William and Mary Review of Virginia Law

Volume 1 (1949-1953)
Issue 2

Article 2

May 1950

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Stanley H. Mervis

DECLARATORY JUDGMENTS IN VIRGINIA

A declaratory judgment has been defined[1] as a judgment which declares the rights of the parties or expresses the opinion of the court on a question of law, without ordering anything to be done, or requiring that an actual wrong, giving rise to a cause of action for damages, should have been committed or suffered.

The common law refuses to allow the maintenance of any action unless an actual wrong shall have been committed. This has made it impossible to know for certain whether a proposed act or course of action was legally permissible. The only thing which could be done was to plunge ahead as if in the dark, and hope that one's attorney was correct in his conclusion as to the applicable law.

Equity early permitted certain bills declaratory in nature, among which were bills to remove a cloud from a particular title, and requests for construction of trusts for the guidance of the trustees. In 1852, England adopted a declaratory judgment procedure.[2] The trend had been established; in the 1920's it became almost a stampede. Today every jurisdiction has some type of declaratory judgment proceeding.

The Uniform Declaratory Judgment Act was first recommended in 1921 by the Commission on Uniform State Laws and revised in 1922. The Virginia Declaratory Judgment Act was adopted in 1922.[3] Although Virginia did not adopt the Uniform Act, the statute is very similar in both language and intent. As a result, decisions from states having the Uniform Act are particularly persuasive in Virginia courts.

The main purpose of the declaratory judgment is to enable a man to obtain a judicial declaration of what his rights, powers, privileges and immunities are *before* he has suffered an injury or done a wrong to another. This eliminates much of the doubt and uncertainty in legal controversies. The Supreme Court of Appeals has held the moving purpose of the statute to be "preventive relief"[4] saying that "The manifest intention of the legislature was to provide a speedy determination of actual controversies between citizens, and to prune, as far as is consonant with right and justice, the dead wood attached to the common law rule of 'injury before action' and a multitude of suits to establish a single right."[5]

The poor reception which the Act received by the bar, characterized by the almost negligible use of its facilities in the early years of its life, led to a plea in the Virginia Law Review[6] urging attorneys to use it. Today it has become what is probably the most widely used single procedure in our present-day system of law.

Attacks upon the constitutionality of declaratory judgment acts have been upon the theory that they give non-judicial power to the court by permitting them to render advisory opinions or decide most questions. This argument has prevailed only once; in a Michigan case.[7]

The constitutionality of the Virginia statute was questioned in *Patterson's Ex'rs v. Patterson.*[8] The Supreme Court of Appeals rejected the rationale of the Michigan decision and held the Virginia statute to be constitutional. The Court placed particular emphasis on the wording of the Virginia statute requiring an "actual controversy" and "actual antagonistic assertion and denial of right"[9] — phrases missing from the Michigan law.

The Court declared that the act contemplated that the parties to the proceeding shall be adversely interested in the matter as to which the declaratory judgment is sought and their relationship thereto such that a judgment or decree will operate as res judicata as to them. It does not, however, confer upon the courts the power to render judicial decisions which are advisory only or determinative of moot questions.

The Supreme Court of the United States, after seeming to infer that it had no authority to review declaratory judgment cases arising under state law,[10] has held[11] that the declaratory judgment was within the scope of the "case" or "controversy"[12] limitation on its jurisdiction. This decision paved the way for the passage of the Federal Declaratory Judgment Act of 1934.[13]

All courts of record are empowered by the statute[14] to make binding declarations of right. The statute confers no additional jurisdiction and unless the court would otherwise have jurisdiction of the subject matter and parties, the declaratory judgment proceeding must fail.[15] This would necessarily exclude the trial justice court as it is not a court of record. Proceedings, would ordinarily be in the circuit or corporations courts and therefore the exclusion of the trial justice court is of little importance.

The Supreme Court of Appeals has expressly declared that it does not have original jurisdiction of a declaratory judgment action.[16] Speaking through Justice Holt, the Court said:[17] "We are asked on appeal to enter a declaratory judgment where no such application was made to the court below. There can be no appeal in a case where nothing was asked and nothing was done, and since there is no appeal, our jurisdiction, if any, must be original. Section 88 of our Constitution reads in part as follows: 'The court shall have original jurisdiction in cases of habeas corpus, mandamus, and prohibition, but in all other cases in which it shall have juris-

diction, shall have appellate jurisdiction only.' . . . . Declaratory judgments are creatures of statutes. We are told when they may be procured and how. In cases of actual controversy, courts of record 'within the scope of their respective jurisdictions shall have power to make binding adjudications.' We have no original jurisdiction."

This decision is obviously correct. The appellant had refused to present any evidence before the State Corporation Commission. Section 156 of the Virginia Constitution gives the Commission exclusive jurisdiction over the activities of transportation companies within this state. For the Court to have accepted any evidence would have been to usurp the constitutional authority of the Commission, and it could not have decided the case on its merits without hearing evidence.

The Supreme Court of Appeals has permitted, in *Moore v. Moore, Auditor*,[18] a party to maintain a declaratory judgment proceeding where the Court had original jurisdiction of the action, a mandamus action. Moore, as an individual, petitioned the Court for a writ of mandamus to compel himself, as Auditor of Public Accounts, to pay to himself certain fees allowed by a statute, the constitutionality of which had been questioned by the Attorney-General. The Court entertained some doubt as to the validity of such a procedure at common law but did not find it necessary to pass on the point, holding that it was permissible under the Declaratory Judgment Act. The peculiar situation warranted a construction of the statute; there seemed to be no other adequate remedy. "We know of no sound reason for doubting its application to this case, even if at common law the remedy by mandamus would be inapplicable or inadequate."[19] Thus it would appear that in any action over which the Supreme Court of Appeals did have original jurisdiction — mandamus, habeas corpus, and prohibition — the Court would entertain a petition for a declaratory judgment concerning the matters there involved.

The Court has expressly left open the question as to whether the State Corporation Commission could enter a declaratory judgment under the statute.[20] The statute gives such authority to "courts of record within the scope of their respective jurisdictions."[21] The Commission is vested with certain legislative, executive and judicial functions, and is required to proceed only by due process of law. The Supreme Court of Appeals has held[22] that in proceedings relating to the establishment of rates and charges for transportation, the Commission is not exercising the functions of a court of record but is exercising a purely legislative function. The Court has also held[23] that the Commission is acting in a judicial capacity,

as a court of record, when it grants or refuses an application for a certificate of public necessity and convenience. No less a distinguished judge than Justice Homes declared:[24] "We shall assume that some of the powers of the commission are judicial, and we shall assume, without deciding, that, if it was proceeding against the appellees to enforce this order and to punish them for a breach, it would be sitting as a court." It is therefore submitted that the State Corporation Commission may act under the Declaratory Judgment Act in such instances as it is acting in a judicial capacity as a court of record.

The statute[25] requires an "actual controversy" for the court to have jurisdiction and it impliedly defines an actual controversy as a case "of actual antagonistic assertion and denial of right." The courts have further defined an "actual controversy." First, the person who raises a question to be settled by a declaratory judgment must have a real interest in the subject matter in controversy.[26] It is elementary that the result must be res judicata as to the parties and the issues.[27] Whether or not there is a controversy is a question of fact, which may be shown by the pleadings or by the evidence.[28]

Assume that an actual controversy exists. Is the petitioner entitled to a declaratory judgment as a matter of right? The Supreme Court of Appeals has said:[29] "Whether or not jurisdiction shall be taken under the Declaratory Judgment Act is within the sound discretion of the trial court." The Virginia statute is silent on this point but the decision of the court is in agreement with the Uniform Act, which provides:[30] "The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered and entered, would not terminate the uncertainty or controversy giving rise to the proceeding." There are two general types of situations which may make it unlikely that a declaration will prevent further litigation: (1) when one or more persons who have an interest in the outcome of the action have not been or could not be joined, and (2) when one or more issues have not been raised, but are a part of the controversy or uncertainty.

It must be remembered the discretion of the trial court is a sound judicial discretion subject to review by the appellate court,[31] and that the statute is to be liberally construed.[32]

The exercise of the trial court's discretion is exemplified by a recent decision.[33] The petitioners were the defendants in a pending contempt of court proceeding for refusing to answer a subpoena to give a deposition in advance of trial, when they would be present at the trial to give their testimony. They requested a declaratory

judgment as to whether they could be so compelled to testify prior to the trial. The court sustained a demurrer on the ground that the identical issue was involved in the pending contempt proceeding. The Supreme Court of Appeals affirmed, holding that since the facts and issues were identical and the issue could be determined in either proceeding, the trial court was under no compulsion to decide it in the declaratory judgment proceeding.

Thus it will be noted that the declaratory judgment is an alternative and not an exclusive remedy, and the courts have so held.[34] The mere fact that there is available to the plaintiff an ordinary action or suit to vindicate his right, however, does not necessarily bar a proceeding for a declaratory judgment. The Supreme Court of Appeals in discussing this question has said:[35] "The fact that a plaintiff or complainant might, by the institution of an action or suit or series of actions or suits, eventually, through protracted and continuous litigation, have determined the same question that may be determined once and for all in a declaratory judgment proceeding, has never, so far as we find, been held by the courts to deprive the courts of jurisdiction to enter a declaratory judgment wherein the entire right of the parties can be determined and settled once and for all." But "In common cases where a right has matured or a wrong has been suffered, customary processes of the court, where they are ample and adequate, should be adopted."[36]

The most useful field for the declaratory judgment is as a preventive device. Thus, where there has been no injury and therefore no right of action exists at common law, but there is an actual controversy, the declaratory judgment proceeding may be utilized by the parties as a means of ascertaining what their rights, powers, privileges or immunities are without running the risk of inflicting an injury on another or suffering a loss.

The statute expressly mentions the use of this procedure for obtaining interpretations of written instruments and governmental regulations, but provides that "this enumeration does not exclude other instances of actual antagonistic assertion and denial of right."[37] This procedure may be used to establish ownership of or other rights in property, either personal or real. It has been used to obtain declarations of right under deeds,[38] contracts,[39] deeds of trust and separation agreements,[40] leases,[41] and corporate charters.[42] State statutes,[43] city charters,[44] city ordinances,[45] and franchises or licenses[46] have had their constitutionality and the rights conferred by them determined in declaratory judgment actions. Judgments have been obtained declaring parties to be engaged in the unlawful practice of law[47] and optometery.[48] It has also been used to settle church controversies not involving purely ecclesiastical matters or

matters outside the jurisdiction of a court of equity or law.[49] In addition to the above mentioned instances, the procedure has been used in almost every type of legal situation. It cannot be used, however, in criminal cases.[50]

If the action or suit be one in which the court has jurisdiction exclusive of the jurisdiction conferred by the Declaratory Judgment Act, the venue is in the same place as in ordinary actions or suits. However if the sole jurisdiction of the court is under the Declaratory Judgment Act, then the defendant has the privilege of being sued only in the place or places designated by the statute,[51] eight specific and narrowly defined venue limitations.

The procedure for obtaining a declaratory judgment shall be the same as that employed in the ordinary action at law or suit in equity. Thus, for example, the burden of proof is ordinarily the same. The running of the statute of limitations, if one is applicable, or the presence of laches, such as would bar relief in an ordinary action or suit, will ordinarily bar declaratory relief unless the granting of such would prevent later litigation. For example, if the statute of limitations on a written contract had expired, the court would dismiss a declaratory judgment proceeding to construe the contract unless such construction was pertinent to other matters.

It now makes no difference whether one proceeds at law or in equity. In *Chick v. MacBain*,[52] the Supreme Court of Appeals affirmed the trial court's action in overruling a demurrer to a declaratory judgment proceeding, on the ground that the plaintiff was seeking relief in a court of equity in a case where there was an adequate remedy at law. This case was severely criticized[53] on the ground that it in effect destroyed the time-honored and cherished distinctions between law and equity. This critic argued that the legislature had not intended the Declaratory Judgment Act to have this effect for it went into considerable detail to give both courts jurisdiction.

The Supreme Court of Appeals has recently reiterated the rule[54] that if a case be brought properly under the Declaratory Judgment Act that it makes no difference on which side of the court it proceeds. Justice Gregory, after admitting that at common law only a court of equity would have had the power to supervise the church election in question, said:[55] ". . . under the declaratory judgment statutes, there is no separation of law and equity. . . . The procedure may be either on the law side or the equity side. We should not be too meticulous about separating law from equity under this procedure. . . . If a case be brought properly under our declaratory judgment statute, it makes no differ-

ence on which side of the court it proceeds." It is significant that there was no dissent from this holding.

It is submitted that this decision is proper. It is definitely in accord with the current trend to do away with unnecessary formalities if substantial justice can still be given. The case will be heard by the same man; what difference does it make if we call him a "judge" or a "chancellor"? The rights peculiar to the legal or equitable nature of the controversy are still maintained. It should make no difference through which door a petitioner enters the courtroom, so long as he is properly there and the court is in a position to grant relief. The declaratory judgment may well be the first step in Virginia to breach the gap between law and equity.

It is worth noting that the proceeding by notice of motion is particularly adapted to this type of proceeding. The courts have permitted its use without comment.

The courts have also permitted adverse parties to file a joint petition asking for a declaration of their respective rights in a particular thing or controversy.[56] This might eliminate the use of an interpleader action in an appropriate case where the parties are agreeable to such a proceeding.

The Virginia statute is silent on the question of who are the proper parties to the proceeding for a declaratory judgment. The requirements of due process would seem to require the court to decline relief where necessary parties affected were not joined or heard. This is a prerequisite if the result is to be res judicata and serve a practical purpose, for if parties in interest are absent or cannot be joined, additional suits would be likely since such parties would not be bound by the declaration. It is elementary that a person seeking declaratory relief must comply at least with the rules governing joinder of parties in ordinary actions.

Consequential relief is provided for[57] where a party refuses to abide by the declaratory judgment. On the petition being filed, the court, if it deems the petition sufficient, issues a rule or order requiring the recalcitrant party to show cause why coercive relief should not be granted. This makes it possible to obtain affirmative relief without instituting an ordinary action and thus beginning anew as if there had been no declaratory judgment.

The section of the Act on Jury Trial[58] merely supplements the earlier provisions declaring that the procedure for obtaining a declaratory judgment shall be identical with that in the ordinary action at law or suit in equity. The rights of the parties to a jury trial are retained, and it is probable that, as in any ordinary action, the

right to the jury would be deemed waived unless expressly requested or required by due process or statute.[59] The interpretation of written instruments is a question of law for the court and not one of fact for the jury. A provision for submitting the issues in the form of interrogatories will tend to narrow the issues and make the findings of the jury more specific.

It should be remembered that if the issue be of an equitable nature, the findings of the jury are merely advisory. In proceedings which would normally fall under the heading of actions at law, the jury's verdict is final unless it is set aside by the court as contrary to the law and evidence or for some other valid reason.[60] This distinction has taken on added significance since the Supreme Court of Appeals has held that a declaratory judgment proceeding may be on either side of the court regardless of its legal or equitable nature.[61]

Section 8-583 of the Code provides: "The mere pendency of an action or suit brought merely to obtain a declaration of rights or a determination of a question of construction shall not be sufficient grounds for the granting of an injunction."

This section would not apply if there are independent grounds warranting an injunction outside of the mere pendency of the declaratory judgment proceeding, and in such cases the injunction may properly issue. This is demonstrated by the case of *Gloth v. Gloth*.[62] A husband sued his wife for divorce and at the same time requested a construction of a separation contract between the husband and wife and a deed of trust executed in pursuance of this contract. He also asked for an injunction against the enforcement of the contract and deed of trust. The wife, relying on section 8-583, demurred. The court overruled the demurrer and granted the injunction. Thus it will be noted that where there is proper matter for the issuance of an injunction, the request for an injunction and a declaratory judgment may be joined.

All matters of costs arising out of a declaratory judgment suit or action are left to the sound discretion of the court, to be guided only by the particular circumstances of each case.[63]

The Code further provides[64] that declaratory judgments, orders and decrees may be reviewed on writ of error or appeal. This means that in the appellate court, as in the trial court, the procedure is the same as in an ordinary action at law or suit in equity.

The appellate court may invoke the statute on its own volition. This is a point of great importance. It is done to escape procedural or other difficulties so as to decide the case upon its merits, instead

of remanding it for a new trial. It may be done only in cases which are properly before the Supreme Court of Appeals; the record must contain all the evidence for the Court cannot treat it as a trial de novo and accept new evidence. Several cases in which the court has so invoked the statute are worth noting.

In *Schmelz Bros. v. Quinn,*[65] the trial courts were in conflict as to whether trustees under a deed of trust who are appointed by the court to act as commissioners at a judicial sale of the land, were entitled to the commission set forth in the statutes or in the deed of trust. The appellant, who had appealed to the Court on other grounds, had won on this point in the trial court and so had no ground of complaint. On the petition of *both* parties, the Court decided the question, holding that the ruling was possibly warranted under the then recently adopted Declaratory Judgment Act.

In *Cohen v. Rosen,*[66] the Supreme Court of Appeals was asked to construe a lease. The trial court had sustained a demurrer on the ground that an adequate remedy was available at law. The Court held that the case presented but a single question; it admitted that there was an adequate remedy at law, but disregarded the question raised as to procedure and decided the case on the merits, relying on the Declaratory Judgment Act in so doing.

Section 90 of the Virginia Constitution declares that "The court may, but need not remand a case for a new trial. In any civil case, it may enter final judgment, except that judgment for unliquidated damages shall not be increased or diminished." Section 8-493 of the Code further authorizes the appellate court in civil cases to "render final judgment upon the merits whenever, in the opinion of the court, the facts before it are such as to enable the court to attain the ends of justice."

The utilization of the Declaratory Judgment Act in such instances is warranted, for to end litigation is generally a boon to the litigants and always desirable in the public interest. Note well that it is done *only* in such cases where the court has *all the facts* before it so that it is not thereby transforming itself into a trial court outside the scope of its jurisdiction.

Section 8-585 of the Code provides: "This act is declared to be remedial; its purpose is to afford relief from the uncertainty and insecurity attendant upon controversies over legal rights, without requiring one of the parties interested so to invade the rights asserted by the other as to enable him to maintain an ordinary action therefore; and it is to be liberally interpreted and administered with a view to making the courts more serviceable to the people."

This mandate has been applied equally in the trial and appellate courts.

STANLEY H. MERVIS

FOOTNOTES

1. BLACK'S LAW DICTIONARY, (3rd ed. 1944).
2. 15 & 16 Vict., c. 86, s. 50.
3. ACTS OF GENERAL ASSEMBLY, 1922, p. 902; VA. CODE §8-578 through §8-585 (1950).
4. American Nat'l Bank, etc. v. Kushner, 162 Va. 378, 174 S. E. 777 (1934).
5. Chick v. MacBain, 157 Va. 60, 160 S. E. 214 (1931).
6. 15 Va. L. Rev. 79 (1928).
7. Anway v. Grand Rapids Ry., 211 Mich. 592, 179 N. W. 350 (1920). This case was overruled by Washington-Detroit Theater Co. v. Moore, 249 Mich 673, 229 N. W. 618 (1930).
8. 144 Va. 113, 131 S. E. 217 (1926).
9. VA. CODE §8-578 (1950).
10. Liberty Warehouse Co. v. Grannis, 273 U. S. 70 (1927); Willing v. Chicago Auditorium Ass'n., 277 U. S. 274 (1928).
11. Nashville, C. & St. L. Ry. v. Wallace, 288 U. S. 249 (1933).
12. U. S. CONST., ART. III, Sec. 2.
13. 28 U. S. C. A. 400.
14. VA. CODE §8-578 (1950).
15. Hagan v. Dungannon Lumber Co., 145 Va. 568, 134 S. E. 570 (1926).
16. Jones Transfer Co. v. Commonwealth, 174 Va. 184, 55 S. E. 2d 628 (1939).
17. **Id.** at 194, 55 S. E. 2d at 639.
18. 147 Va. 460, 137 S. E. 488 (1927).
19. **Id.** at 462, 137 S. E. at 491.
20. Jones Transfer Co. v. Commonwealth, 174 Va. 184, 5 S. E. 2d 628 (1939).
21. VA. CODE §8-578 (1950).
22. Norfolk & W. R. R. v. Commonwealth, 162 Va. 314, 174 S. E. 85 (1934).

23. Jones Transfer Co. v. Commonwealth, 174 Va. 184, 5 S. E. 2d 628 (1939).

24. Prentis v. Atl. Coast Line Co., 211 U. S. 210, 225 (1908).

25. VA. CODE §8-578 (1950).

26. Brinkley v. Blevins, 157 Va. 41, 160 S. E. 23 (1931). (Plaintiff, who was not a lien creditor, asked that a deed be set aside on the ground that it was not properly recorded. Under §55-96 an unrecorded deed is valid as to creditors who are not lien creditors.. Plaintiff, therefore had no interest.)

27. Chick v. MacBain, 157 Va. 60, 160 S. E. 214 (1931).

28. Yukon Pocahontas Coal Co. v. Ratliff, 175 Va. 366, 8 S. E. 2d 303 (1940).

29. American Nat'l Bank, etc. v. Kushner, 162 Va. 378, 174 S. E. 777 (1934).

30. UNIFORM DECLARATORY JUDGMENT ACT §6.

31. VA. CODE §8-580 (1950).

32. VA. CODE §8-585 (1950).

33. Andrews v. Universal Moulded Products Co., 189 Va. 527, 53 S. E. 2d 837 (1949).

34. 31 Mich. L. Rev. 180 (1930).

35. Chick v. MacBain 157 Va. 60, 160 S. E. 214 (1931).

36. American Nat'l. Bank, etc. v. Kushner, 162 Va. 378, 174 S. E. 777 (1934).

37. VA. CODE §8-578 (1950).

38. E. g. Barley v. Pulaski A. Coal Co., 155 Va. 656, 156 S. E. 372 (1931); Craig-Giles Iron Co. v. Epling, 135 Va. 74, 115 S. E. 534 (1922). It has been suggested that the declaratory judgment would be a good method of determining rights under restrictive covenants in deeds. See 15 Va. L. Rev. 85, 86 (1928).

39. Sydnor, H. & C. v. Sydnor, 172 Va. 545, 2 S. E. 2d 309 (1939).

40. Gloth v. Gloth, 154 Va. 511, 153 S. E. 879 (1930); **accord**, Portsmouth Ass'n. v. Hotel Alliance, 183 Va. 757, 33 S. E. 2d 218 (1944).

41. Antrim v. Parker, 158 Va. 1, 163 S. E. 71 (1932); Cohen v. Rosen, 157 Va. 71, 160 S. E. 36 (1931).

42. Powell v. Craddock-Terry Co., 175 Va. 146, 7 S. E. 2d 143 (1940).

43. Moore v. Moore, Auditor, 147 Va. 460, 137 S. E. 488 (1927).

44. City of Danville v. Ragland, 175 Va. 27, 7 S. E. 2d 121 (1940).

45. Brooks Transportation Co. v. Lynchburg, 185 Va. 135, 37 S. E. 2d 857 (1946).

46. Brumley v. Grimstead, 170 Va. 340, 196 S. E. 668 (1938).

47. Richmond Ass'n. of Credit Men v. Bar Ass'n., 167 Va. 327, 189 S. E. 153 (1937); Commonwealth v. Jones & Robins, Inc., 186 Va. 30, 41 S. E. 2d 720 (1947).

48. Ritholz v. Commonwealth, 184 Va. 339, 35 S. E. 2d 210 (1945).

49. Carr v. Union Church, 186 Va. 411, 42 S. E. 2d 840 (1947).

50. Commonwealth v. Doss, 159 Va. 968, 167 S. E. 371 (1933).

51. VA. CODE §8-579 (1950).

52. 157 Va. 60, 160 S. E. 214 (1931).

53. 18 Va. L. Rev. 338 (1931).

54. Carr v. Union Church, 186 Va. 411, 42 S. E. 2d 840 (1947).

55. **Id.** at 417, 418, 42 S. E. 2d at 847.

56. American Nat'l. Bank, etc., v. Kushner, 162 Va. 378, 174 S. E. 777 (1934).

57. VA. CODE §8-581 (1950).

58. VA. CODE §5-582 (1950).

59. BURKS, PLEADING AND PRACTICE, §242 (3rd ed. 1934).

60. **Id.** at §§297, 298.

61. Carr v. Union Church, 186 Va. 411, 42 S. E. 2d 840 (1947).

62. 154 Va. 511, 153 S. E. 879 (1930).

63. VA. CODE §8-584 (1950).

64. VA. CODE §8-580 (1950).

65. 134 Va. 78, 113 S. E. 845 (1922); **cf.** Craig-Giles Iron Co. v. Epling, 135 Va. 74, 115 S. E. 534 (1922).

66. 157 Va. 71, 160 S. E. 36 (1931).