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VIRGINIA SECTION

THE NOTICE OF MOTION AND MODERN PROCEDURAL REFORM

Introduction

FOR a number of years Virginia has been experimenting to see what preference would be shown if attorneys were given a choice between pleading their cases according to the common law or according to the modern device called notice of motion procedure. The rapidity with which the bar of this state has discarded the common law declaration and has switched completely to the simple motion procedure augurs well for the favorable reception of other procedural reforms which have been developed and tested in the federal courts and in the courts of sister states. It should also encourage the courts of Virginia to give interpretations of the statute creating this procedure which will carry out the objects intended to be accomplished by its enactment.

The notice of motion procedure emphasizes the pleading of the *facts* upon which the plaintiff claims relief, and relieves the plaintiff of the necessity which existed at common law of confining himself at his peril to one single certain legal theory or issue.¹ This change requires a corresponding change in principles for determining what claims must be joined or lost, what claims may either be joined or properly left for separate suit, and the joinder of defendants. It also suggests the need for statutes permitting broad pleading of claims of the defendant and a blending of equity and law procedure.

The concepts limiting the plaintiff in stating his facts should be those adapted to the needs of the motion procedure, not those derived from the superseded common law system.² Some of the

1. Blume, *The Scope of a Civil Action*, 42 MICH. L. REV. 257 (1943). In this article a distinction is drawn between the minimum scope (content) of a civil action at common law which was determined by the original writs and the maximum scope (outer boundary) of a civil action which was determined by five unrelated principles one of which was that the case before trial had to be reduced to a single issue of law or fact.

2. It is stated in footnote 5 of CLARK, HANDBOOK ON CODE PLEADING 436 (2d ed. 1947), "Of course, the extent of the subject-matter of a single case was limited at common law; but it was done by the formulary system, and the use of the cause of action as a *unit of measurement* is a device of the code, developed largely from equity procedure."

Virginia decisions overlooking this fact have continued to use common law rules thereby circumscribing in many ways the broad scope a case should have if the motion procedure were interpreted according to code pleading principles. To use the common law as a *sine qua non* for the interpretation of the motion device is to restrict the very liberality in pleading which this procedure is intended to provide. It results in the substitution of technicality for justice in a great many cases and introduces in another form the outworn distinctions of the formulary system.³

The Joinder of Related Claims

In a recent case, *Felvey v. Shaffer*,⁴ the Supreme Court of Appeals of Virginia set forth a rule which permits a plaintiff in a limited class of cases to go far in pleading his facts as facts without classification of them into counts according to the legal theories involved. In his notice of motion the plaintiff set out in separate paragraphs, but not in separately numbered counts, a claim against the defendant under the insulting words statute and a claim for assault and battery occurring at the same time. The defendant contended the notice of motion was fatally defective for duplicity and moved the court to require the plaintiff to elect on which action he would proceed. The trial court overruled this motion as well as a motion to strike evidence of the assault. The Supreme Court of Appeals affirmed the case holding that it was unnecessary for the plaintiff in stating his case to separate allegations of insulting words from those relating to assault and battery. This could be interpreted to mean that the court considered there was but one broad cause of action in such case with the plaintiff seeking relief by way of several

3. This principle was enunciated long ago in the FIRST REPORT OF HER MAJESTY'S COMMISSIONERS FOR INQUIRING INTO THE PROCESS, PRACTICE, AND SYSTEM OF PLEADING IN THE SUPERIOR COURTS OF COMMON LAW 32 (1851); "The principal objection that has been urged against any alteration in this respect is, that by abolishing forms of action causes of action would become less clearly defined * * *. No merit of distinctness as to causes of action can be attributed to present forms; * * *. It is manifest, therefore, that as the question, whether there is a cause of action or not, must depend upon the facts and not upon the form adopted, the decision of a cause on the merits is not helped by means of these forms of action."

4. 186 Va. 419, 42 S. E. 2d 860 (1947).

legal theories.⁵ However it is clear from the rest of the opinion that the court was unwilling to extend its holding this far. Although allowing the statement to be in composite form the court shifts back to the idea of two causes of action, saying, "In the case before us the two causes of action, one for insulting words and the other for assault and battery, both sound in tort, are closely related and arise out of the same incident. They should have been the basis of a single suit."⁶ Did the Court mean "required" to be determined in a single suit? There is nothing in the notice of motion procedure to prevent such a holding and a great deal of modern thought would dictate this as an appropriate result to prevent multiplicity of suits and unfair advantage to the plaintiff in permitting piecemeal treatment of a problem which should by reason of the relationship of the facts giving rise to it form a unit for purposes of legal treatment.⁷ The possibility of what is essentially a double recovery is apparent no matter how we may try to enmesh the problem with procedural niceties concerning causes of action or forms of action. It may even be the subject of debate whether two satisfactions would have been allowed at common law under such circumstances although it is frequently stated that since two forms of action would be involved this would be the case.⁸

The real difficulty with the above decision is caused by the failure of the court to overrule its earlier holding in *Bowles v. May*.⁹ The notice of motion in that case was a "conglomerate" allegation of trespass, assault, slander and insulting words combined in a single count, and the court upheld a demurrer for misjoinder of causes of action. In distinguishing it from the *Felvey* case the court said, "the real defect in the pleading for which we thought the demurrer should have been sustained, was its failure to state a cause of action 'with reasonable precision'."¹⁰ The plaintiff's re-

5. CLARK, *op. cit. supra* note 2, at 454. The author points out that the cases fall into three groups. Under the first the assault and slander would give rise to distinct causes of action not arising out of the same transaction and not joinable. Under the second there would be different causes of action joinable as arising out of the same transaction. Under the third there would be a single cause of action. He says that courts in the same jurisdiction will vary between the second and third interpretations.

6. 186 Va. 419, 424, 42 S. E. 2d 860, 862 (1947).

7. CLARK, *op. cit. supra* note 2, at 455.

8. CLARK, *op. cit. supra* note 2, at 474. But see BURKS, PLEADING AND PRACTICE § 143 (3d ed. 1934) where the general conception is stated.

9. 159 Va. 419, 166 S. E. 550 (1932).

10. 186 Va. 419, 424, 42 S. E. 2d 860, 862 (1947).

liance in the *Bowles* case on several legal theories, instead of one, for a recovery is the only apparent reason for any lack of precision in the notice of motion. The number of possible theories created a confusion of issues which was unacceptable to the court. This is made clear in the *Bowles* case where the court says, "The defendant was unnecessarily handicapped, in pleading to the notice, in ascertaining the real basis of the plaintiff's cause of action, and in making preparation for his defense."¹¹ From this standpoint the *Felvey* case could now be said to stand for the proposition that a conglomerate statement which only combines two legal theories as a basis for a recovery will be permitted. Actually the approach in the *Felvey* case is modern, based on pleading the facts, while that in the *Bowles* case is antiquated, harking back to the common law ideal of a single certain issue. The following quotation from the *Bowles* case makes this very clear, "The object of all pleading is the production of an issue, and, when it is one of fact, to confine the introduction of evidence to the relevancy of the issue thus made, so that there will be no confusion in the minds of the jury as to the question to be decided."¹² It is interesting to notice that the court found the issues sufficiently formed to hold for the defendant that there was no ground for recovery on the evidence. If the issues were sufficiently formed for the adequate development of the evidence for this purpose, they were sufficiently formed for the notice to have been sustained for all purposes.

The Joinder of Contract and Tort Claims

For the purpose of the case before it, the court in the *Felvey* case correctly substituted the rationale of notice to the defendant and trial convenience for the restricted view of the *Bowles* case which would concern itself with the technicalities of issues as they were formed at common law. Unfortunately the court is unwilling to give complete adherence in all classes of cases to the principle which it uses. Broad notice pleading is allowed "because both causes of action sound in tort." If one had sounded in contract and the other in tort, the court would have applied the common law rule requiring an election. This retention of the common law tort-contract dichotomy seems unfortunate. If the two claims are sufficiently related that it is convenient for them to be tried in the same case,

11. 159 Va. 419, 423, 166 S. E. 550, 551 (1932).

12. *Ibid.*

and if the pleading gives the defendant adequate *factual* notice of the nature of the claims against him, the plaintiff's pleading should be allowed to stand even though at common law the plaintiff would have had to choose at his peril whether he could prove his case in contract or tort.

The case of *Kavanaugh v. Donovan*¹³ furnishes a graphic example of the unfairness which results when this common law rule is applied to the notice of motion procedure. There an action at law was brought against a tenant for waste, the plaintiff landlord proceeding by notice of motion founded both upon contract and tort. The contract claim was based upon an oral agreement to execute a written lease requiring the tenant to make necessary repairs. The defendant went into occupancy, which continued three and one-half years, without signing the lease because he desired a clause releasing him in case his business of rendering dead animals was enjoined. The tort claim was based upon negligence of the defendant and upon wanton waste under section 5509 of the Virginia Code permitting double damages in wanton waste. The defendant's demurrer for misjoinder of causes of action was sustained, and the plaintiff elected to proceed in tort. Nevertheless, the trial court admitted the unexecuted lease in evidence to show the relationship of the parties. It also instructed the jury that the defendant was to use ordinary care and was to return the premises at the end of the lease in substantially the same condition as he found them. The Supreme Court of Appeals held that the trial court correctly required the election, but then by admitting the lease to show relationship (which was already admitted and also shown by the long occupancy) and by the instruction, erroneously allowed the plaintiff to proceed on both causes of action as though no election had been required.

In arriving at its conclusion the court relies almost exclusively upon Burks, *Pleading and Practice*.¹⁴ The court interprets this author as follows, "It is elementary that causes of action in tort and contract should not be joined in the same notice of motion or declaration."¹⁵ It is submitted that the court should not have adopted this restrictive common law rule under the notice of motion procedure without any consideration of the necessity or desirability of its application to that procedure or to the facts of

13. 186 Va. 85, 41 S. E. 2d 489 (1947).

14. § 99 (3d ed. 1934).

15. 186 Va. 85, 93, 41 S. E. 2d 489, 493 (1947).

the particular case. There is no direct reference in Burk's work which justifies the conclusion that the principle against joining causes of action in tort with causes of action in contract applies to the notice of motion procedure. The fact that the section in that work purports to be dealing with the common law action of assumpsit and reads solely with reference to the *declaration* would seem to limit the discussion in that section to the common law action of assumpsit only. This view is strengthened by reference to another section of Burks, *Pleading and Practice*, which reads, "The procedure by motion (after notice) for a judgment is practically what is known as 'code pleading' plain and simple, and is destitute of the formalities usual in common-law actions."¹⁶ Many leading cases in states where code pleading is used dispense with the common law distinction which prevented the joinder of claims in tort and contract.¹⁷

Where a plaintiff cannot tell in advance what the development of his evidence will be, it seems unfair to require him at his peril to choose a single legal theory for his case. If he could have recovered had he chosen the right theory, the substantive law gives him a right which the law of procedure denies him. Frequently it will be at best merely a good guess as to the proper way to frame the action. There is no reason under the notice of motion procedure or under the codes why he cannot state the entire transaction factually in one count, or if desired in two or more counts. The court exercising its administrative function can see that only those issues upon which sufficient evidence has been offered are submitted to the jury.¹⁸

The application by the Virginia Courts of the rule requiring an election between contract and tort causes particular hardship in cases of sales of food containing deleterious substances.¹⁹ The

16. § 173 (3d ed. 1934).

17. Sundeeland, *Joinder of Actions*, 18 MICH. L. REV. 571, 576 (1920).

18. "One of the unfortunate consequences of the close historical connection between rights and remedies, is the inveterate tendency of lawyers and judges to accord to the rules relating to each the same protection and the same measure of professional homage." Sunderland, *supra* note 17, at 571.

19. The requirement of an election is set forth emphatically in *Blythe v. Camp Mfg. Co.*, 183 Va. 432, 32 S. E. 2d 659 (1945); *Kroger Grocery & Baking Co. v. Dunn*, 181 Va. 390, 25 S. E. 2d 254 (1943); *Colonna v. Rosedale Dairy Co.*, 166 Va. 314, 186 S. E. 94 (1936). There was even doubt in Virginia under the old procedure whether breach of warranty was properly classified as a contract action. Certainly the early case of *Birmingham v. Chesapeake and Ohio Ry.*, 98

plaintiff in preparing the case frequently will be unable to determine in advance of proof which theory his evidence will sustain. In view of the confused state of the law on the subject he will also have difficulty in determining what construction of the law the court is likely to adopt. Without unduly prejudicing a defendant the plaintiff should be able to state his facts in terms of a recovery for breach of warranty, for negligence and for negligence per se for violation of a pure food statute, and recover on the basis of the facts which he is able to prove. This enlargement of the case is no more than he is entitled to under the applicable substantive law. The fact that the Virginia courts are unwilling to adopt the modern view making a seller of goods virtually an insurer of the edibility of the food he sells by extending the warranty made on the sale to persons likely to be injured from eating the food, makes it especially important not to place a handicap on the plaintiff requiring him to frame his case so narrowly that he often pleads himself out of court.

Determining the Scope of a Case

If the approach is one of freely determining under a new procedure a sensible factual unit for consideration of the tribunal in a single case, it is much more likely that a common sense determination can be made of such questions as how much must and how much can a plaintiff bring into a single case or action, how far the entire matter is *res judicata* where a part has already been determined, etc.

In this connection it may be asked, "Can you bring an action for defamation under the insulting words statute, then later an action for common law slander and recover in both?" Suppose the first action fails, can you maintain the second action? While there is no duplicity in stating the two counts in one action, apparently the courts would refuse to grant two separate recoveries. In *W. T. Grant Co. v. Owens*²⁰ the court holds the action for insulting words is

Va. 548, 37 S. E. 17 (1900), holds that the proper statute of limitations is not determined by the form of action but by its object. The court says if the thing complained of is an injury to the person, the limitation in *assumpsit* is the same as if the action were in form, *ex delicto*. This case, however, is overlooked in *Colonna v. Rosedale Dairy Co.*, *supra*, which holds that limitation in contract actions is the one properly applicable to the case where personal injury results from eating bad food.

20. 149 Va. 906, 141 S. E. 860 (1928).

treated *entirely* as an action for libel or slander for words actionable per se, except (now removed from the statute) "no demurrer shall preclude a jury passing thereon", and no publication of the words is necessary. It is further held, "In fact the trial of an action for insulting words is completely assimilated to the common law action for libel or slander, and from the standpoint of the Virginia law is an action for libel or slander."²¹ This must mean that the plaintiff has but one cause of action but can state his case in terms of two legal theories and recover upon the one proved. If this is the correct interpretation, it seems an eminently sound decision and one which develops a theory also useful where a single transaction or occurrence may involve legal theories more definitely separable than insulting words and slander, *i.e.*, assault and battery and insulting words where related to the same transaction, as in the *Felvey* case. It is certainly preferable to a recent West Virginia case where the court allowed itself to become hopelessly involved in trying to separate an issue of assault and battery from malpractice in an action against a dentist.²² However it is reasonably certain that the courts in Virginia would not at this time go so far as to hold that only one cause of action is involved in many of these situations.²³

The Joinder of Defendants

The scope of a case which should be treated as a unit can be narrowed by the application of restrictive rules relating to the joinder of defendants. Recognizing this, the code systems adopt a broader joinder of parties defendant than was permitted at common law. Since some change of the common law rule is an integral part of all code pleading it is proper to conclude that reform was in-

21. *Id.* at 914, 141 S. E. at 863.

22. *Wellman v. Drake*, 43 S. E. 2d 57 (W. Va. 1947).

23. In *Cohen v. Power*, 183 Va. 258, 32 S. E. 2d 64 (1944), the plaintiff was hired as a traveling companion of the defendant. When defendant thought plaintiff had stolen jewelry she was discharged and denied access to her baggage, and the plaintiff brought detinue for its return. Before recovery it was returned to her and the action dismissed. Plaintiff then brought an action for breach of contract of employment and recovered. Lastly, she brought an action for common law defamation and for insulting words under the statute. Defendant contended that all matters in the courts for defamation had been adjudicated in the action of detinue and in the action for breach of contract. The Supreme Court of Appeals of Virginia held that the plaintiff could maintain the action for defamation and insulting words applying the narrow test, "would the same facts or evidence sustain both actions."

tended in this respect when the notice of motion procedure was adopted in Virginia. Instead, the Supreme Court of Appeals has adopted the strict common law rules which have little in common with the purpose of motion procedure and result in the unnecessary reversal of decisions on technicalities.

A recent case demonstrates the waste of time and human effort which occurs when that which is one from a factual or transaction standpoint is split asunder by the use of common law rules relating to joinder of defendants and causes of action. In *Norfolk Union Bus Terminal, Inc. v. Sheldon*,²⁴ the plaintiff sued the Terminal Company and its servant Webb (who was also a conservator of the peace) for malicious prosecution arising out of allegedly false charges filed by Webb, 1. that the plaintiff had operated his automobile without a license, and 2. that plaintiff had trespassed on the defendant Terminal Company's property. The trial court ruled that the Terminal Company was not liable for charging the plaintiff with operating the car without a license since its servant Webb was acting in the discharge of his public duties in making the charge. It, however, refused to require the plaintiff to elect which defendant he would proceed against. At the trial the plaintiff was permitted to amend his notice of motion to charge the defendants with obtaining warrants, instead of a warrant, for his arrest on the above charges. It was argued by the Terminal Company that the amendment resulted in a fatal misjoinder of causes of action since the Terminal Company was not liable on the cause of action for charging the plaintiff with operating without a license. The Supreme Court of Appeals of Virginia held that in actions against several parties, whether *ex contractu* or *ex delicto*, all the causes of action must be stated to be joint. Counts against the parties jointly and counts against them severally cannot be joined. When it developed that the plaintiff's causes of action were not the same as to both defendants, the plaintiff should have been required to elect as to which cause of action he would pursue.

The court refused to pass on the question of whether the plaintiff might properly maintain a joint action against the two defendants for damages arising out of the prosecution under the trespass warrant with the right to recover compensatory damages against the defendant Terminal Company and both compensatory and

24. 49 S. E. 2d 338 (Va. 1948).

punitive damages against Webb.²⁵ It would indeed be a refinement of the applicable principles to hold that the difference in measure of damages required the severance of an otherwise joint action, but it shows the ridiculous extreme to which the court might be willing to go to narrow the issues of a case.

A decision such as that in the *Norfolk Union Bus Terminal, Inc.* case would not occur in a modern pleading state nor would it occur under the Federal Rules²⁶ which permit a plaintiff to join persons as defendants, "if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence or series of transactions or occurrences if any question of law or fact common to all of them will arise in the action."

The result of the Virginia decision is that master and servant can be sued jointly where they are charged with a joint tort, but where the plaintiff attempts to combine in addition a related claim against the servant alone as to which the master is not liable, the plaintiff will be required to elect for misjoinder of causes of action. This limitation of the scope of the case can only be understood as an application of common law principles to the notice of motion procedure. It is one of the purposes of this procedure to avoid just such limitations and to have courts treat problems as a whole, not piecemeal.

Set Off and Recoupment and the Scope of a Case

The Virginia statutes on set off and recoupment do not permit sufficient development of the claims of the defendant, related and otherwise, which can be conveniently handled in the same case as the primary claim. While there are Virginia cases recognizing the necessity of preventing a multiplicity of suits by allowing rather extreme interpretations of the present statutes, the court in *Odessky v. Monterey Wine Company, Inc.*²⁷ refuses to go the whole way by the process of judicial legislation. In this case the court refused to permit a defendant, sued for the purchase price of one lot of wine, to plead by way of set off a claim for breach of warranty of

25. What rule would the court feel compelled to apply, in view of the restrictive views shown in the cases cited, where a party has alleged two counts, one for a wilful act, one for negligence? Strict adherence to a theory of pleading as developed in Virginia would require an election, but this seems ridiculous.

26. FED. R. CIV. P., 20 (a).

27. 49 S. E. 2d 330 (Va. 1948).

quality and alcoholic content in the purchase of an earlier lot of wine which the defendant had already paid for. The court considered the claim unliquidated and not arising out of the contract sued on. The court limited recoupment under Virginia Code section 6145 to cases where the claim sought to be settled grows out of the contract sued on, and limited set off under Virginia Code section 6144 to cases where the subject of set off is a liquidated demand. In reaching this result the court finds that the cases defining "liquidated" are unsatisfactory. "The confusion arises in Virginia from an effort to give the statute a liberal interpretation for the purpose of preventing a multiplicity of suits ***."²⁸ The Legislature should change the statutes so that the courts do not have to strain and will not fail to reach the result which they recognize as the only rational one.

Extension of Notice of Motion Procedure to Equity

With the adoption of code pleading, states abolished the procedural distinctions between cases at law and those in equity and substituted one form of action for both. When the change first appeared in the code pleading states some courts were reluctant to hold that the plaintiff could recover on the facts he pleaded and required a statement of fact in terms of either a legal or equitable claim. In *Simpson v. Bantley*,²⁹ objection was made that no cause of action was stated in conversion but that the plaintiff had only an equitable interest in the property. The court held there was but one form of action and if the facts showed any rights of recovery the petition must be held good, whether called an action at law for conversion, for breach of contract for failing to comply with the terms of the mortgage, or an action in equity. Thus the full effect of notice pleading is now being realized and is being utilized to avoid the technicalities incident to the use of other theories attempting to limit the scope of cases too drastically at the pleading stage. The distinguished committee drafting the new federal rules of civil procedure recognizing how well one form of civil action has worked in practice have incorporated it into the Federal Rules.

The enlightened and sensible decision of the court in *Carr v. Union Church of Hopewell*³⁰ has laid the groundwork in Virginia

28. *Id.* at 332.

29. 142 Mo. App. 490, 126 S. W. 999 (1910).

30. 186 Va. 411, 82 S. E. 2d 840 (1947).

for the adoption of one form of civil action combining law and equity procedure into a single system of pleading. In that case the question was raised as to which set of statutes, those relating to appeal or to error proceedings, applied to a declaratory judgment action. In a moment of inspiration the Court said, "Under our statutes (6140a *et seq.*) there is no separation of law from equity. The court may enter an order, judgment or decree, and the losing party may apply for a writ of error or an appeal. 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. Even if a case has been treated as one at law when in strictness it should have been treated as in equity, or vice versa, the court, when proper and if necessary, would transfer it from one side to the other under Code, sec. 6084 (Michie, 1942). But we do not think it was necessary in this case to transfer it to the equity side. If a case be brought properly under our declaratory judgment statute, it makes no difference on which side of the court it proceeds."³¹

This decision demonstrates that a blending of law and equity procedure does not present any great obstacles where the declaratory judgments procedure is used. Since the mere fact that a declaration is sought does not change the essential nature of most cases, as being at law or in equity, and since this procedure can be used in almost every class of case, the decision stands as a reminder to the bar that the difficulties of blending equity and law procedure are mostly imaginary and do not disturb the highest court of this state.

Conclusion

There is a great deal of discussion going on in Virginia as to the advisability of adopting the federal rules of procedure as the rules of procedure for the state courts. Several states have done so, and their experience indicates that the rules form a very satisfactory basis for state procedure. Most of the difficulties discussed in this article would be avoided if this were done. More thought and work has been given to the problems of procedure by the federal committee than can ever be accomplished by a state committee however careful and worthwhile its work may be. It is important to observe, too, that whatever changes in Virginia procedure are made there will follow the costly interpretation which necessarily accompanies

31. *Id.* at 417, 42 S. E. 2d at 843.