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Real and Personal Property (Survey of Virginia Case Law - 1955)

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The nature of the 1955 property cases spreads from adverse possession to trespass, with only two cases presenting relatively similar factual and legal situations. In one case concerning joint bank accounts a new trend is visible; the other cases merely reaffirm well settled principles. One or two cases present unique, once-in-a-lifetime factual situations which make for enjoyable as well as instructive reading.

Adverse Possession. Virginia's sole adverse possession case[1] of 1955 involved an interpretation of the State's philosophy regarding the forfeiture of land for tax delinquency. The land involved had been occupied adversely for more than forty years and the parties who so held the land brought a suit to quiet title. They were met with the defense on the part of the record owner that his own failure to pay taxes upon the land had resulted in the forfeiture of said land to the Commonwealth, thus breaking the continuity of possession. In affirming the lower court's decision in favor of the adverse possessor the Court elucidated the evolution of Virginia's modern view of tax forfeiture; the court expressly stated that *Armstrong* v. *Morrill*[2] which interpreted an 1835 tax statute was inapplicable. The Armstrong case held that a forfeiture of land to the state constituted a break in the continuity of possession requisite for adverse possession even though the land in question was later redeemed.

The Court in an instructive manner pointed out that the state's former policy of actual forfeiture for tax delinquency was a matter of necessity, for the state in its earlier history was "land rich" but "tax poor" and by forfeiture the land could be placed in the hands of a "paying" taxpayer. The Court, citing C. J. S.[3] with approval, stated that Virginia has long allied itself with the view that where there is no forfeiture of title in fact but a permanent lien instead, that there is no breach in continuity of possession. In passing, the Court pointed out that it did not lie in the mouth of the defendant to seize upon his own tax negligence to

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[1] Thomas v. Young, 196 Va. 1166, 87 S.E.2d 127 (1955).
[2] Armstrong v. Morrill, 14 Wall (U.S.) 120, 20 L.Ed. 765 (1871).
[3] 2 C.J.S., *Adverse Possession,* §152(e) (1936).

profit by the non-running of the statute of limitations against the State, thus benefiting himself alone, for the State was not a party to the suit.

Covenants. *The Virginia Reports* are replete with cases involving covenants for support in which realty is deeded away by grantors. *Stroch* v. *MacNicholl*[4] forms an exceptional case of this type upon the extreme facts presented. Although the lower court refused a rescission of the conveyance, the Supreme Court held that a material breach of the covenant for support, which was the major consideration, entitled the grantor to a recission. Upon the facts of the case no other decision was possible. The grantor, an artistic and cultured lady of eighty, conveyed her home, valued at around $25,000, to her sister in return for support and maintenance. In the course of time discord arose and the younger sister ceased to feed or care for her grantor and in addition forced her to perform unseemly household chores and publicly insulted her in the presence of her art students. During a period of illness the younger sister left Mrs. Stroch in bed for several days without feeding her or administering to her needs—friends came in to care for her.

The court in granting a recission said that in the light of the blood relationship and the mode of life of the parties that the "evidence must be justly weighed and the covenant liberally construed in favor of the grantor." [5]

Two cases involving covenants which were restraints on use occurred last year; in both instances the covenants were upheld. In one case[6] a grantee without notice of the covenant sought to have it set aside as a restraint on alienation—a ground which the court said was not well founded—or in the alternative because it did not pertain to land retained by the grantor but to land conveyed. The court held the covenant to be personal, hence the second ground was inapplicable. The covenant involved the use of hotel-theater property, the theater occupying one-sixth of the building area. The grantors forbade the use of the theater portion as a theater except with their consent. Previously they had

4 196 Va. 734, 85 S.E.2d 263 (1955).
5 *Id.* at 744.
6 Carneal v. Kendig, 196 Va. 605, 85 S.E.2d 235 (1955).

enjoyed a theater monopoly in the town and wished to continue to do so although they were shifting the area of their operations to a new building. Under these circumstances the court found no reasonable restraint of trade or use of the hotel-theater property.

The second case[7] involved a declaratory judgment action instituted to ascertain the rights of assignees of the original covenantor and covenantee of a 1921 restrictive covenant. Plaintiff's assignor-covenantor agreed not to operate a wood pulp business upon certain Hopewell property (consisting of 389 acres in the hands of the present plaintiff) in order to assure an adequate supply of pine pulp to the defendant's assignor. The plaintiff bought the land with notice of the original covenant.

The Court refused to pass on whether or not the covenant ran with the land, saying that in any event it was an enforceable equitable right. The Court cited a long line of its own cases in which it had ruled in favor of enforcement when the covenant was reasonable when made and not against public policy even though the covenant might be detrimental to one of the immediate parties.

Damages. From the human interest angle *Mac Pherson* v. *Green*[8] is possibly the most engrossing personal property case of the year. The background of the case involves bitter political rivalry, "name-calling" complete with unkind publications of slanted material, a lost election, and a resulting suit in detinue. The party who lost the election sued the winner to recover a letter and damages for the unethical use thereof by the victorious party. The Court treated the action as a motion for judgment under the New Rules. Plaintiff claimed $10,000 damages without specifically stating his grounds for so doing and also sought $50,000 in special damages. The latter was struck from the pleadings upon the defendant's motion. Following this action the plaintiff sought and received a change of venue upon his affidavit that he "believed" he would not be given a fair trial in the vicinity of the original controversy. The Court held this to be error—no proof was given that a fair trial could not be had.

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[7] Hercules Co. v. Continental Can, 196 Va. 945, 86 S.E.2d 128 (1955).
[8] 197 Va. 27, 87 S.E.2d 785 (1955).

The lower court awarded a verdict in favor of the plaintiff, granting him the return of the letter and $300 damages, said damages being a compensation for plaintiff's expense in publishing a refutation to the implied charges made against him by the wrongful initial publishing of the letter. Upon appeal the Court held that plaintiff was entitled only to the return of his letter saying:

> To allow recovery for damages flowing from wrongful publication of the letter would be to convert the plaintiff's action of detinue into one for defamation of character or for libel and slander for words written or spoken of a candidate for public office, in which action the issues would bear no relationship to those in a detinue action.[9]

Aside from the wealth of human wisdom to be gleaned by "reading between the lines" of this case, the case is instructive along procedural lines. Further, the Court politely but firmly reprimands the parties for pursuing their grievances through the legal machinery of the state and indicates its disapproval by dividing the costs both in the trial court and the Supreme Court. In passing the Court had this to say:

> We have not previously read a court procedure like it. We hope that we shall not have to do so again. It was far removed from the order and dignity that should attend the judicial process in its effort to find the truth and establish justice.[10]

Virginia had one other case involving damages in the last calendar year—*Preston Mining Company* v. *Matney*.[11] This case represented a second cycle of litigation between the same parties; prior litigation determined that the Company had no right to use a private road of Matney's in coal hauling operations. The present litigation involved the measure of damages which Matney could recover for such use after the parties had agreed by contract to let the use continue during the prior litigation which at one stage involved a temporary injunction. The trial court awarded damages on the theory that the defendant was a tres-

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[9] 197 Va. 27, 33, 87 S.E.2d 785, 789 (1955).
[10] *Id.* at 31, 87 S.E.2d at 789.
[11] 197 Va. 520, 90 S.E.2d 155 (1955).

passer following the ascertainment of the rights of the parties. The Supreme Court in reversing and remanding stated that the defendant was an "occupant by consent" and that the proper measure of damages was the fair value of the use, not the actual damage done the property as per defendant's contention.

From this it can be seen that the Court adopted its own standard for settling the damages and refused to adopt either the plaintiff's or defendant's view. Under the plaintiff's view the measure of damages would have been "the fair and reasonable value of the benefits received by the defendant by reason of its use of the road." [12]

Easements. Two cases, each involving a different type of easement, were presented to the Supreme Court last year; a third case was presented in the U. S. Court of Appeals, Fourth Circuit. One of the former might be termed a nuisance suit.[13] Following personal differences the plaintiffs sought an injunction to prohibit use of a road which defendants or their predecessors had used continuously since 1909. The lower court refused the injunction, and the Supreme Court affirmed this action holding that where a reciprocal (though unrecorded) easement appurtenant was created by grant that there was no need to pass upon the issue of whether or not an easement of necessity existed.

In the other state suit,[14] the issue involved was of much greater legal significance. The suit was a declaratory judgment action instituted by the State Highway Commission to ascertain its right to lower the grade of a rural road without compensating a water company which would be forced to relocate its pipe line situate in the roadbed. The pipe line had been installed in 1897 pursuant to an easement granted the water company's predecessor in interest. The lower court felt that the water company had a property right which entitled it to compensation. The Supreme Court reversed this holding and in addition stated that the road change did not constitute an additional servitude upon the fee owner of the roadbed, being merely a change in degree.

[12] *Id.* at 523, 90 S.E.2d at 157.
[13] Harless v. Malcolm, 197 Va. 56, 87 S.E.2d 817 (1955).
[14] Anderson v. Water Company, 197 Va. 36, 87 S.E.2d 756 (1955).

The case is recommended for its instructional discussion of the entire nature of public versus private easements.

The third easement case[15] arose in the Western District of Virginia and formed part of the to-be-expected litigation concerning the Kerr Dam and Reservoir construction on the Roanoke River. The United States brought the initial proceeding to condemn flowage easements for intermittent flooding of the land involved, the fee to be left in the owner. The District Court gave judgment in favor of the landowners whereupon the United States appealed. Upon appeal the case was reversed on the measure of damages. The lower court permitted a full fee simple recovery for the land involved; the Court of Appeals allowed a recovery of the difference in the value of the land with and without the easement. By way of dictum the Court said that if there were a future change in the dam the landowners then would be entitled .to additional compensation.

Eminent Domain. Having discussed the previous case under easements, that leaves only one case for consideration under the eminent domain classification, although both cases are basically eminent domain ones. *Virginia Electric and Power Company* v. *Pickett*[16] involved the action of condemnation commissioners in awarding damages for a right of way through the best fields of two separate farms. The case resulted in a four to two decision for affirmance, the split occuring over whether or not a quotient verdict had been reached by the commissioners and whether or not one of the awards was excessive in the light of the evidence. The case is most instructive in depicting the framework within which condemnation commissioners operate and the latitude of discretion which is accorded them.

Joint Bank Account. There is much confusion and conflict throughout the country as to the nature of a joint savings bank account with survivorship. The Supreme Court of Appeals was presented with one case[17] calling for a direct construction of the problem. The Court in an honest appraisal of the confused state of the law on this issue said:

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[15] United States v. 2,648.31 Acres of Land, Etc., 218 Fed.2d 518 (1955).
[16] 197 Va. 269, 89 S.E.2d 76 (1955).
[17] King, Ex'x v. Merryman, Adm'x, 196 Va. 844, 86 S.E.2d 141 (1955).

> For more than a half century, the courts of this country have struggled to discover whether a joint deposit bank account with an extended right of survivorship, sometimes called a 'poor man's will', is a gift, a trust, a contract, or joint tenancy, or a testamentary disposition.[18]

After this forthright recognition of the problem, however, the Court refused to take a concrete stand on the issue. Without adopting any theory of construction which could serve as a future guide the Court held that the facts did not constitute sufficient evidence on the part of the deceased joint tenant to indicate an intent of survivorship.

It is respectfully submitted that the Court in this instance made an equitable factual decision, but left the responsibility for creating necessary presumptions in this type of case at the legislature's door.

Lease. In a declaratory judgment action[19] involving the right to remove heavy industrial improvements from realty the Court was called upon to construe the terms of an ambiguous lease. The Court admitted extrinsic evidence to ascertain the intent of the parties as expressed in two ambiguous instruments of contract. The Court listed three possibilities: a lease, a lease with option to purchase, or a contract of conditional sale of realty. After holding a conditional sale of realty was the original intent of the parties, the Court reversed and remanded the case for distribution of the improvements according to the tenor of the contract, not according to the law of fixtures.

Partition. Three partition cases arose last year; two of which involved reference to statutory requirements[20] essential to the validity of sales in lieu of partition. By statute courts of equity are given jurisdiction to decree the sale of land involved in a partition suit only *after* it has been judicially determined that partition in kind is not feasible.

In one case after finding partition in kind was practical the lower court nevertheless permitted the sale of the half interest

[18] *Id.* at 849, 86 S.E.2d at 143.
[19] Bolling v. Hawthorne Coal and Coke Company, 197 Va. 554, 90 S.E.2d 159 (1955).
[20] Va. Code §8-690 and §8-692 (1950).

of a party who had become *non compos mentis* during the litigation, said party being represented by a guardian *ad litem.* Subsequent conveyances occurred. The instant suit[21] was instituted to attack the decree collaterally; in this action the lower court sustained a demurrer, but the Supreme Court reversed and remanded on the grounds that the sale was void, for there had been non-compliance with the pertinent statutes. The Court states two pre-requisites to a sale: (1) record evidence that partition is not conveniently possible, and (2) proof that the interest of the partition parties will be advanced by such a sale.

The case of *Nichels* v. *Nichels*[22] affirmed a lower court decision ordering a sale of a small farm when partition in kind was found impossible,[23] although an attempt had been made to divide it–two separate commissions had been appointed. The Court stated that every partition suit turned upon the issue of whether or not partition could be "conveniently made" and that the second step of sale "turned upon the judicial determination from the record" [24] that such was the fact.

> . . . [T]he power of the court to allot part of the land and sell the residue or to sell the entire subject and distribute the proceeds is dependent upon the further judicial determination from the record that "the interest of those who are entitled to the subject or its proceeds will be promoted" by such disposition.[25]

The third partition suit[26] involved a family dispute between two brothers and a sister who inherited two adjoining lots from their mother. For a period of years the three acted as joint owners and in unison executed a note for necessary repairs. After repeated insistence upon partition, one brother came forward with a 1919 writing by which allegedly his parents had deeded him one lot outright for a stated consideration of $5,000. The evidence was most conflicting as to the genuineness of the document; it was held that there was no merit to the claim of

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[21] Cauthorn v. Cauthorn, 196 Va. 614, 85 S.E.2d 256 (1955).
[22] 197 Va. 498, 90 S.E.2d 116 (1955).
[23] The land consisted of 22.5 acres of land, much of which was steep, rocky terrain and there was but one dwelling house upon the land.
[24] 197 Va. 498 at 502, 90 S.E.2d 116 at 118.
[25] *Id.*
[26] Reese v. Reese, 196 Va. 1028, 87 S.E.2d 133 (1955).

equitable sole ownership of the one lot, and the lower court's judgment was affirmed.

Trespass. The one trespass case[27] of the year presented an entertaining factual situation: a landowner and a fisherman disagreed over the right of the latter to fish in a stream flowing through the former's property. The fisherman claimed the right to fish on the theory that the stream was navigable and the property of the Commonwealth. The landowner claimed that the stream was non-navigable which meant that he owned the bed as a riparian owner. The landowner traced his title to a colonial grant recorded between 1749 and 1751, said grant including ownership to "rivers, waters and water courses." Since Virginia has not expressly changed the common law ownership to bed of streams so as to affect grants made prior to 1802 in the western part of the State, the situs of the disputed stream, the landowner prevailed. The fisherman failed to carry the burden of proof that the stream was navigable. The landowner was granted a permanent injunction, thus giving him adequate relief against the party who insisted he intended to fish the stream when the lower court offered to save him the expense of defending the suit if he would agree to desist from his trespass.

Summary. The property cases of 1955 show no distinct new trends, but rather reiterate basic doctrines as would be expected in an older settled state, long conscious of property rights. It is interesting to note that the range of doctrines presented by the case material stretched from the English common law doctrine concerning non-navigable waterbed rights to modern statutes concerning partitioning of land.

It is to be expected that all the issues before the court in the past year may be presented by new parties as the future unfolds. It is respectfully submitted that the joint bank account case may be the focal point either of new legislation or of litigation which will necessitate a growth in the law.

John Lee Darst

[27] Boerner v. McCallister, 197 Va. 169, 89 S.E.2d 23 (1955).