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DEMURRER AND PROCEEDINGS IN LIEU OF DEMURRER: A
CONCEPTUAL DISCOURSE IN A CONTINUING CONTROVERSY

I. INTRODUCTION

The rate at which the concepts of demurrer and proceedings in lieu thereof are being applied in legal proceedings is not infinitesimal. The confusion and unsettled avenue being created in a given legal system in the applicability of proceedings in lieu of demurrer, coupled with the dynamism and the relative judicial activism in the way and manner law is being applied, has left one in doubt as to whether the issue of abolition of demurrer in our legal system is factual or merely fallacious. The crucial question is whether the difference between demurrer and proceedings in lieu of demurrer is not a mere difference without distinction.

This paper discusses the nature of demurrer, being an old concept, and juxtaposes it with the new regime of proceedings in lieu of demurrer with the aim of determining whether or not demurrer has truly been abolished, or put in another way, whether demurrer has truly been replaced by proceedings in lieu of demurrer.

II. NATURE AND MEANING OF DEMURRER

The concept of demurrer is of universal discourse. It is an archaic concept - a process whereby a party hypothetically admits as true certain facts alleged by the opposing party but asserts that despite the admission, the facts are not sufficient grounds for relief or redress. A ruling on a demurrer can result in the quick disposition of a case resting on the point of law challenged in the demurrer.¹

It is an old legal term which essentially posits that a party's case is deficient for a legal reason, not necessary a factual reason. It is a party's (usually the defendant) response to the opposing party's (usually the plaintiff or claimant) case wherein the defendant denied everything the claimant alleges and simultaneously apply to the court for dismissal of the suit on the legal basis that the complaint lacks legal sufficiency.² It is a response in a court proceeding in which the defendant does not dispute the truth of the allegation but claims it is not sufficient ground to justify legal action.

The word, 'demurrer', is from the Latin word *demorari* or the French *demorner*, meaning 'to wait' or 'stay'. It imports that the party demurring waits or stays in his proceedings in the action until the judgment of the court is given whether he is bound to answer to so insufficient a pleading.³ It originated from English Common Law procedure. Thus, demurrer is an old English common law procedure of challenging an opponent's pleading on point of law.⁴

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² Demurrer, *Encyclopedia Britannica*, <http://www.britannica.com/demurrer>, accessed 15 May 2019. See also: *Encyclopedia Britannica*, 2019.

³ Demurrer, *Encyclopedia Britannica*, <http://www.britannica.com/demurrer>, accessed 15 May 2019. See also: *Encyclopedia Britannica*, 2019.

⁴ *Black's Law Dictionary*, 9th edn, West Publishing Co. (St. Paul, 2004) at 467. See also: *Black's Law Dictionary*, 9th edn, West Publishing Co. (St. Paul, 2004) at 467.

⁵ *Black's Law Dictionary*, 9th edn, West Publishing Co. (St. Paul, 2004) at 467. See also: *Black's Law Dictionary*, 9th edn, West Publishing Co. (St. Paul, 2004) at 467.

⁶ *Black's Law Dictionary*, 9th edn, West Publishing Co. (St. Paul, 2004) at 467. See also: *Black's Law Dictionary*, 9th edn, West Publishing Co. (St. Paul, 2004) at 467.

⁷ *Black's Law Dictionary*, 9th edn, West Publishing Co. (St. Paul, 2004) at 467. See also: *Black's Law Dictionary*, 9th edn, West Publishing Co. (St. Paul, 2004) at 467.

⁸ *Black's Law Dictionary*, 9th edn, West Publishing Co. (St. Paul, 2004) at 467. See also: *Black's Law Dictionary*, 9th edn, West Publishing Co. (St. Paul, 2004) at 467.

⁹ *Black's Law Dictionary*, 9th edn, West Publishing Co. (St. Paul, 2004) at 467. See also: *Black's Law Dictionary*, 9th edn, West Publishing Co. (St. Paul, 2004) at 467.

¹⁰ *Black's Law Dictionary*, 9th edn, West Publishing Co. (St. Paul, 2004) at 467. See also: *Black's Law Dictionary*, 9th edn, West Publishing Co. (St. Paul, 2004) at 467.

State³ as follows:

of demurrer is the virtual end of the suit.

demurrer by sustaining it, or denies it by overruling it.

demurrer application constitutes an abuse of judicial process.

*Ors v Forest Mercantile Co. Ltd*¹ held:

⁴Demarier, <http://en.wikipedia.org/wiki/...>

³ Cap 134 Laws of the Federation of Nigeria, 2004.

Procedural) Rules 2009) and Order 16. In 1976, the Federal High Court (Civil Procedure) Rules 1976

High Court (Civil Procedure) Rules 2009

deponent deposes

3. The court, on hearing the application, shall either dismiss the

the motion on demurrer must be brought before issues are joined on matters alleged in

... Foreast Mercantile Co. Ltd (n 9).

Ogwuegbu JSC @ 143. 22

the statement of claim,¹² hence if the parties have joined issues and pleadings have been exchanged by parties there is no more place for demurrer and the case must proceed to trial.¹³ Thus, it appears that any procedure adopted which involves the taking or assessing of evidence, whether oral or documentary would be outside the procedure for demurrer and accordingly would be irregular for the purposes of demurrer proceedings.¹⁴

In *Bravol Shipping (Nigeria) Ltd v F I. Onwadike Co Ltd & Anor*,¹⁵ the Supreme Court, per Uwaiso JSC, delivering the leading judgment, held as follows:

The principle is that only those facts as pleaded should be considered at that stage on the assumption that they are accepted by the defendant as true but that in spite of those facts the plaintiff's case should be terminated in limine on some legal or equitable ground as not maintainable on those facts. Any other approach would, in my view, radically change the principle as to demurrer which is firmly laid down by this court

In a demurrer proceeding, a defendant is neither permitted to file a statement of defence nor to rely on it, neither is he to tender evidence. He is taken to have accepted all the facts pleaded by the plaintiff as established but rely on some point of Law.¹⁶

As a parting shot, for a demurrer to be competently raised and heard by the court, the party demurring must make the plea a threshold issue by making it before filing his defence, and a corollary of this is that the plea cannot be made before filing of statement of claim, the reason being that demurrer application is based or premised on the averments in the statement of claim. The assumption that underlies the provisions relating to demurrer in the rules of pleading that the court may order the demurring party to answer the plaintiff's allegation of fact if demurrer application is overruled is that the defendant had not done so by filing his statement of defence, and it is from this assumption and the nature of demurrer as a threshold plea that the courts are reinforced in establishing the principle that after the defendant had already answered to the allegations of facts by delivering a defence, he could no more revert to a threshold plea and raise a demurrer.

IV. Types of Demurrer

Demurrer may be general or special demurrer. There is also demurrer to evidence and demurrer to interrogatories.

(i) General Demurrer

A general demurrer is one which objects to the sufficiency of a previous pleading in general terms without showing specifically the nature of the objection, and

¹² *Okafor v. A.G. Anambra State* (n 5). Note that although demurrer is usually brought by the defendant in an action, defence although this is uncommon.

¹³ *Gold Coast and Ashanti Electrical Power Development Corporation v Attorney-General* (1937) 3 WACA 215; *Chloro v Chlor & Anor* (1974) 2 SC (Reprint) 18; *Okafor v A.G. Anambra State* (n 5) @ 4; *Mobil Oil (Nig.) Plc v IAL* 36 JCL (2000) 4 SC (pt 1) 55. See also *Demurrer* (n 1).

¹⁴ See *Bravol Shipping v Onwadike* (2000) 6 SC (pt II) 133; (2000) 11 NWLR (pt 678) 387.

¹⁵ It is to be noted that the decision of the Supreme Court in *Bravol Shipping v Onwadike* (n 14) and *Bloshin Maritime Inc v Farvacit* (n 9) to the effect that it is not part of our procedure to attach documents pleaded to the statement of claim so as to make them possible to be read at once along with the pleading is now anachronistic and upon at trial must of necessity be attached to the pleadings, written statement on oath and documents to be relied upon at trial must of necessity be attached to the pleadings. Thus, the Lagos State High Court (Civil Procedure) Rules 2005, and Kwara State High Court (Civil Procedure) Rules 2005, among others, have adopted front-loading approach while others still maintain the old rules of non-frontloading.

such demurrer is sufficient, when the objection is on matter of substance.¹⁷ In criminal cases, a demurrer may be used in some circumstances to challenge the legal sufficiency of the indictment or other similar charging instrument. Traditionally, if the defendant could admit every allegation of the indictment and still be innocent of any crime, then a general demurrer would be sustained and the indictment would be dismissed.

(ii) Special Demurrer

A special demurrer merely refers to an attack on the form, rather than the substance of the charge: if the defendant correctly identifies some defect on the face of the indictment, then the charges are subject to being dismissed, although usually such an indictment can be re-drawn and re-presented.¹⁸

A special demurrer therefore is one which objects to the sufficiency of the pleading on the opposite side and shows specifically the nature of the objection and the particular ground of exception. A special demurrer is necessary when it turns on matter of form only; that is where notwithstanding such objections, enough appears to entitle the opposite party to judgment as far as relates to the merit of the case.

(iii) Demurrer to Evidence

A demurrer to evidence is analogous to a demurrer in pleading; the party from whom it comes declaring that he will not proceed because the evidence offered on the other side is not sufficient to maintain the issue.

(iv) Demurrer to Interrogatories

Strictly speaking, demurrer to interrogatories is not a demurrer, which admits facts stated for the purpose of taking the opinion of the court but by an abuse of the term, it is the witness' objection to answer, and in which case the witness gives reasons for not answering a particular question in interrogatories.¹⁹

Demurrer application is usually in written form, hence it has been held in *R.v Deputy Chairman of Inner London Quarter Session, Ex Parte Metropolitan Police Commissioner*,²⁰ per Cantley J that:

The plea of general demurrer should not have been accepted since it was not in writing. Furthermore demurrer being an objection to the form or substance of the indictment, the plea should not have been decided by examination of the depositions.

V. ABOLITION OF DEMURRER PROCEEDINGS

It is axiomatic to posit that the procedure by way of demurrer is not only archaic and time wasting,²¹ it is a product of English rules of the 18th century whereby formulary system reigned.²² However, while demurrer has been abolished in some states or countries some still retain it.

(i) Abolition of Demurrer in the United Kingdom

Under the modern rules of pleading in the English practice and procedure, established by the rules of Federal Civil Procedure and followed in a number of states,

¹⁷ See *Demurrer* (n 13).

¹⁸ See *Demurrer* (n 6).

¹⁹ See *Demurrer* (n 3).

²⁰ (1969) 3 ALL ER 1537.

²¹ Especially in situations where demurrer application is overruled and the defendant or demurring party is ordered to file his pleading, in which case the court, and parties as well, must have wasted the precious time and resources which ordinarily ought to have been used for the hearing and determination of the merit of the case.

²² *Okafor v A.G. Anambra State* (n 5) 5 lines 1-3.

(ii) Abolition of Demurrer in the United States of America

In civil cases in the United States District Courts, demurrer was abolished by Federal Rule of Civil Procedure and has been replaced by another Federal Rule of Civil Procedure by bringing a motion to dismiss an action for failure to state a claim upon which relief can be granted. However, in most United States State Court systems, demurrer proceedings are still allowed.²⁵

Thus, in the United States case of *Kathleen R. v City of Livermore, et al.*²⁶ the Supreme Court of State of California in and for the county of Alameda held that even if the court grants the demurrer, it must allow leave to amend if there is a reasonable possibility that the defects in the complaint can be cured by amendment but that where there is no reasonable possibility that the defects can be cured by amendment, sustaining a demurrer without leave to amend is clearly merited and is not an abuse of discretion.

The reasoning behind this decision of the Supreme Court of the State of California is clear and simple; when a demurrer is raised, the court can still grant leave to the other party to amend his pleading only to the extent that the amendment will cure the defects in the pleading being demurred. In other words, where the amendment will not cure the defects it will be improper not to sustain demurrer.

(iii) Abolition of Demurrer in the Nigerian Rules of Court

In all the Nigerian States' High Court Civil Procedure Rules of Court, including the Federal Capital Territory, Abuja, demurrer has been abolished.²⁷ The Federal High Court (Civil Procedure) Rules is also not left out in this new regime. And except for the difference in the particular order in each Rule of Court, provisions relating to abolition of demurrer are couched in virtually the same or similar wordings.

For the avoidance of doubt and clarity of intention, Order 16 Rules 1 of the Federal High Court (Civil Procedure) Rules 2009 provides that 'No demurrer shall be allowed.'²⁸

(iv) A Comparative Analysis

The foregoing, no doubt, is a clear testimony to the effect that because a demurrer challenges legal deficiency, a judge could reach different outcomes, on the same facts, in different jurisdictions, if the law in the different jurisdictions differs.

Thus in the United States, if a complaining party sued for libel but failed to assert that the allegedly libelous statement is false, the claim could be dismissed on a demurrer or a motion to dismiss. However, in the United Kingdom, falsity is not a required element of libel and the analogous request to dismiss would not be sustained.²⁹ Similarly, while demurrer has been formally abolished in virtually all the common law countries or states in civil causes of matter, most states in the United States still retain it.

One intriguing aspect in the abolition of demurrer is that though under the modern rules of pleading demurrer has been abolished as a formal type of answer, the same argument against the plaintiff's cause of action can still be, however, made by motion to dismiss or strike out the plaintiff's action on the ground that he or she has failed to state a claim on which relief can be granted, and this is so much so that even where the formal demurrer is no longer in use, lawyers and judges often use the old term for an argument of the same type.

VI. PROCEEDINGS IN LIEU OF DEMURRER

It has been shown supra that generally speaking, under the modern rules of pleadings, demurrer has been abolished. However, the rules of pleadings have provided for proceeding in lieu of demurrer. Thus, in order to have non-meritorious claims dismissed *in limine*, the modern rules of pleadings provide for proceedings in lieu of demurrer.

(i) Proceedings in Lieu of Demurrer in the Nigerian High Court Rules

In the Nigerian law, the Rules of Court did not merely abolish demurrer; they have equally made provisions for proceedings in lieu of demurrer so that the gap which might likely be created by the abolition of demurrer would be breached. For example, the Federal High Court (Civil Procedure) Rules³⁰ provides as follows:

2.-(1) A party shall be entitled to raise by his pleadings any point of law, and any point so raised shall be disposed of by the judge who tries the cause at or after the trial.

(2) A point of law so raised may, by consent of the parties, or by order of the court or a judge in chambers on the application of either party, be set down for hearing and disposed of at any time before the trial.

3. If, in the opinion of the court or a judge in chambers the decision on the point of law substantially disposes of the whole action, or of any distinct cause of action, ground of defence, set-off, counter-claim, or reply therein, the Court or Judge in chambers may thereupon dismiss the action or make such other order therein as may be just.

¹⁰Demutur <http://legal-dictionary.thefreedictionary.com/Demutur>, accessed 16 May 2009. See also F. Stroud (n2) the Court of Appeal case of *Chief Sir A.A. Abere & Ors v. Apostle I.D. Anyanwu* (2006) 14 NWLR (pt 1000) 490 at 503 paras 11-11, per Adesimisi JCA. Another history has it that demutur was abolished by the Decadants Act 1846 whereby proceedings in lieu of demutur was substituted. See particularly Nnametaka Agu JSC in *Okoye v. Nigeria Const & Utilities Co. Ltd* (1991) 6 NWLR (pt 199) 501 at 540.

²⁴ Demurrers are still used in California and Virginia state court practice. A similar procedure is used in Pennsylvania State Court and governed by Pennsylvania Rule of Civil Procedure, though it is termed *motion to dismiss* rather than demurrer. In contrast however, demurrers has been abolished in England and Wales.

²² Case No.V- 015266-4 of October 1998 in the city of Livermore, California. See the full text of the Judgment on Document: *Reply to Opposition to Demurrer of Defendant City of Livermore* (Kathleen/81029.htm, accessed 16 May 2009).

[illegible]

²⁸ (n27).

²⁹ Demurrer (n6).

³⁰ Of 2009, Order 16 Rules 2-4.

4. The Court or a Judge in Chambers may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or defence being shown by the pleadings to be frivolous or vexatious, the Court or a Judge in Chambers may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just.³³

Above is the typical position of proceedings in lieu of demurrer in all the High Court Civil Procedure Rules of Courts in Nigeria.

(ii) Proceedings in Lieu of Demurrer in the United Kingdom's Rules of Court

In the English Civil Law, and as stated earlier, a demurrer as such is no longer available under the current law of England and Wales. However, two similar proceedings may be employed where claims without merit need to be expeditiously dismissed. Firstly, an application on notice can be made for summary judgment in favour of the defendant and secondly, the court has the power to strike out the particulars of claim.

In order to have non-meritorious claims dismissed, however, the distinction between the two procedures in England and Wales is that when the particulars of claim are struck out, the claimant usually has another opportunity to file amended particulars of claim within a specified period of time, whereas summary judgment is final, subject only to appeal.³⁴

In criminal law of English and Wales, though demurrer has not been formally abolished, it has however become obsolete and superseded by the more modern motion to quash, usually a verbal application to the judge to declare the indictment null and void and to stop the case. The distinction here being that such an application can be made verbally whereas demurrer must be in writing.³⁵

(iii) Proceedings in Lieu of Demurrer in the United States of American Rules of Court

In the United States too, demurrer has been replaced by the Federal Rule of Civil Procedure of motion to dismiss for failure to state a claim upon which relief can be granted, although this is applicable to Federal Courts. In respect of State Courts in the United States, the term *preliminary objection* is used for a similar procedural device in States which did not use demurrer as a defence.³⁶ In short, objection on point of law can now be conveniently raised and if sustained could terminate the proceedings, and this is normally by way of preliminary objection in proceedings in lieu of demurrer.³⁷

From the foregoing, one can safely conclude that except for some State Courts in the United States, abolition of demurrer and its replacement with another procedure in lieu thereof is of universal application. Hence, whether it is called motion to dismiss, preliminary objection or otherwise, a procedure has been put in place in lieu of demurrer.

³³ See also Order 22 Rules 2 (1) & 2 of the High Court of Lagos State (Civil Procedure) Rules 2003; Order 22 Rules 2-4 of Oyo State High Court (Amended Civil Procedure) Rules 2008; Order 26 Rule 2-4 of the Kwara State High Court (Civil Procedure) Rules 2005; Order 22 Rules 2(1) & (2) of Ogun State High Court (Civil Procedure) Rules 2008.

³⁴ Demurrer (n6).

³⁵ *Idem*.

³⁶ For example, the term *preliminary objection* is used instead of demurrer in Pennsylvania State Courts and is governed by Pennsylvania Rule of Civil Procedure. See Demurrer (n6).

³⁷ Akinyemi & Okoro, *Modern Civil Procedure Law* (Dorsey-Long Ltd 2007) 154.

VII. PHILOSOPHICAL BASIS FOR ABOLITION OF DEMURRER AND SUBSTITUTION OF PROCEEDINGS IN LIEU OF DEMURRER

In demurrer proceedings, a party demurring is not expected to file his defence otherwise the court would not entertain his demurrer application, hence once parties have joined issues, the case must proceed to trial, and any legal point could only be decided on after taking evidence and it is this part of demurrer that informed the abolition of demurrer since it did not make sense to allow a case run through a full trial when it could well be disposed of on preliminary point of law. The proceedings in lieu of demurrer were therefore introduced to remedy such an obvious wrong.

Though, generally speaking, demurrer has long been abolished, it has been found, even in England, desirable and indeed very necessary, to preserve some forum of objection on point of law to avoid endless prolongation of trials in courts with its attendant expenses. Thus, where a party conceives a point of law of which he is persuaded would put an end to the case of his adversary, he is at liberty to raise the point, *in limine*, urging the court to strike out or dismiss the action even without filing a defence. So also is that despite the abolition of demurrer, rules of court permit a party who has filed his pleading to include therein a provision which, if taken, may put an end to the proceedings.³⁸ The rationale for the proceedings in lieu of demurrer, therefore, is to save valuable time and expense, although the abolition of demurrer was not made ordinarily to prevent an earlier disposal of cases, but rather to prevent the difficulty created by the technical rule that once issues have been joined an action must well proceed to trial.³⁹

VIII. DEMURRER AND PROCEEDINGS IN LIEU OF DEMURRER: A DIFFERENCE WITHOUT DISTINCTION?

Of all the issues confronting the practicability and applicability of any given law, substantive or adjectival, not in the least in seriousness is the problem associated with the interpretation of the provision of the Law (and this includes Rules of practice and procedure of courts). The discourse on demurrer and proceedings in lieu of demurrer is not left out in this legal and jurisprudential issue.

In this context, the crucial issue is whether, despite the abolition of demurrer application, and its substitution by proceedings in lieu thereof, a clear cut distinction can still be made between the two, or put succinctly in another way, are demurrer and proceedings in lieu of demurrer not at crossroads?

The legal regime of proceedings in lieu of demurrer leaves no one in doubt that both concepts are, in some aspect, a mere difference without distinction.

To better appreciate the contention here, it is pertinent to highlight some areas of interest that may be of relevant consideration such as: equating demurrer with issue of jurisdiction; what is not demurrer and when may proceedings in lieu of demurrer be undertaken, regard being had to the legal interpretation of the topical controversial phrase that commands or permits the applicability of proceedings in lieu of demurrer in our rules of court. All these issues are necessary concepts to be addressed without which it may be extremely difficult, if not impossible, to clear the procedural fog about the conceptual discourse at hand.

³⁸ See *Opakwu and Ojukwu* (n 3) 237. See also *Aderemi JCA* (as he then was) in *Chief Sir A.A. Abere & Ors v. Apostle I.D. Anyanwu* (2006) 14 NWLR (pt 1000) 490 @ 504. See also *Eghazien v. Eghazien* (2005) 4 NWLR (pt 916) 488 @ 499, per *Aderemi JCA*.

³⁹ See *Opakwu and Ojukwu* (n 3) 237 and *Eghazien v. Eghazien* (n 36).

IX. EQUATING DEMURRER WITH ISSUE OF JURISDICTION: A CONTINUING CONTROVERSY?

It is now settled beyond peradventure that the question of jurisdiction is a threshold issue which can be raised at any state of the proceedings, hence the more reason it can be raised by the court suo motu, even for the first time at the court of last resort³⁸. It can even be raised viva voce³⁹.

The tendency to equate demurrer with objection to jurisdiction stems from jurisprudential divergent views in our case law, and this is not unconnected with the divergent views and perceptions of what is, and what is not, demurrer and the crucial issue is: when are issues of competence and jurisdiction of court and what are instances of demurrer.

On the competence of an action and the jurisdiction of the court to entertain same, the locus classicus case comes into consideration, being the celebrated Supreme Court case of *Gabriel Madukolu & Ors v Johnson Nkemidilim*,⁴⁰ where Bairamian F.J., delivering the leading judgment stated thus:

Before discussing these portions of the record I shall make some observations on jurisdiction and the competence of a court. Put briefly a court is competent when:

- (1) It is properly constituted as regards members and quantifications of the member of the bench and no member is disqualified for one reason or another and
- (2) The subject matter of the case is within its jurisdiction and there is no feature in the case which prevents the court from exercising its jurisdiction and
- (3) The case comes before the court initiated by due process of law and upon fulfillment of any condition precedent to the exercise of jurisdiction.

Any defect in competence is fatal for the proceedings are a nullity however well conducted and decided, the defect is extrinsic to the adjudication.

The above-quoted voice of the learned jurist has gained tremendous applause in our juridical terrain. It has become a watchword in determining the competence of suits and the jurisdiction of the court to entertain same.⁴¹ Thus, where a complaint is about failure to observe due process and non-fulfilment of any condition precedent to the exercise of jurisdiction, issue of jurisdiction is automatically raised.

³⁸See the following cases: *Babalola v Ogunbo L.G* (2003) 10 NWLR (Pt 829) 465 @ 480-481; *Daniel v Amusan* (2009) All FWLR (Pt 473) 1339 @ 1373; *Nwade v Chairman F.F.C.* (2005) All FWLR (Pt 276) 740 @ 756; *Adeloyi v Isomidele* (2005) All FWLR (Pt 428) 234 @ 244.

³⁹See *Petrophysical Enterprises Ltd & Anor v Leveas Technical Company Ltd* (1992) 6 SCN, 154 @ 167; (1992) 5 NWLR (Pt 244) 675 @ 693; *Comfort Olawumi v Ojogbeni (Unreported)* Appeal No. CAH/EP/SA/4/2003 delivered on 12/12/2003; *Owners of the M/T "Arabela" v N.A.L.C.* (2008) All FWLR (Pt 443) 1208 @ 1232-1233 SC; *Nwade v Chairman F.F.C.* (in 38); *Adeloyi v Isomidele* (in 38).

⁴⁰(1962) 1 ALL NLR 586 @ 595; (1962) SCNLR 341 @ 348.

⁴¹See the following cases: *Enyibros Foods Processing Company Ltd & Anor v Nigerian Deposit Insurance Corporation & Anor* (2007) All FWLR (Pt 387) 793 @ 816; *Odeja Investment v Talabi* (1997) 10 NWLR (Pt 523) 1 @ 58-59; *Ibiola v Ajiboye* (1994) 6 NWLR (Pt 352) 506; *Babalola v Ogunbo L.G* (n 38); *Tayo Holdings Ltd v Niger-Benue Transport Co Ltd* (2007) All FWLR (Pt 356) 800 @ 809; *Kala Mark & Anor v Gabriel Eke* (2004) 1 SC (Pt II) 1 @ 26.

In *Enyibros Foods Processing Company Ltd & Anor v Nigerian Deposit Insurance Corporation & Anor*,⁴² the Supreme Court, per Onnoghen JSC in his leading judgment posited as follows:

...it becomes very clear that where a complaint in any grounds of appeal is about failure to observe due process and non-fulfilment of any condition precedent to the exercise of jurisdiction, such as payment of filing fees, giving judgment on a matter under the undefended list on pleadings without first and foremost ordering a transfer of the matter from the undefended list to the general cause list and hearing a matter on a date other than the agreed adjourned date by the parties and the court clearly, to my mind raise issue of jurisdiction of the court to entertain the matter for non-fulfilment of conditions precedent."

Instances of issues or circumstances of jurisdiction cannot be exhausted. In *Babalola v Ogunbo Local Government*,⁴³ the court viewed non-issuance and service of statutory pre-action notice of intention to sue pursuant to Sections 173 and 174 of the Local Government Law of Oyo State⁴⁴ as non-fulfilment of condition precedent to the competence and jurisdiction of the court to entertain the suit. It held:

In this case, appellant by operation of law must institute the action by due process of law for the action to be competent and to grant jurisdiction to the court. To comply with due process of law in the commencement of this action appellant has the burden under Sections 173 and 174, Cap 66 (supra). Regrettably he did not comply with the said Sections and did not fulfil the condition precedent to the grant and exercise of jurisdiction.

This action was not instituted by due process of law and any defect in competence is fatal for the proceedings are nullity however well conducted and decided, as the defect is extrinsic to the adjudication.

Above shows without an iota of doubt that failure to issue and serve pre-action notice before the institution of a suit is a failure to fulfil condition precedent to the competence of the suit and the jurisdiction of the court.

Of utmost importance also is the issue of service of court process on the opposing party, especially the originating process. It has been held that service of process is fundamental and affects the competence and jurisdiction of the court and where there is non-service of court process where service is required, any order made can be set aside for being a nullity. In *Societe Generale Bank (Nig) Ltd v John Adebayo Adevumi*,⁴⁵ the Supreme Court held:

... it is now trite law that failure to serve process where service of process is required, is a failure which goes to the root of the case. See *Craig V. Kenseen* (1943) KB 256 at 262. Service of process on a party to a proceeding is fundamental. It is service that confers competence and jurisdiction on the court raised (sic) of the matter. Clearly due service of process of court is a condition *sine qua non* to the hearing of any suit. Therefore, if there is a

⁴²(2007) All FWLR (Pt 387) 793 @ 816.

⁴³(n 38) 484.

⁴⁴Cap 66, Laws of Oyo State 1978 as then applicable to Oyo State.

⁴⁵(2003) 4 SC (Pt I) 93 @ 98.

is submitted therefore, that be only reasonable distinction that may be made relates to the time of making the objection challenging the suit since instances of preliminary objections on points of law and issues of jurisdiction are interwoven.⁵⁸

X. CLEARING A PROCEDURAL FOG AND THE INTERPRETATION PALAVER IN THE INTERFACE BETWEEN DEMURRER AND PROCEEDINGS IN LIEU OF DEMURRER

There is no doubting the fact that demurrer and proceedings in lieu of demurrer appear to be at cross-roads and the only saving grace would have been the interpretation of the provisions relating to proceedings in lieu of demurrer. However, instead of solving the problem, the interpretation has only succeeded in aggravating it. This, however, is not unconnected with the perception of our courts of law.

At the expense of superfluity, but for ease of reference and clarity of purpose, the relevant provision of the rule provides that 'A party shall be entitled to raise by his pleadings any point of law, and any point so raised shall be disposed of by the judge who tries the cause at or after the trial.'⁵⁹ (Underlining added for emphasis)

The interpretation of the above quoted provision of our rules of court, especially the underlined portion has posed more questions than answers. While some interpretations posit that to comply with the provision relating to proceedings in lieu of demurrer, the point of law can only be raised in the statement of defence (that is statement of defence must be filed and the point of law can only be raised therein), otherwise it will amount to demurrer which has been abolished, others posit that proceedings in lieu of demurrer has provided for a more summary way of getting rid of incompetent suit and hence, the point of law can be raised at any stage of the proceedings even before filing statement of defence.

In *Everett v Ribbards*,⁶⁰ Romer L.J. held as follows:

Where there is a point of law which, if decided in one way, is going to be decisive of litigation, advantage ought to be taken of the facilities afforded by the rules of court to have it disposed of at the close of pleadings or very shortly afterwards (underlining added for emphasis)

However, Aguda J., relying on Romer L.J. in *Everett v Ribbards*⁶¹ in *Bello Adegoke Foko & Ors v Oladokun Agboola Foko & Ors*,⁶² while interpreting Order 22 Rule 2 of the High Court (Civil Procedure) Rules (West)⁶³ posited that the proper time to make the application to have the legal point decided is on completion of pleadings.

competence of the proceedings before the court while the combined effect of the cases of *Kida v Ogunmola* (2006) 6 SC 147, *Babalola v Orogbo Local Government* (n 38), *Odutola v Kayode* (1994) 2 SCNJ 21, *Societe Generale Bank (Importers) Appeal No. CA/IL/44/2014* delivered on 30/11/2005 and *Emuakpor v Ekanjike* (1975) 12 SC (Reprint) 31 requires jurisdiction.

⁵⁸ While demurrer application can only be made after filing statement of claim but before filing statement of defence, statement of defence or even after filing statement of defence.

⁵⁹ See Order 22 Rule 2(1) of the High Court of Lagos State (Civil Procedure) Rules 2008; Order 22 Rule 2(1) of the High Court of Ogun State (Civil Procedure) Rules 2008; Order 22 Rule 2 of the High Court of Ogun State (Civil Procedure) Rules 2009.

⁶⁰ (1952) 2 OJ 198-9, 206.

⁶¹ (1952) (n 60).

⁶² (16/8) NWLR 411.

⁶³ The provision is in pari materia with Order 22 Rule 2(1) of the High Court of Lagos State (Civil Procedure) Rules 2008; Order 22 Rule 2(1) of the High Court of Ogun State (Civil Procedure) Rules 2008; Order 22 Rule 2 of the High Court of Ogun State (Civil Procedure) Rules 2009.

He was, however, liberal in his approach in the interpretation of the relevant rules. He posited and held that:

...this is not to say that the application could not have been taken earlier, for example, after the filing and service of the statement of claim on the defence, or even after the writ before pleadings are ordered.⁶⁴

The effect of interpretation of statutes (and this includes rules of court) on the practice and procedure before a court of law cannot be overemphasized. It is not an issue that can be swept behind the closed doors of secrecy if and only if the sustainability and development of case law in the administration of justice is anything to guide jealously. A dissent or disparity in interpretation of statutory provisions has the effect of desecrating and unsettling an already settled and sacrosanct position of the law. Interpretation of the clause, 'a party shall be entitled to raise by his pleading'⁶⁵ has therefore created serious issues of debate.

The recent Supreme Court case of *Mr. Popoola Elabango & Anor v. Chief (Mrs) Ganiat Dawodu*⁶⁶ readily comes to legal minds in this regard. In his concurring judgment, Ogburn JSC posited, in interpreting the phrase, 'shall be entitled to raise by his pleading any point of law' in proceedings in lieu of demurrer, as follows:

Now it is firmly settled in a string of decided authorities, that in the interpretation/ construction of a statute, the cardinal principle is to give the words used, their ordinary meaning without resort to any internal or external aid. See *Attorney-General of Ondo State v. Attorney-General of Ekiti State* (2001) 9-10 SC 116; (2001) 10 SCNJ 117. In other words, ordinary meaning is to be given effect. See *Alhaji Ibrahim v. Galadima Barde* (1996) 12 SCNJ 1 @ 38, per Uwailu, JSC, citing some other cases therein and *City Engineering (Nig) Ltd v. Nigerian Airport Authority* (1999) 6 SC (pt II) 41; (1999) 6 SCNJ 263. That being the state of the law, in my humble but firm view, the words "shall be entitled to raise by his pleadings any point of law", mean clearly entitled to raise by his pleadings any point of law, "shall be prevented, in any way or manner whatsoever, from raising by his pleading, any point of law. It does not mean to me that the party so entitled, must raise the point in his by pleading. That does not mean in my respective view, that he must file a statement of Defence before he can raise such point of law.... All these to my mind are simple provision in very clear English words or language. To suggest that a party to raise such point of law must have filed a statement of Defence in which the point of law must be raised, with profound and greatest respect, is clearly absurd to me. I am sure that is certainly not the intention of the law makers. It could never be⁶⁷

⁶⁴ *Bello Adegoke Foko & Ors v Oladokun Agboola & Ors* (n 62) 444.

⁶⁵ By Order 22 Rule 2(1) of the High Court of Lagos State (Civil Procedure) Rules 2008; Order 22 Rule 2 of the High Court of Ogun State (Civil Procedure) Rules 2008; Order 16 Rule 2(1) of the Federal High Court (Civil Procedure) Rules 2009.

⁶⁶ (2006) 6-7 SC 24.

⁶⁷ *Elabango v Dawodu* (n 66) 38-59. The same position that the point of law can be taken even before filing statement of Defence was upheld in the following cases: *Tijani Bamba & Ors v Alhaji Yusuf Adeniji Aderinola* (1977) NSCC 1 @ 41, *Madarikani JSC* delivering the judgment of the court; *Eghazim v Eghazim* (2005) 4 NWLR (pt 916) 488 @ 499, *Aderemi JCA* (as he then was), delivering the leading judgment; *Chief Sir A.A. Ehere & Ors v Apostle H.D. Arunonu* (2006) 14 NWLR (pt 1000) 490 @ 504, *Aderemi JCA* delivering the leading judgment; *Bello Adegoke*

The intriguing part of the same Supreme Court judgment is the position of Onnoghen JSC, dissenting, who posited that in a demurrer proceeding, the defendant is not required to file a statement of defence before raising the point of law in contention but that in proceedings in lieu of demurrer, the point of law must first be raised in the statement of defence, relying on *Bumbe v Aderinola*⁶⁸ and *Olive v Obar*⁶⁹. In clear words, His Lordship held as follows:

From the above, it can be seen that the word, 'shall' as used in 'A party or Any party shall be entitled to raise by his pleadings any point of law' in Rule 27¹ under proceedings in lieu of demurrer has been interpreted to be a mandatory provision to the effect that the party raising the point of law must first file his pleading. But the crucial and pertinent question now is: What is the correct interpretation of the word 'shall' or 'shall be entitled to' as used in the provision under reference as it is the interpretation that has been causing the divergence of opinions and decisions of our law lords.

Foko & Ors v. Obidokun Agboda Foko & Ors (1968) NMLR 441 @ 444 per Aguda J.; *Mallam Saka Kadri Agboda & 2 Ors v. Mr. Acee Agboda & 5 Ors* (Unreported) Suit No. KWS/01/2006, delivered on 8/5/2007; *Rangbala J., Abhai Ayo Kolomoile Bello & 2 Ors v. Abhai Muhammed Ayinde & Anor* (Unreported) Suit No. KWS of 1/2002, delivered on 15/7/2004, Adewale J.
 (1977) 1 SC (Reprint) 1; (1977) NSCC, 1.
 (1972) 1 SC (Reprint) 1; (1972) NSCC, 1.

Foko & Ory v. Oluokun Agboda Foko & Ory (1968) NMLR 441 @ 444 per Aguda J.; *Mallam Saka Kadiri Agboda & 2 Ory v. Mr. Acee Agboda & 5 Ory* (Unreported) Suit No. KWS/OM/2006, delivered on 8/5/2007; *Bangbala J. Abaji Alayi Kolomo Belo & 2 Ory v. Abaji Muhammad Ayinde & Anor* (Unreported) Suit No. KWS/OF/1/2002, delivered on 15/7/2004, Adewale J., (1977) 1 SC (Reprint) 1; (1977) NSCC, 1. (1974) 2 SC (Reprint) 81; (1974) NSCC, 1.

[illegible]

The Supreme Court had the opportunity, in several cases, of construing the provision relating to proceedings in lieu of demurrer, the effect of which is that the rules have provided an alternative to demurrer proceedings. It is therefore humbly submitted that even though demurrer has been abolished, the rules of court has provided for a more convenient and summary way of disposing of incompetent cases in limine. This position has long been settled in the Supreme Court case of *Tijani Bambe & 6 Ors v Alhaji Yusufu Adetunji Aderinola & 6 Ors*.²⁹ In this case, after a copy of the statement of claim had been served on the defendants and without filing a statement of defence, the defendant filed an application challenging the competence of the suit on ground, among others, of non-joinder or misjoinder of parties. The learned trial judge dismissed the application on the ground that it was in the nature of demurrer, and could not be allowed until pleadings were completed, relying on order 22 Rule 1 of the High Court of Lagos (Civil Procedure) Rules 1972.³⁰ Allowing the defendant's appeal to the Supreme Court, it was held, Madarikan JSC, delivering the judgment, as follows:

It is now glaringly clear that the failure to have the procedural fog cleared is not the only reason why the Rules are not being followed. The Rules are being followed, but the provisions that abolish demurrer in proceedings in lieu of demurrer is usually considered without necessary attention and consideration being paid to the other provisions of the Rules. It is therefore humbly submitted that if our courts consider the provisions relating to proceedings in lieu of demurrer as a whole and not the only provision relating to abolition of demurrer in isolation, perhaps it would have been clear that proceedings in lieu of demurrer have clearly and unequivocally made adequate provisions to get rid of incompetent suits in a manner even quicker than that provided by demurrer procedure.

²²See the case of *Mobil Oil (Nig) Ltd v IAL 36 INC* (2000) 4 SC (pt 1) 85 @ 99.

⁷²See the case of *Mobil Oil (Nig) Ltd v IAL 36 INC* (2000) 4 SC (pt 1) 85 @ 99.

⁷⁸ Which is in part materia with Order 29 High Court (Civil Procedure) Rules; Order 20 Rule 1 of the Federal High Court (Civil Procedure) Rules 2005; Order 24 Rule 1 of the Kogi State High Court (Civil Procedure) Rules 2005; Order 24 Rule 1 of the Ondo State High Court (Civil Procedure) Rules, also applicable to Ekiti State High Court (Civil Procedure) Rules 2009; Order 24 Rule 1 of the Oyo State High Court (Civil Procedure) Rules 2009; Order 24 Rule 1 of the Lagos State High Court (Civil Procedure) Rules 2009; Order 24 Rule 1 of the Ogun State High Court (Civil Procedure) Rules 2009; Order 24 Rule 1 of the Osun State High Court (Amended) (Civil Procedure) Rules 2008.

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In its ordinary grammatical sense, the word, 'shall', connotes a mandatory expression.⁷⁷ However, the drafters of the rules did not use the word 'shall' alone. The word is used with 'entitled to'. What then is the meaning of the word 'entitled'? To entitle somebody is to grant him right or to give him the right to have or to do something. In its legal sense, it means to grant a legal right to or qualify for.⁷⁸

The question is: Must a person exercise a particular right if he does not intend to so exercise? It is submitted that the answer is capital No! It is humbly submitted that the only reasonable interpretation that can be given the expression is that any party shall not be prevented from raising by his pleading any point of law. This is because if the drafters of our rules had wanted the provisions to be mandatory, they would have used the word 'shall' without adding 'be entitled to'. And at any rate, assuming without necessarily conceding that the expression can be used in a mandatory sense, the settled position of the law is that rules of court that appear mandatory are not as sacrosanct as mandatory provisions of statutes.⁷⁹

The rationale behind the non-mandatory nature of filing statement of defence before embarking on proceedings in lieu of demurrer is not far-fetched. What is more, in considering or determining the competence of a suit or whether a party's pleading discloses a reasonable cause of action or not or whether the plaintiff has locus standi or not the process to consider is the claim before the court and not the defence as stated in the statement of defence.⁸⁰ Why then is the need or mandatory nature of filing statement of defence, when same cannot be considered in determining the competence of the claimant or plaintiff's suit and more so when the point of law so raised may be decisive of the whole case in limine. Filing of statement of defence, it is humbly submitted, is therefore grossly otiose, although a party wishing to raise the point of law is not prevented from filing his statement of defence first before raising it. This position is in tandem with the position of the Supreme Court in *Elabanjo & Anor v. Davodu*,⁸¹ where it was held, per Ogburn JSC as follows:

... in my humble but firm view, the words "shall be entitled to raise by his pleadings any point of law" mean clearly and no more than that any party, shall not be prevented in any way or manner whatsoever, from raising by his pleading, any point of law. It does not mean to me that the party so entitled must raise the point in his pleading.

That does not mean in my respectful view, that he must file a statement of Defence before he can raise such point of law

⁷⁷ See the cases of *Ogidi v. State* (2005) 1 SC (Pl 1) 98 @127; *INEC & Anor v. Abaji* (2007) 1 FWR (Pl 377) 807 @ 857 where the word 'shall' is interpreted to mean a mandatory expression, imposing that a thing must be done. It should be noted, however, that the word 'shall' may mean a directory or discretionary expression, for instance in *Associated Discount House Ltd v. Anopolamated Traders Ltd* (2007) All FWR (Pl 392) 1781 @1813, per Onu JSC, the word 'shall' was interpreted to mean 'may' connoting a merely directory expression. Thus, where the word is for the benefit of the public it is usually mandatory but if it relates to the benefit of an individual, it is usually directory and mandatory. It means *N.S.P.C.* (2000) 6 S.C. 66 @ 79 and *Int'l Tobacco Co. Plc v. RAFDAC* (2007) All FWR (Pl 382) 1981 @2000-2001.

⁷⁸ See Black's Law Dictionary 7th Edition 573.

⁷⁹ See the case of *Kaito v. Central Bank of Nigeria* (1991) 11-12 SC, 176; *Elabanjo v. Davodu* (n 66) 61; *Essang v. Bank of the North* (2001) 6 NWLR (Pl 709) 384 @ 397.

⁸⁰ See generally, *Idigun v. Ojo* (1976) 9-10 SC, 31; (1976) 1 FNR, 149 @ 158.

⁸¹ (n 66) 59, Ogburn JSC concurring.

It is submitted therefore that proceedings in lieu of demurrer can be embarked upon either upon filing statement of claim and before filing a defence or at the close of pleadings.⁸²

IX. CONCLUSION

In this work, attempts have been made to delve into the nature, meaning and forms of demurrer. It conceptualizes demurrer as a threshold and universal concept. It further considers abolition of demurrer application and its substitution with proceedings in lieu of demurrer as well as the rationale behind the two concepts. The all-important issue of jurisdiction is also juxtaposed with demurrer as a result of misconception about the nature and extent of the duo. From the various views considered, demurrer, proceedings in lieu demurrer, preliminary objection and jurisdictional issues appear to be at cross-roads. The interpretation of the relevant provisions of the law, which ordinarily would have been a saving grace, has added more injury to the wound, thereby resulting in seemingly unsettled and dicey position of the law. What are points of law that can be raised in demurrer proceedings can as well be raised in proceedings in lieu of demurrer and so also on issue of jurisdiction – preliminary objections on point of law can be raised on the grounds of lack of jurisdiction on the part of the court to hear and determine the case; that some conditions precedent to the proper institution or commencement of the action were not fulfilled; that the parties (or one of the parties) lack the requisite capacity or locus standi to institute or defend the action; that the suit is statute barred; that the defendant is immunised from jurisdiction or prosecution; that the writ of summons or statement of claim discloses no reasonable cause of action against the defendant; that there was non-joinder or misjoinder of parties in the case; lack of service or proper service of process, especially originating process, to mention but a few.⁸³

Despite the fact, however, that demurrer is a universal discourse, there is no doubting the fact that demurrer in criminal cases are in criminal procedure in the United States and United Kingdom, although it is unheard of in the Nigerian criminal procedure context. What can be likened to it is motion to quash an indictment, motion to terminate proceedings, preliminary objection to the jurisdiction of the court to entertain the criminal charge etc, all of which are still relevant and applicable within the Nigerian criminal procedure context.

Perhaps a clear cut difference among the trio of demurrer, proceedings in lieu of demurrer and issue of jurisdiction is in the form of raising them. While demurrer can only be raised in writing, issue of jurisdiction and point of law in proceedings in lieu of demurrer can be raised either orally or in writing, depending on whether the points to be relied upon do not flit with facts not before the court.

Although it may be in the interest of efficient and timeous dispensation of matters in court to allow parties to join issues before points of law which may dispose of the matter are raised, the fact still remains that some matters are so incompetent and incurably defective, even on the face of the originating process or statement of claim, that they can preemptorily be disposed of *in limine* and without hearing evidence. And if this position is right, then filing of statement of defence becomes otiose in such situations. It therefore behoves the drafters of rules of practice and procedure to always be explicit in the draft so as to prevent unnecessary and damaging interpretation of the law or rules of practice and procedure, resulting from seemingly ambiguous provisions.

⁸² See *Abaji v. Chibudo & Ors v. Abaji A. W. Akhu & Ors* (1982) 7 SC (Reprint) 294 (1982) 1 ANLR (pt 1) 194.

⁸³ See generally *Ojukwu & Ojukwu* (n 3) 238. See also *Belaji Abdulkabir Oyun, 'Proceedings in Lieu of Demurrer: A Myth or Reality'* (2008) Vol 13, *The Jurist*, (An annual Publication of Law Students Society, University of Benin) 235-236.

It is therefore recommended that since virtually all points of law affect the competence of the plaintiff's suit, and invariably the jurisdiction of court to entertain it, the point should be allowed to be raised at any stage of the proceedings once the facts to be relied upon are already before the court, and if the facts are not before the court then it behoves the objector to file necessary formal application supported with affidavit.