his convictions, as did Kingman, J., in *Marley v. Smith.*[93] But even Kingman, J., in the later case of *Parker v. Hays,*[94] seems to be reconciled to the distinction there made. Phillips on Code Pleading, however, cites *McKyring v. Bull* as *contra* to *Quinn v. Lloyd,* rather than as distinguishable.[95]

Reduced to its simplest form, what Lott, J., says, is this: In *McKyring v. Bull,*[96] the plaintiff stated facts from which it appeared a much larger sum had once been due to the plaintiff than he claimed at

[88] The italics are the writer's.
[89] *Supra,* n. 7.
[90] *Supra,* n. 24.
[91] *Supra,* n. 7, at p. 303.
[92] *Ibid.*
[93] *Supra,* n. 24.
[94] *Ibid.*
[95] *Supra,* n. 2.
[96] *Supra,* n. 7.

the time of the suit, and that the phrase "*over and above all payments*" was a mere legal conclusion drawn from the facts stated, serving to limit his claim to less that the total amount once due; whereas in *Quinn v. Lloyd*,[97] there were no facts stated by which it appeared that a larger sum than the plaintiff was claiming had at one time been due. In short, the only factual difference between the two cases was that in *McKrying v. Bull*[98] the total amount originally due was stated, whereas in *Quinn v. Lloyd*[99] the total amount originally due was not stated. While this is true, in *Quinn v. Lloyd*[100] a balance was claimed, from which it could be as clearly implied that a much larger sum had once been payable to the plaintiff than he had claimed, as if the original amount once due had been stated, as in *McKyring v. Bull*.[101] In both cases, the plaintiff was claiming a balance. The real problem seems to be whether the general denial is to be allowed to put a conclusion in issue as a fact. It is allowed to do so in *Quinn v. Lloyd*.[102] And there is no apparent reason why it should not also do so in *McKyring v. Bull*,[103] merely because facts from which the conclusion is drawn are stated in the complaint. In *McKyring v. Bull*,[104] it is said that the conclusion contained in the phrase "over and above all payments" served to limit the plaintiff's claim to less than was originally due. If this phrase served as an allegation of sufficient materiality to accomplish this end, then why is it not of sufficient importance to be put in issue as a fact? In any event, the pleader is claiming a balance, whether it appears from the facts stated what was originally due or not, and this slight factual difference is hardly enough to justify the difference in results in the two cases. The writer recognizes the force of Selden's, J., suggestion, when he said:[105]

> "A second inference is that, in regard to pleading, it is indispensable to adhere to strict logical precision in the interpretation of language.* * * But the most important inference to be deduced from the historical sketch just given consists in an admonition to adhere rigidly to that rule of pleading which permits a traverse of facts only, and not of legal conclusions."

But if this suggestion is to be followed, it is submitted that the

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[97] *Supra*, n. 24.
[98] *Supra*, n. 7.
[99] *Supra*, n. 24.
[100] *Ibid.*
[101] *Supra*, n. 7.
[102] *Supra*, n. 24.
[103] *Supra*, n. 7.
[104] *Ibid.*
[105] *Ibid.*, at p. 302.

pleader, in cases such as *Quinn v. Lloyd*,[106] should be required to state the facts so as to show what was originally due, and thus obviate the necessity of making such a technical distinction as was made by Lott, J., in *Quinn v. Lloyd*.[107]

The next case was that of *White v. Smith*,[108] which was an action brought upon an account for work, labor, and materials, plaintiff alleging the amount of the account to be $541.90 *and that there was a balance due, after deducting all payments, of $175.75*. The court held that the complaint admitted a payment of $366.15, and that the defendant was not precluded from insisting upon the admissions, by disputing the correctness of the items of the account. Here it actually appeared that the plaintiff voluntarily limited his claim to less than at one time had been payable, and yet the court does not insist that payment should have been pleaded affirmatively, as it clearly should have done in order to have followed the distinction which, Lott, J., laid down in *Quinn v. Lloyd*.[109] The question as to the right of the defendant to prove payment of a larger amount than admittedly had been paid, was not raised.

Acharan v. Samuels[110] was an action for a balance due upon a running account, the plaintiff admitting partial payment. It added a qualification to the general rule as to suits for existing balances, which is best expressed in the words of Obrien, J., when he says:[110a]

> "It would seem from a review of the cases that the second rule enunciated by Justice Vann in Conkling v. Weatherwax,[111] is to be limited to cases in which the plaintiff declares generally upon a balance due, so as to leave both sides of the account open upon the general issue, but that when there is as in the present case the allegation of a specific amount as originally due and an admission of partial payments thereon, a general denial puts in issue the original amount due, but does not permit proof of payments thereon beyond the amount admitted in the complaint. If it is claimed more has been paid than is so admitted, payment must be alleged and proved by the defendant."

From this survey of the cases, these three propositions seem clear:

1. That in an action for an existing balance, where the plaintiff declares generally on a balance due, the defense of payment may be shown under a general denial, and it is not new matter in confession and avoidance.

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[106] *Supra*, n. 24.
[107] *Ibid.*
[108] *Ibid.*
[109] *Ibid.*
[110] *Ibid.*
[110a] At p. 945.
[111] See the second rule stated, *infra* p. 276.

2. That in suing on an open account, it is always advisable for the plaintiff, to sue on the account as it was originally and omit any allegation as to the amount the defendant has paid, leaving the same to be pleaded as a defense by the defendant.

3. That where there is an allegation of a specific amount due and an admission of partial payments thereon, a general denial puts in issue the original amount due, but does not permit proof of payments thereon beyond the amount admitted.

PAYMENT IN A SUIT WHERE THE INDEBTEDNESS IS ALLEGED GENERALLY

Another exception to or variation from the general rule is found in the case where the plaintiff alleges the indebtedness generally, without stating the grounds thereof.[112] In that situation, it has been held that payment may be shown under a general denial and in the absence of a special plea. The leading case on this point is that of *Marley v. Smith.*[113] The theory of that case cannot be better stated than in the words of Kingman, J., when, in *Parker v. Hays,*[114] he said:

> "If the pleader chooses to state his case without setting forth whether his claim arose on contract or tort, or at least on the request of the defendant, or that the materials were of certain value, as charged, and a promise to pay therefor, but merely states an indebtedness, without stating how it arose, he invites an issue upon whether there is an indebtedness, and an examination into that issue by testimony; and this can be gone into by the defendant under a general denial."

In the case of *Stevens v. Thompson,*[115] the case of *Marley v. Smith*[116] was clearly distinguished from one wherein the facts which constitute the basis of the indebtedness are set out. Kingman, J., the same judge who delivered the opinion in *Marley v. Smith*[117], said:

> "The case [at bar] is wholly unlike that of Marley v. Smith, 4 Kansas 185. In that case the petition only alleged indebtedness generally, without stating the grounds of the indebtedness. In this case the facts constituting the plaintiff's claim are fully stated; these facts only are denied by the answer. In the case of Marley v. Smith, 4 Kansas 185, the plaintiff had chosen to risk his case upon a conclusion from facts. Any fact that would

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[112] "And in at least one jurisdiction evidence of payment is admissible under a general denial where the complaint merely alleges the indebtedness in general terms, but not where particulars of the claims are stated." 30 Cyc. 1262.

[113] *Supra,* n. 24.

[114] *Ibid.,* at p. 414.

[115] *Ibid.,* at p. 311.

[116] *Ibid.*

[117] *Ibid.*

show the conclusion untrue was legitimate and proper evidence under such a state of pleadings, but it was not intended to say, nor was it said, that the general denial would authorize proof of payment in any case in which the petition set out the facts on which the plaintiff's claim rested."

The theory in *Marley v. Smith*[118] is somewhat analogous to the theory under which, at early common law, in the action of debt, most any defense was admitted under the general issue.[119] Undoubtedly, as long as such statements of a cause of action are permitted, it is only fair to admit any defense under the general denial, but it seems that the general theory of pleading may be better preserved by requiring the cause to be more specifically stated, so that the general rule that payment is an affirmative defense may be consistently and justly followed. This would also have the added merit of eliminating an exception to or variation from the general rule.

WHERE THE FACT OF NONPAYMENT IS ALLEGED AS A NECESSARY AND MATERIAL FACT

In the case of *Knapp v. Roche*,[120] still another variation is stated in the following language:

"While it is generally true that a defense of payment is inadmissible under a general denial, this is not so when the fact of nonpayment is alleged in the complaint as a necessary and material fact to constitute a cause of action. It is always competent to prove under a general denial any facts tending to controvert the material affirmative allegations of a complaint."[121]

This rule has been recognized in other cases and by the text-writers.[122] *Knapp v. Roche*[123] involved an action against an officer of a bank for making loans of its funds in a manner not authorized by law, the plaintiff alleging nonpayment of the funds. The defendant pleaded the general denial, and at the trial wanted to prove payment. The court held that the general denial of the allegation of nonpayment of the money so loaned put the fact of payment in issue. The court remarked:

"The only damage occuring to such bank in consequence of the acts of the defendant as stated in the complaint was that

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[118] *Ibid.*

[119] For a detailed statement of this development, see the History of the Anomaly, div. II, *post*, p. 271, *et seq.*

[120] 94 N. Y. 329 (1884).

[121] The difficulty here is to determine when nonpayment is alleged as a necessary and material fact; a suggestion as to this may be found, *post* p. 283, *et seq.*

[122] See 30 Cyc. 1262; Phillips on Code Pleading, *supra*, n. 2; 16 Enc. Pl. & Pr. 176, n. 3.

[123] *Supra*, n. 120.

such loans remained due and unpaid at the commencement of the action."

The same rule seems to apply in actions on official bonds.[124] In the case of *Barker v. Wheeler*[125] the plaintiffs sued the defendants as sureties upon an official bond, alleging that one E was county judge during a certain term, that the defendant's X and Y were the sureties upon his official bond; that E, in his official capacity, received certain money belonging to the plaintiff and converted it to his use. The answer was a general denial. At the trial, the defendants offered evidence to show that E, while acting as county judge, paid the plaintiff's money to her duly constituted guardian. The evidence was rejected. On appeal the Nebraska Supreme Court held the evidence should have been received, as payment was not new matter, as it was offered, not to show a discharge of an obligation that once existed, but that no liability had ever accrued.[126]

This type of case again illustrates that altho payment is usually referred to and regarded as a plea in confession and avoidance, and hence as involving new matter, the defense of payment is not necessarily of this nature.

MISCELLANEOUS CASES IN WHICH PAYMENT MAY BE SHOWN UNDER A GENERAL DENIAL

Yet to be noted are a number of miscellaneous cases,[127] covering a

[124]State v. Peterson, 142 Mo. 526 (1897); Barker v. Wheeler, 62 Neb. 150 (1901).

[125]*Supra.*

[126]Sullivan, J., at p. 151, said: "But neither this court, nor any other so far as we know, has ever held in an action on an official bond or other bond of indemnity, that the plaintiff was, by a general denial, relieved of the necessity of proving the loss or injury out of which arose his right of action. The defendants did not by their bond become indebted to the plaintiff; they assumed no specific obligation to her which they were bound at all events to discharge by payment or otherwise; their promise, given to the county of Douglas, was to make good any loss that the county or individuals might sustain by reason of the official misconduct of Eller. This being so, it would be illogical—it would be inconsistent with reason and common sense—to hold that a general denial, like the plea of non-assumpsit, put in issue nothing but the execution of the bond. An offer to prove payment is not in every case an implied admission that the plaintiff once had an actionable demand against the defendant; its purpose may be, as in this case, to prove that a right of action never existed. Eller received the money in question rightfully; his possession of it as county judge was lawful, and there is no presumption that he was guilty of official misconduct. The allegation of conversion was, therefore, a material one, and it was not admitted by a general denial. Payment was not new matter, within the meaning of section 99 of the Code of Civil Procedure, for it was offered, not to show the discharge of an obligation that once existed, but to show that the bond had not been forfeited as alleged * * *."

[127]Bussey v. Barnett, 9 M. & W. (Eng.) 312 (1842) (payment on delivery in suit for goods sold and delivered); Marvin v. Mandell, *supra*, n. 28 (payment of advances previously made to plaintiff); Gray v. Thomas, *supra*, n. 29 (suit against an administrator; statutory); Richmond City Ry. Co. v. Johnson, *supra*, n. 30 (payment proved under a descriptive account filed with plea); Patterson v. Walter Gage Realty Co., *supra*, n. 31 (suit by a vendor against a vendee on a contract to purchase real estate); Albers v. Commercial Bank, *supra*, n. 32 (payment to

variety of human affairs and in which payment is admitted under a general denial. They are merely noticed as further illustrations of variations from the general rule, and also to support the statement, previously made, that the question as to whether payment is or is not an affirmative defense, cannot be settled by the arbitrary, unqualified statement of a general rule, but must, to a large degree, depend upon the special circumstances of each particular case.

SITUATION NUMBER TWO

Is an Allegation of Nonpayment Essential to a Complaint?

Is it logical to say that an allegation of nonpayment is essential to a complaint, and yet, under a general denial, does not operate to put payment in issue? Answering this question in the affirmative, is the leading case of *Lent v. N. Y. Ry. Co.*,[128] decided under a statute,[129] which was an action to recover the amount awarded to the plaintiff in certain condemnation proceedings. The complaint alleged the various proceedings resulting in the award, but did not allege nonpayment. The defendant demurred. In the argument of the demurrer, the plaintiff contended that since payment was an affirmative defense, which had to be pleaded to be available, nonpayment did not have to be alleged, as it was not a fact put in issue by the general denial.[130] The court admitted the force of the contention, and the inconsistency of requiring an allegation in the complaint which could not be put in issue by a general denial, but held, nevertheless, that the presence of this anomaly furnished no ground for further extending the rule, so as to hold the allegation of nonpayment not an essential element of the cause of action.[131] The court argued that such a course would result in even greater embarrassment than would come from requiring nonpayment to be alleged, altho the allegation need not be proved. In support of this, the court said:[132]

> "The complaint should show facts which, if verified and not denied, prove to the clerk that the plaintiff is entitled to the judgment which he demands."

Finally, the court concludes that nonpayment must be pleaded,

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show no conversion); Mulhall v. Mulhall, *supra*, n. 34 (where no objection to evidence of payment); Penwell v. Fleckinger, *supra*, n. 33 (payment before assignment).

[128] *Supra*, n. 35.

[129] Sec. 481, New York Code, provides: "The complaint must contain a plain and concise statement of the facts constituting the cause of action."

[130] This view had been adopted in Salisbury v. Stinson, 10 Hun (N. Y.) 242 (1877), which case was subsequently overruled by Tracy v. Tracy, 59 Hun (1891).

[131] In fact, the authority seems to point in the other direction; see *supra*, n. 48; see also the authorities in Lent v. Ry. Co., *supra*, n. 35.

[132] *Supra*, n. 35, at p. 512.

altho not placed in issue by the general denial, and hence the genera rule under the code that a general denial puts in issue all the material allegations of the complaint, is subject to an exception, created by the rule that payment must be pleaded affirmatively. It should be noted that this case arose on demurrer, and hence the statement of the court that nonpayment was not put in issue by the general denial might be regarded as obiter dicta. However, the statement probably represents the law as it is in New York and in a majority of the states.[133]

Directly opposed to this position, and answering the above question in the negative, is the case of *Rossiter v. Schultz*,[134] in which the plaintiff alleged that he had owned a certain scow, that on a certain date the defendants purchased said scow, together with a derrick, for $1,500.00, which the defendants agreed to pay. The plaintiff then demanded judgment, making no allegation of nonpayment. The defendant demurred, and contended that no cause of action had been stated, because the complaint contained no allegation of breach on the defendant's part. The court, contrary to the view taken in *Lent v. N. Y. Ry. Co.*,[135] regarded this as "A mere technical objection and not a substantial one." Says the court:

> "If he had alleged it in his complaint, he would not have been required to prove it, even tho the defendant had answered by alleging a payment of the price, nor upon a general denial. Why, then, under the statutory pleading, should the plaintiff be required to make an allegation in his complaint which it is unnecessary to prove at the trial?[136] We see no reason for such allegation."

The court finally held that nonpayment was not put in issue by a general denial, and hence did not constitute an essential element of the complaint. Both the New York and Wisconsin courts recognized the validity of the rule that a complaint must contain all the facts which upon a general denial the plaintiff must prove to be entitled to a judgment, but they differed as to what the plaintiff must prove, which here means they differed as to whether nonpayment was one of the facts the plaintiff must prove. That is, the New York court held that nonpayment was an essential allegation which had to be alleged, even tho, when met by a general denial, it did not have to be proved; whereas, the Wisconsin court held that since nonpayment was not a fact put in issue by a general denial, it did not have to be alleged at all.

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[133] *Ibid.*; see also *supra*, n. 7.
[134] *Supra*, n. 36.
[135] *Supra*, n. 35, at p. 658.
[136] *Supra*, n. 36; see this statement answered by Brown, J., in Lent v. N. Y. Ry. Co., *supra*, n. 53.

Which of these two views, as a matter of legal analysis, is correct? If we accept the view of the New York court that in every cause of action a breach must be alleged, that the breach is material, even tho not always placed in issue by a general denial, then we create an exception to the general rule that a general denial puts in issue all the material allegations of the complaint. On the other hand, if we accept the Wisconsin court's view, that since a general denial does not put nonpayment in issue, it need not be alleged, we create an exception to the rule that a breach must be stated in every action. As a matter of logic, the Wisconsin view seems the more tenable of the two, because in harmony with the rules of pleading that whatever facts are essential to be proved to entitle the plaintiff to recover must be alleged in the complaint, and that what the plaintiff alleges he must prove. The New York view, it will be noted, violates the second of these rules, requiring the allegation of nonpayment, but not requiring its proof at the trial. But despite the fact that the Wisconsin view is more in line with the rules of pleading, it seems the worse of the two evils, for as Brown, J.,[137] points out, to hold with the Wisconsin court would be to violate "The whole spirit of the Code". Then, too, the exception established by the Wisconsin rule would be much wider in its application and scope, as it would cover all actions, whereas the exception established by the New York rule would merely operate to narrow the scope of the general denial when applied to one particular situation, that is, a plea of payment.

In conclusion, perhaps it may be said:

1. That in an action on a contract for the payment of money, nonpayment, its breach, must be alleged.
2. A general denial of such a breach ought to operate to put payment in issue.
3. Altho the New York view that nonpayment must be alleged, even tho not in issue under a general denial, is illogical when contrasted to the Wisconsin view, it is sounder in policy, as it better protects the rights and interests of the litigant, it being impossible, under this view, for the clerk, on a complaint, unverified and to which there is no answer, to enter a judgment, unless the complaint contains an allegation of nonpayment or breach.

SITUATION NUMBER THREE

Is Payment New Matter which Necessitates a Reply?

The next issue is this: Does the plea of payment constitute new matter so as to necessitate a reply? Before attempting an answer to this question, it should be observed that "The Codes of the several

[137] *Ibid.*

states do not agree as to the necessity for a reply. In a few states, no reply is required or permitted; in some, none is required except to a counterclaim or set-off; and in some, a reply is required when the defense of new matter is to be met by matter in avoidance; while, in others, all new matter in the answer, whether by way of defense or by way of cross-demand, must be replied to, either by denial or by new matter in avoidance."[138] From this statement, the conclusion is obvious that the problem as to whether payment is new matter so as to necessitate a reply will, in large measure, depend upon the nature of the statute under which the question is decided.

But among the various views which prevail, there are at least two of special interest, which are apparently opposed in principle. The first view is that payment constitutes new matter which necessitates a reply, and is perhaps, well represented by the case of *Benecia Agriculture Works v. Creighton*,[139] decided under a statute which provided that "If the answer contains a statement of new matter, constituting a defense or counterclaim, and the plaintiff fail to reply or demur thereto, within the time prescribed by law, the defendant may move the court for such judgment as he is entitled to on the pleadings."[140] The plaintiff sued for goods sold and delivered. Defendant, in his answer, alleged an accounting, that $55.00 was found to be due, and that he paid the same. These allegations were not denied in the reply. A verdict was rendered for the plaintiff, whereupon the defendant moved for judgment notwithstanding the verdict, which motion was overruled. On appeal, the decision of the lower court was reversed, the upper court holding that since the plea of payment was not denied by the reply it must be taken as true. This amounted to saying that in Oregon payment was new matter which necessitated a reply in order to prevent it from standing admitted on the pleadings.

In *Hubler v. Pullen*[141] plaintiff sued the defendant on a bill of exchange. Among other defenses, the defendant set up payment, to which particular plea there was no reply. The court held that since there was no reply to the plea of payment, "There was in effect, a trial without an issue, which has often been adjudged erroneous." This case was decided under a statute which provided that "All defenses except the mere denial of the facts alleged by the plaintiff, should be specially pleaded."[142] Construing this statute, the court said:[143]

[138]Phillips on Code Pleading, sec. 267.
[139]*Supra*, n. 4.
[140]Hill's Code (Ore.), sec. 78.
[141]*Supra*, n. 37.
[142]See the provision of the statute, *supra*, n. 57.
[143]At p. 275.

> "This evidently means facts which the plaintiff, to sustain his action, is bound to prove. The complaint, it is true, ordinarily avers that the instrument sued on has not been paid; still, proof of that averment is not required, and therefore, it is not put in issue by a general denial."

It will be noticed that this result in Indiana was attained without the aid of a statutory provision to the effect that if new matter is not replied to it will stand admitted, as was the case in the Oregon decision.

The second and opposite view is that payment is not new matter as to necessitate a reply, and is illustrated by the case of *Van Giesen v. Van Giesen*,[144] decided under a similar statute[145] and on the same state of facts. The court held that "Under the Code of 1848, a complete issue was made by an averment in the complaint of nonpayment, and the allegation of payment in the answer; such allegation is not new matter, and no reply is necessary to prevent it standing admitted." Observe that altho New York and Indiana are alike in that both hold that nonpayment must be alleged, even if proof of the allegation is not required,[146] New York holds in this case that no reply is necessary because payment is not new matter, clearly implying that a reply would be necessary, if it regarded payment as new matter. The difference, therefore, is not one of principle, as it appears on the surface, but it is one as to whether the plea of payment in that particular situation is new matter, Indiana holding that it is, New York holding that it is not. To state the same thing in another form, in New York, a plea of payment to an action for a debt has been held to be a traverse, whereas, in Indiana, a special plea of payment is not treated as a traverse, but as an affirmative plea. If, as a matter of substantive law the courts of these two states agreed that the plea of payment was always an affirmative defense, both would require a reply to such a plea to prevent the same from standing admitted. It should be noted that the result in New York would be the product of an express statutory provision, whereas in Indiana it would be the product of judicial decision. It should also be observed that in Indiana the courts apparently regard payment as new matter, irrespective of the character of the plaintiff's allegations. This is an arbitrary rule, and it is submitted that the New York view, which leaves the court free to give some regard to the character and form of the allegations, is less apt to lead into difficulty.

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[144] *Supra*, n. 38.

[145] Sec. 131 of the New York Code of 1848 provided: "When the answer contains new matter constituting a defense or counter-claim, the plaintiff may reply to such new matter, denying particularly each allegation controverted by him."

[146] Hubler v. Pullen, *supra*, n. 37; Lerche v. Brasher, 104 N. Y. 157 (1887).

Another case holding that a special plea of payment is a traverse is the case of *Frish v. Caler*,[147] which was also a suit on a promissory note, decided under a similar statute. Indeed, the argument in favor of the view that payment is not new matter which necessitates a reply is most ably presented by Cope, J., when he says:[148]

> "*Whether matter is new or not, must be determined by the matter itself, and not by the form in which it is pleaded—the test being whether it operates as a traverse or by way of confession and avoidance.* A plea tendering no new issue, but controverting the original cause of action, is a mere traverse, and as nothing new is involved in it, to call it new matter would be a misapplication of terms. It is not essential to a traverse that it be expressed in negative words—the form of the plea depending upon the allegation it is intended to meet; a negative allegation requiring an affirmative plea, and vice versa. An averment that a debt has not been paid, followed by a plea of payment, makes an issue upon the point, and a replication would only amount to a reiteration of the negative already expressed."

On principle, the New York and California view, as represented by *Van Giesen v. Van Giesen*,[149] and *Frish v. Caler*,[150] seem preferable to the view expressed in the Oregon and Indiana cases, in that they seem to hold that "Matter, whether it is new or not, must be determined by the matter itself", thus leaving some leeway for the courts to give some attention to the substantive character of the various allegations, rather than to be bound by the mere form of the pleadings. In Indiana, at least, the courts seem to lay more emphasis upon the form than upon the substantive character of the various allegations, as they hold that a special plea of payment, which in *Van Giesen v. Van Giesen*[151] was held to be a specific traverse, is not a specific traverse, but an affirmative plea. That is, in Indiana, the statute is so construed as to make all pleas of payment affirmative pleas, whether the language of the pleadings would logically lead to another conclusion or not.

On the other hand, it is difficult to reconcile the result secured in *Van Giesen v. Van Giesen*[152] with that obtained in *McKyring v. Bull*.[153] Concerning the *Van Giesen* case, Selden, J., said:

> "That case simply decided that where the complaint contained an averment of nonpayment, a plea of payment formed a complete issue."

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[147] *Supra*, n. 38.
[148] At p. 75.
[149] *Supra*, n. 38.
[150] *Ibid.*
[151] *Ibid.*
[152] *Ibid.*
[153] *Supra*, n. 7.

Stated conservatively, lawyers and judges have not been entirely satisfied with the hurried distinction here drawn between the two cases, because if nonpayment could be put in issue by a specific traverse, as is expressly held in *Van Giesen v. Van Giesen*,[154] why, in *McKyring v. Bull*,[155] could it not be put in issue by a general traverse or denial?

In conclusion, probably the most that can be said is this: In states which regard the statutory provisions as absolutely binding, and which adhere strictly to the form of a plea, rather than to its content or substance, payment will be held to constitute new matter which necessitates a reply; but in states which are not so bound by their statutory provisions as to leave out of consideration the character and content of the allegations, payment will be considered not as new matter which necessitates a reply.

VI. Conclusion

From the foregoing, perhaps the following conclusions may be drawn:

1. That the usual statement of the general rule, *without qualification*, that payment is an affirmative defense which cannot be relied upon unless specially pleaded and which cannot be shown under the general denial, is neither strictly accurate nor helpful.

2. That in a strict and accurate sense, there is no general rule. But if one must be stated, probably the most that can be said is this: Granted a case wherein the allegation of nonpayment is an essential element in the complaint, a general denial puts payment in issue, and hence payment is not new matter to be specially pleaded; but granted a case wherein the allegation of nonpayment is not an essential element in the complaint, a general denial does not put payment in issue, and hence payment is new matter which must be specially pleaded.

3. That the problem of pleading would be simplified by a rule that nonpayment, the breach, should be alleged and proved in all contract actions for the payment of money; for to hold that a general denial does not put the allegation of nonpayment in issue is to create an exception to the rule that a general denial puts in issue all the material allegations of the complaint; whereas, to hold with the minority view, that nonpayment need not be alleged since it is not placed in issue by the general denial, is to create an exception to the rule that in every action a breach must be alleged—a much more

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[154] *Supra*, n. 38.
[155] *Supra*, n. 7.

dangerous exception than the one narrowing the scope of the general denial in a particular situation, as has been pointed out.

4. That "The proper way to plead payment, whether by way of confession and avoidance, or by way of traverse, is to assert it affirmatively. But under the rule that the denial of a negative averment is a defect in form, and not of substance, it might not be error, tho a practice not to be tolerated, to admit evidence of payment, under a denial of alleged nonpayment."[156]

5. That the difficulties encountered in suits for an existing balance, and in suits wherein the indebtedness is merely alleged in general terms, could be largely eliminated by a strict requirement that facts and not conclusions should be stated; that in any event, when suing on a balance on an open account, it is always advisable for the plaintiff, to sue on the account as it was originally and omit any allegation as to the amount the defendant has paid, thus leaving the same to be pleaded as a defense by the defendant.

6. That altho the conclusions stated may be logically correct, and that the so-called general rule that payment is an affirmative defense presents an anomaly, there seems to be an under current of feeling running thru the decisions, unexpressed, it is true, but evident from a constant striving on the part of the courts to make every case fit into the general rule, that probably the rule, as it stands, presents the best solution of a difficult problem. As pointed out, to require the plaintiff, not only to allege but also to prove the negative averment of nonpayment, is to require the proof of a negative, which is looked upon with little favor by the courts. On the other hand, if the defendant has paid, practically speaking, it places no great burden on him to plead and prove payment as a defense. So, despite the anomaly connected with the plea of payment as an affirmative defense, probably the rule should be retained as a matter of sound policy.

[156] *Supra*, n. 2.