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Procedure, Section I - The Pleading Stage (Survey of Virginia Case Law - 1955)

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PROCEDURE

Section I—The Pleading Stage

Service of Process. Immunity of Non-Resident Witness. In *Davis* v. *Hackney*[1] the Supreme Court of Appeals extended the doctrine of immunity from service of process with regard to non-resident witnesses. In this case one Hackney sought to quash service of process upon himself and service of attachment upon his automobile. Hackney was a resident of Tennessee who was summoned to appear as a witness in a criminal proceeding in Virginia. Hackney accepted a subpoena which was not issued or served in compliance with the Uniform Act relative to out of state witnesses.[2] Immediately after the criminal hearing, service of process was had upon Hackney in a civil proceeding and his automobile was attached. Davis, the plaintiff in the civil proceeding, contended that the Uniform Act[3] displaced the common law rule, and that even should the Act be construed as in furtherance of the common law, the immunity should not extend to the automobile as this would result in a miscarriage of justice. The Court in affirming the trial court's opinion ruled in favor of Hackney and held that the Uniform Act was passed in furtherance of the common law and that his automobile should likewise be free from attachment in this instance.

There should be no quarrel with this decision. In *Wheeler* v. *Flintoff*[4] (1931) it was held that a non-resident party to a criminal prosecution was exempt from civil process. Similarly, it had long been the rule in Virginia that non-resident witnesses are immune from service of process while attending court.[5] It would appear inequitable to cast aside a doctrine of such long standing where a non-resident witness has waived strict performance with the statute.

The decision affords Virginia authority for the extension of personal immunity to the non-resident's property present in the forum, necessary for his attendance in court. As to the witnesses'

[1] 196 Va. 651, 85 S.E.2d 245 (1955).
[2] Va. Code §19-242, 19-252 (1950) (Supp. 1954).
[3] *Ibid.*
[4] 156 Va. 923, 159 S.E.2d 112 (1931).
[5] Commonwealth v. Ronald, 4 Call. (8 Va.) 97 (1786).

clothes there has been substantial unanimity among the courts in holding such immune;[6] the closer issue arises with respect to automobiles. The Virginia Supreme Court of Appeals, however, in a modern approach, likewise held Hackney's automobile immune from attachment. In practical effect, the Court reasoned since a horse was considered a "necessary" in 1880,[7] that an automobile in this age should receive the same treatment.[8]

In *Reese* v. *Reese*[9] there was involved an attempt to collaterally assail service of process. The appellant in a partition suit had sought to set aside a prior judgment against him on the basis that he was in New York or Kentucky when the judgment was rendered. Counsel intimated that the officer making the service and return should be "acquainted with the facts in the case" [10] and should have the return corrected due to his alleged mistake in making substituted service. Once again the Court was forced to drive home to counsel that in Virginia a judgment once rendered cannot be collaterally assailed.[11]

Jurisdiction. Although several minor issues concerning jurisdiction in courts of law were disposed of by the Supreme Court of Appeals in 1955,[12] the troublesome area appeared to involve equity jurisdiction. In line with the Virginia view[13] that the courts of equity, having once acquired jurisdiction, do not lose it because jurisdiction of the same matter is given to law courts (unless the statute conferring jurisdiction uses restrictive words), the Court in *Overnite Transportation Co.* v. *Woodfin*[14] preserved

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[6] Bridges v. Sheldon, 7 Fed. 17, 43 (1880).

[7] *Ibid.*

[8] See 2 W. & M. Rev. Va. L. 180 (1955) for a case comment involving Davis v. Hackney.

[9] 196 Va. 1028, 87 S.E.2d 133 (1955).

[10] *Id.* at 1038, 87 S.E.2d at 138.

[11] The futility of counsel's efforts can be further brought out by the fact that Virginia is one of the few remaining states in which the officer's return is conclusive. So even in a direct attack his premise would be weak. Burks, *Pleading and Practice*, §98 (4th Ed.)

[12] i.e. In Lee v. Virginian Ry. Co. the Court disclaimed jurisdiction on the basis that a railway employee seeking damages for breach of contract should exhaust all administrative remedies provided under the Railway Labor Act before resorting to Federal or State courts for relief.

[13] Buchanan v. Buchanan, 174 Va. 255, 6 S.E.2d 612, 621 (1940); 1 Bartons Ch. Pr. (2 ed.), pp. 60-1.

[14] 196 Va. 747, 85 S.E.2d 217 (1955).

injunctive relief in the face of a statute[15] which provided the legal remedy of fine or imprisonment for the offense of a common carrier's charging a lesser freight rate than that fixed by the State Corporation Commission. The defendant in demurring admitted violating the statute but contended that the plaintiff had an adequate remedy at law, namely, punishment for the misdemeanor by statute. In overruling the demurrer, the Court placed emphasis upon the threatened invasion of the right of franchise.[16] Thus, where valuable property rights are threatened with interference, the criminal remedy of the act is considered as separable from injunctive relief in order to prevent a multiplicity of suits.[17]

In *Cauthorn* v. *Cauthorn*,[18] it was determined that where property is partitionable in kind, the jurisdiction of equity ceases with regard to sale of the land. This result is predicated upon the fact that the statute[19] which authorizes a court of equity to sell land in a partition suit requires that it be judicially determined that partition in kind cannot conveniently be made. Therefore, in light of the statute, a sale which had been made by the equity court of an incompetent's interest in property which was determined on record as partitionable in kind was deemed void for lack of jurisdiction. It was further held that strict compliance with statutory provisions must be had since equity has no inherent jurisdiction to order a sale of land for the purpose of partition.

Venue. In *MacPherson* v. *Green*[20] an action in detinue was removed under Virginia Code 8-157, "for good cause shown." Removal was granted on the grounds that the plaintiff "verily believe[d]" that such prejudice existed against him "in the minds of prospective jurors" [21] of the Circuit Court of Arlington County that he would not be given a fair and impartial trial. On appeal the removal was held to be reversible error. The Court reiterated its position[22] that a conclusion or mere belief of a party that he will not receive a fair trial is not sufficient basis

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[15] Va. Code §46-2 (1950).
[16] Turner v. Hicks, 164 Va. 612, 180 S.E.2d 543 (1935).
[17] 196 Va. 747, 750, 85 S.E.2d 217, 219 (1955).
[18] 196 Va. 614, 85 S.E.2d 256 (1955).
[19] Va. Code §8-690 and §8-692 (1950).
[20] 197 Va. 27, 87 S.E.2d 785 (1955).
[21] *Id.* at 29, 87 S.E.2d at 787.
[22] Boswell v. Flockhart, 35 Va. (8 Leigh) 364 (1837).

to justify change of venue in a civil action. Facts and circumstances must be sworn to that a fair trial cannot be had; and since the record on appeal showed no such evidence, removal was denied.

Detinue v. Libel. Also present in the *MacPherson*[23] case was an example of the fatality of improper pleading at law. The plaintiff had been a treasurer of Arlington County and was running for re-election. A banker sent the plaintiff a letter referring to an enclosed check which was purportedly in payment for fees for effecting loans. The plaintiff entrusted the letter to a friend who wrongfully gave the letter to the defendant, the plaintiff's opponent in the election. The defendant then mailed circulars containing excerpts from the letter to voters and charged that the plaintiff was using public office for private gain. The plaintiff attempted to rebut the charges with advertisements in the local papers, but he lost the election. The court on appeal held for the plaintiff in the detinue action. That is, he received the letter back. However, no damages were allowed since detinue is a possessory action for the recovery of specific personal property and damages *for its detention.*[24] (Emphasis added.) Here the damages sought were for the *misuse* of the letter via publication and not its detention. Therefore the plaintiff should have proceeded under an action for libel and slander, in which case the issues would have been entirely different. It appears from the record that the plaintiff initially included in his declaration an action for slander which was stricken upon objection; had he appealed on this basis, the possibility of recovery probably would have been more favorable. In any event this case points out to practitioners that remnants of strict common law "categorizing of actions" are still evident in Virginia despite the proposed flexibility of "Notice Pleading", provided for in the Rules of Court.

Joinder of Breach of Warranty and Negligence. Although the fourth edition of Burks *Pleading and Practice* (1952) fails to mention the *duPont*[25] case, in which there was held to be proper joinder of negligence and breach of warranty, the question posed

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[23] 197 Va. 27, 87 S.E.2d 785 (1955).
[24] Burks Pl. & Pr., 4th Ed. §125, p. 239.
[25] E. I. duPont de Nemours and Co. v. Universal Moulded Products Corp., 191 Va. 525, 62 S.E.2d 233 (1950).

by the *duPont* case concerning possible misjoinder should be of significance to Virginia lawyers. That question is, has the Supreme Court of Appeals relaxed its position with regard to joinder of tort and contract? The issue was partially sidestepped in the *duPont* case, the court laying much emphasis on the point that the gravamen of breach of warranty sounds in tort. As to how far this trend will continue, one can but speculate. The only clue which we have in the *duPont* case is general in nature. The Court states:

> In Virginia, the distinction between common law forms of actions has largely disappeared since the adoption of our notice of motion statute . . . In the interpretation of that statute we have adopted a liberality of procedure.[26]

In a recent case,[27] however, negligence and breach of warranty were joined and there was no mention of the *duPont* case or the point involved. Either counsel were not cognizant of the *duPont* decision, or they were resigned to the holding and saw no basis for distinction. In *Gleason Co.* v. *International Harvester and Richardson*[28] (1955), the court in its decision states "Harvester was neither *negligent* nor guilty of a *breach of contract.*" (emphasis added) At first blush it would appear that the Court was condoning joinder of tort and contract. Perhaps incorrect terminology was used and "breach of contract" as described in this case was meant to cover only breach of warranty.

Regardless, it is submitted that joinder of tort and contract may be permissible in the not too distant future in Virginia. Though the editors of *Burks* in 1952 did not feel that the *duPont* case was worthy of mention, the decision has undoubtedly left an indelible impression on many Virginia practitioners. In any event, it is submitted that the *Gleason* case probably affords no more than an echo for the *duPont* holding, and it can safely be concluded that those practitioners who choose to join tort and contract beyond breach of warranty and negligence will at least be treading on shaky ground.

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[26] *Id.* at 534, 62 S.E.2d at 236.

[27] Gleason v. International Harvester and Richardson, 197 Va. 255, 88 S.E.2d 904 (1955).

[28] *Ibid.*

Equity Pleading. Bill of Complaint. Of special interest to Virginia attorneys is the case of *Matney* v. *McClanahan*;[29] for in this instance one can note that any tendency towards "loose pleading" in equity as compared with law will be immediately checked, regardless of the general rule that equity looks to substance rather than form. In *Matney*, the complainant sought removal of a cloud from his title to mineral rights under a tract of land, an injunction to restrain trespass by the defendants, an accounting for the value of coal removed, and recovery of the statutory penalty for mining within five feet of the boundary line. In a lengthy bill of complaint[30] the complainant failed to allege the exact boundary lines of his property and he also failed to state clearly what parts of one of his alleged tracts were involved in a particular interlock. Demurrers were interposed with leave to complainant to file an amended bill "if he be so advised." Instead of filing an amended bill he sought to rely upon his original bill; whereupon the circuit judge dismissed the case. The Court of Appeals affirmed the lower court's decision on the basis that the allegations of the complainant's bill were vague, involved, and uncertain. As a result the defendants were not advised of the area of the property which they were purportedly mining in a wrongful manner.

Under the specific facts of this particular case, one must sympathize with the Court's decision in that the complainant did not amend his bill when given the opportunity. In theory, however, this case raises several questions. Is equity a step behind law in Virginia with respect to "Notice Pleading"? Did the Court actually go further than "scratching the merits" in disposing of the bill? Was the defendant in reality apprised of a controversy involving his property or that of an adjoining landowner, and could a commissioner in chancery have been appointed to iron out preliminary issues? The answers to these questions are matters of conjecture; but it is submitted that with the recent advent of Rules of Court incorporating notice pleading, stringent common law factual construction of the declaration at law were to a great extent abolished by provisions for the more liberal motion

[29] 197 Va. 454, 90 S.E.2d 128 (1955).

[30] The bill of complaint consisted of ten printed pages, to which was attached seventeen exhibits comprising twenty-four additional pages. Perhaps this proved exasperating to the Court since brevity is the sign of good pleading!

for judgment. Under the *Matney* decision it would appear that Rules of Court should be similarly adjusted with respect to the bill of complaint. Else Virginia would be in the anomalous position of having a liberal notice procedure in actions at law; whereas equity, which always has looked to substance rather than form, would be burdened by continuing strictness in the bill of complaint. In any event it is submitted that as a result of the *Matney* decision, it will be more difficult for a pleader to "toe the mark" in a suit to remove a cloud from title than to do so, for example, in a negligence action.

Counterclaim. In *Short* v. *Long*,[31] the defendant had been awarded $400 on a counterclaim in a negligence action. It was alleged by the plaintiff that since the defendant had proved damages of a larger amount, the jury in effect apportioned the damages without consideration of liability. On appeal the judgment was affirmed, on the rationale that the plaintiff could not have been damaged by such a verdict. Therefore, where a counterclaim is now pleaded, it is submitted that as a practical matter juries may apportion negligence in Virginia where the evidence is conflicting. Although the comparative negligence doctrine is not law in Virginia the same result may be reached by the procedure in this case whereby a jury could reason "X was more negligent than Y, therefore we will give Y something—but not as much as he proved since he himself was negligent." In Virginia what would be termed "textwise" a regrettable occurrence, with contributory negligence an absolute bar, may now be turned into mitigation by means of a counterclaim, where a jury is involved.

In *National Bank and Trust Company at Charlottesville* v. *Castle*,[32] the bank, assignee of sums due under a building contract, sought to defeat an attempt by the defendant general contractor, to set-off breaches of the assignor subcontractor's contract which occurred after the assignment. The bank was unsuccessful in its contention; the Court held that the defendant's right consisted of recoupment rather than set-off and therefore should be superior. Although Rule 3:8 of the Virginia Rules of Court has liberalized the pleading of set-off, recoupment, and counterclaim, this case

[31] 197 Va. 104, 87 S.E.2d 776 (1955).
[32] 196 Va. 686, 85 S.E.2d 228 (1955).

points out that substantive differences between the three still exist in Virginia. Particular emphasis was placed in the *Castle* case upon the fact that the transaction was intrinsic in nature providing a diminution of the assignee's claim; therefore recoupment followed. Burks' *Pleading and Practice*[83] states:

> The scope of the Virginia Rules of Court is such as to embrace under the broad term "counterclaim" both set-off and recoupment and to render the statutes and their technical distinctions of far less practical importance.

Though this statement appears to be correct from an adjective point of view, Virginia practitioners should note that under the *Castle* case, the remnants of the substantive common law distinctions between set-off and recoupment are still extant.

Limitation of Actions. *Norwood, Adm'r.* v. *Buffey*[84] involved a construction of Va. Code Section 8-634 (1950) which provides for the one year limitation period for wrongful death actions. The plaintiff had suffered a voluntary nonsuit after the statutory period had expired but reinstated the action on the same day. The question involved was whether the section of the statute providing exclusion of time from the statutory period where the action "for any cause abates or is dismissed without determining the merits" would be construed liberally so as to protect the plaintiff. The Court of Appeals held in favor of the plaintiff in considering the section remedial in nature. Though the word "nonsuit" was not used in the statute, the Court followed a liberal interpretation in considering this procedure within the purview of this section.

The words "for any cause" appear to embrace an extremely wide area in Virginia, for in this case, the abatement was voluntary and on the part of the plaintiff.

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[83] Burks *Pleading and Practice*, Fourth Edition, p. 443.
[84] 196 Va. 1051, 86 S.E.2d 809 (1955).