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AN ANALYSIS OF SUMMARY PROCEEDINGS UNDER SPECIAL STATUTES IN VIRGINIA

PHILIP G. DENMAN

Virginia can be justly proud of her leadership in the adoption of the summary proceeding as a method of litigation, but this extremely valuable field of the law appears to have long suffered an uncalled-for neglect. It is never enough to be satisfied with what was once rapidly acceptable and forward-looking law, since the passage of years and changing conditions often impair and sometimes completely destroy the efficiency of the best of statutes. Thus, the basic purpose of this paper is to present for re-examination this important section of the Virginia law, to analyze and criticise in the light of present day conditions and, with all deference, to submit suggestions for possible legislative simplification and clarification, with the hoped-for end-product being statutes which are clear in context and easy in application.

A summary proceeding has been defined as "a form of trial in which the ancient established course of legal proceedings is disregarded."¹ It is, then, any proceeding by which an existing controversy is settled or case disposed of in a prompt and simple manner, and as such fits admirably into the modern trend of the law in moving steadily away from the time honored form of trial with its complicated and oft times antiquated pleadings. The resultant benefits of such simplification are patent. First, any defense which might be presented solely for purposes of delay is discouraged; second, it gives the plaintiff a speedy judgment in the average case, with a consequent lowering of costs to all parties involved; and third, it encourages aggrieved persons, who might ordinarily choose otherwise, to resort to the courts, knowing they will get rapid satisfaction.²

The adoption of the first summary proceeding in Virginia can be traced to 1732, when statutes appeared providing for summary judgment on motion against sheriffs and other officers failing to

¹ *Yoder v. Com.*, 107 Va. 823, 57 S.E. 581 (1908), citing *Brown v. Epps*, 91 Va. 726, 21 S.E. 119, 27 L.R.A. 676 (1895)

² For discussion see Clark & Samenow, *The Summary Judgment*, 38 Yale L.Rev. 423 (1929), citing *Am.Jur.Soc. Bul. XIV* (1919) 100.

pay over public money to the proper recipient.³ During the subsequent one hundred and seventeen years the remedy was extended to other procedures, and by 1849 was available to "any persons entitled to recover by action on a contract."⁴ Thereafter the expansion continued steadily, reaching its broadest form in 1919 when the remedy was extended to embrace all actions at law.⁵ The evolution was completed by adoption of Rule 3:1.⁶

By Rule 3:3 an action shall be commenced by filing in the clerk's office a motion for judgment. By Rule 3:1 the notice of motion procedure is applied "to all civil actions at law in a court of record seeking a judgment in personam for money only (except where a tax refund is sought), actions for establishment of boundaries, ejectment, unlawful detainer, detinue and declaratory judgments (when at law), including cases appealed or removed to such courts from inferior courts whenever applicable to such cases. In matters not covered by these Rules, the established practices are continued."⁷

The working of Rule 3:1 therefore contemplates the coverage of all actions at law, but the summary proceedings here considered are for the most part excepted from the coverage of Rule 3:1, being governed by special statutes. The reason for such special treatment may seem questionable in the face of the existence of a catch-all rule such as Rule 3:1. The answer seems to be for the most part historical, since the great majority of the summary proceedings are those which were originally adopted as such before the extension

³ Acts of May, 1732, Ch. 10, Section 8, 4 Va.Stat.(Hening) 352.

⁴ Report of Revisers cited in *Wilson v. Dawson*, 96 Va. 687 (1899) ". . . seeing that this mode of proceeding has worked well in the cases in which it has been heretofore allowed, it seems to us advisable to extend it to all cases in which a person is now entitled to recover money by action on a contract."

⁵ Va. Code Ann. (1919) Title 60, §6043; Va. Code Ann. (1950), Title 8, § 8-717. "Any person entitled to maintain an action at law in lieu of such action at law, may proceed by motion before any court which would have jurisdiction of such action . . ." For reasons motivating this final expansion see *Chandler v. Balt.R.Co.*, 125 Va. 63, 99 S.E. 194 (1919); *Whitley v. Booker Brick Co.*, 113 Va. 434, 74 S.E. 146 (1912); *Curtis v. Peebles*, 161 Va. 780, 172 S.E. 257 (1934); *Shearin v. Va. Elec. etc. Co.*, 182 Va. 573, 29 S.E.2d 841 (1944); *Preston v. Salem Imp. Co.*, 91 Va. 583, 22 S.E. 486 (1895).

⁶ See 16 V.L.Reg. Editorial favoring the reduction of the whole system of pleading to a single notice stating the object of the unit.

⁷ Rule 3:1, Rules of Supreme Court of Appeals of Virginia, Va. Code 1950.

of the summary remedy to all actions at law. It would seem at first glance quite possible to include all these proceedings under Rule 3:1 and as a result eliminate some 59 statutes from the Code. Whether this would be efficacious is a question which will not be answered here since it seems apparent that these proceedings, with their roots buried so deeply in history, would not be so easily moved. It must be conceded that iron clad customs, stemming from long accepted practice, often present an insuperable barrier to change, even when opposed by the dictates of logic. Such is the case here.

For summary proceedings no formal pleadings are required.⁸ "A proceeding by motion under Code Va. is intended to furnish a simpler, more expedient and less offensive remedy for the collection of debts. Hence we find that the uniform course of decision in this State has been to view with more leniency and to allow greater laxity in the pleadings in that form of procedure."⁹

As to the notice requirement, §8-140.1 gives the general provision: "Except as provided in Part Three of the Rules of Court in any case wherein there may be judgment or decrees for money on motion, such motion shall be after ten days notice unless some other time be specified in the section or statute giving such motion."

GENERAL ANALYSIS AND RECOMMENDATIONS

I. The individual summary proceedings are at present found at only one location in the Code—each under the title and chapter to which the proceeding itself immediately applies. For example, the special statute governing proceedings against officers failing to make a return are found only in Title 15, those governing proceeding against delinquent treasurers of sureties in Title 58, and those governing recovery of fines in Title 19, etc. There seems to be no apparent connection or coordination between an individual statute at its individual location and the other special statutes in other parts of the Code, although the fact is apparent that all are closely re-

⁸ *Hall v. Ratcliff*, 93 Va. 327, 24 S.E. 1011 (1896), citing *Bunch's Ex'r. v. Fluvanna Co.*, 86 Va. 452, 10 S.E. 532 (1890).

⁹ *Carr v Meade's Ex'r.*, 77 Va. 142 (1883). "Any notice, however informal, which informs the defendant of the nature and object of the motion is sufficient." And see also *Board of Supervisors v. Lunn*, 27 Gratt. (68 Va.) 608 (1876); *Preston v. Salem Imp. Co.*, 91 Va. 583, 22 S.E. 486 (1895); *Montieth v. Com.*, 15 Gratt. (56 Va.) 172 (1859).

lated in principle. There is no place where a person may turn to find a definitive list of all the summary proceedings governed by special statutes, although the value of such a list is immediately obvious, at least to one who has had the misfortune of attempting to track down each proceeding to its final resting place. Finally, and most basic of all, there is no reference to summary proceedings in the Code General Index. Thus, the researcher is faced with an exasperating and time consuming task for which no justification is apparent, and which could be remedied quite easily. It seems advisable, therefore, that there should be entered in the Code a complete list of all summary proceedings with their accompanying special statutes, such a list to incorporate cross references to the sections at which the proceedings are presently individually located, and corresponding cross references at the individual location to the list, and this to be indexed.¹⁰

II. In §8-140.1 there is set forth a uniform time provision for notice governing the summary proceedings. However, with this admirable uniformity there arises a resulting difficulty—namely, an immediate need for explanation of the meaning of the word “motion” employed in the statute. It has been said that: “A motion is necessarily to a great extent a proceeding of an informal character. It is an application *ore tenus* addressed to the court by counsel.”¹¹ When §8-140.1 is read for the first time, however, it becomes questionable whether the term “motion” represents a contracted reference to the notice of motion for judgment procedure of Rule 3:3, or indicates some type of simplified procedure. The latter is, of course, the correct view, but confusion on the point is difficult to avoid. Moreover, upon further study of the various summary proceedings one finds that individually they are identified by a variety of names, among these being: “action”, “motion”, “petition”, “suit”, “warrant”, and “application.” Such a disparity of terms is testimony to past legislative genius, but is extremely unwelcome to the person attempting to deal with the summary proceedings as a group. Obviously, none of these terms are intended to be construed as having the same meaning, and, as a result, the lawyer, in his search for the absolute is necessarily, albeit unwillingly, driven to extensive investigation and definition. Therefore, in order that any type of recommendation for revision or simplification may

¹⁰ For proposed list, see Appendix.

¹¹ *Kendrick v. Whitney*, 28 Gratt. (69 Va.) 646 (1877).

be made herein, a closer examination of the meaning and use of these terms, and a resulting judgment upon the advisability of their retention or rejection becomes necessary.

*Motion:*¹² A majority of the special statutes incorporate the term 'motion' to identify the proceeding. We have already noted in considering §8-140.1 that the term as used in the summary proceeding is in the main descriptive of a simplified procedure in contradistinction to the comparatively formal notice of motion for judgment procedure of Rule 3:3. Some of the proceedings, however, employ the term as a motion under Rule 3:2. Rule 3:2 states in effect that rule days are abolished and the procedure will be by notice of motion for judgment. With respect to this situation the question of whether to retain the summary procedure when the statute obviously falls within the coverage of Rule 3:1 again arises. Once more the answer is found in the past, as discussed heretofore. Whatever the reason may be it is obvious that the word "motion" as used in the greater part of the statutes is capable of being defined in several different ways.¹³

*Action:*¹⁴ An action indicates jurisdiction at law,¹⁵ and has been defined as "an ordinary proceeding in a court of justice by

¹² Proceedings against county treasurers for failure to pay warrant (§58-928); Proceedings against delinquent treasurers and sureties (§58-976); Proceeding against officer for money due from him (§15-520); Proceeding by client against attorney for failure to pay on demand money received for the client (§54-46); Proceeding by officer against deputy for default or misconduct in office (§15-521); Proceeding by surety against principal for money paid (§49-27); Recovery of damages sustained for property withheld during appeal in detinue action (§8-595); Recovery of fines (§§19-298 through 19-302); Recovery on bonds taken or given by officers (§8-140.2).

¹³ For a prime example of such confusion see Recovery of Debts Due the State (§§8-758 through 8-788), which statutes seem to denote a summary proceeding in favor of the State, especially when taken in context with the other proceedings considered herein. The position taken with reference to these statutes by the Office of the Comptroller, however, is one of construing them as not giving the State any procedure for the recovery of debts due the State that is not available to individuals or business firms, with the exception of when there are special provisions available for the levy of liens. This would then bring this proceeding under the coverage of Rule 3:1.

¹⁴ Recovery of Debts Due the State (§§8-758 through 8-788); Recovery of Fines (§§19-299 through 19-302); Recovery on Bonds Taken or Given by Officer (§8-140.2); Note, 10 Va.L.Rev. 166 (1923-24).

¹⁵ Lawhead v. Board of Trustees, 115 W.Va. 475, 176 S.E. 860 (1934).

which one party prosecutes another for the enforcement or prosecution of a right, the redress or prevention of a wrong, or the punishment of a public offense.”¹⁶ But we have seen that the summary proceedings herein considered are certainly not “ordinary proceedings,” being excepted from the coverage of Rule 3:1, which governs all actions at law. The terms “action at law” and “action” immediately bring to mind the usual type of legal proceeding with its attendant formalities and technicalities, while summary proceedings, by their very name, denote a radically different type altogether. There is then a distinct difference between “action” as applied under Rule 3:1 and any term employed to adequately describe a method of summary procedure. The retention of the term can apparently be justified upon the grounds that it is a hangover from the days when there were actions for various counts, and is so preserved in the statutes as a concession to the older procedures.

*Rule:*¹⁷ A small number of the statutes employ the phrase “. . . the clerk . . . shall issue a rule . . . etc. . . .” Any person who has attempted to determine the actual basis and meaning of this phrase in Virginia procedure will recognize it as an old enemy and approach it again with a feeling approximating morbid fascination. In the volumes which constitute recognized authority on procedure,¹⁸ much is said about rule days—nothing is said about the rule itself. Just what is a rule, and what exactly are the requirements for its issuance? Has it any relation to the Rules of Court; has it any weight at all since, by Rule 3:2, rule days are expressly abolished? Is any particular type of request required, and finally, are there any statutes governing the procedure of issuance? More such questions arise when the proceeding being dealt with is one in equity (§8-664 through §8-667),¹⁹ since by Rule 2:1, rule days have been abolished in equity in some, but not all, situations.

When all these questions are finally answered, it appears that

¹⁶ *Missionary Society v. Ely*, 56 Ohio St. 405, 47 N.E. 537 (1897).

¹⁷ Proceeding against an Officer Failing to Make a Return (§§15-515, 15-516); Proceeding against Receivers, Commissioners, Sureties Appointed by or Acting under the Authority of the Court, and also, Against a Purchaser at a Judicial Sale and his Surety (§§8-664 through 8-667).

¹⁸ Barton's *Chancery Practice*, 3rd Ed. (1926); Burke, *Common Law & Statutory Pleading and Practice*, 4th Ed. (1952); Lile's *Equity Pleading and Practice*. 3rd Ed. (1952). Michie's *Jurisprudence*.

¹⁹ *Rush v. Dickinson County Bank*, 128 Va. 114, 104 S.E. 700 (1920), applied in *Ferebee v. Todd*, 154 Va. 293 153 S.E. 705 (1930).

when the court issues a rule against the person named in the statute, it does nothing more than order him to appear before the court and show cause why a certain thing should not be done, (i.e., fine levied against him). What the researcher is faced with then is a vague method employed to implement an extremely simple procedure. The reason again is found in established custom, but there are times, and this is one such time, when even history cannot justify needless obscurity.

Petition:²⁰ "The word "petition" is usually used in judicial proceedings to describe an application in writing in contradistinction to a motion which may be *viva voce*."²¹ "The principal distinction between motions and petitions lies in the fact that motions, though usually made in writing, may sometimes be made orally while a petition is always in writing. So, also, motions can usually be made only by a party to the record, while petitions may in some cases be presented by persons not parties."²² "The term "petition," as related to equity procedure, connotes an application in writing addressed to a court or judge, stating facts and circumstances relied upon as a cause for judicial action, and containing a prayer for relief."²³

"Petition" then, by definition, is applicable to both law and equity, and further investigation is therefore necessitated. It has been held that: "It is immaterial whether the proceeding is to be regarded as one in law or equity, since the statute (§8-752) will be liberally construed."²⁴ The term also seems to anticipate antagonistic pleadings, and in fact is so construed in most other states.²⁵ If such is the case, it would appear that "petition" means exactly the same as the motion for judgment procedure under Rule 3:1.

²⁰ Recovery of Claims against the State (§§8-752 through 8-757, 2-103); (Further Relief Based on a Declaratory Judgment, §8-581).

²¹ Bergen v. Jones, 4 Metc. (45 Mass.) 371 (1842).

²² Gibb v. Ewing, 94 Fla. 236, 113 So. 730 (1927).

²³ Nield v. Nield, 126 W. Va. 430, 28 S.E. 2d 825 (1944).

²⁴ Stuart v. Smith Courtney Co., 123 Va. 231, 96 S.E. 241, 125 A.L.R. 68 (1918), citing Green v. Marye, Auditor, 112 Va. 352, 71 S.E. 555 (1911).

²⁵ Murphy v. Ferguson-McElhane Motor Co., 40 Ga. App. 847, 151 S.E. 663 (1930); Hudson's Administratrix v. Collins, 239 Ky. 131, 38 S.W. 2d. 975 (1931); State ex. rel. Rakowsky v. Bates, 286 S.W. 420 (1926); Cowley-Lantner Lumber Co. v. Dow, 150 Okla. 150, 300 P. 781 (1931).

Again we have the problem of inclusion under Rule 3:1 or retention as a summary proceeding, which point has been settled *supra* in favor of the latter.

*Application.*²⁶ The commonly accepted meaning of this term is that of a request, or a document containing a request. "A putting to, placing before, preferring a request or petition to or before a person."²⁷ An applicant is defined as "one who files application or petition, a petitioner."²⁸ The term is therefore synonymous with "petition," the complexities of which have been examined previously. Again we are presented with two completely different terms in different statutes denoting exactly the same type of procedure.

Suit, Warrant, Motion for Judgment, etc.: In several of the special statutes governing the summary proceedings, two or more methods of procedure are embodied to be applied in the alternative.²⁹ In every case where the terms describing these methods are not ambiguous and conflicting but are set forth in clear unequivocal language as a secondary procedure, such procedure is to be retained.³⁰

By the foregoing examination of the varied terms used at present to describe the individual methods of summary procedures, it becomes apparent that such variances tend only to confuse. Look-

²⁶ Interpleader (§§8-226, 8-227, 16.1-119 through 16.1-122); Proceeding to Change Name of a Person (§8-577.1).

²⁷ *In re Meyer*, 100 Misc. Rep. 587, 166 N.Y.S. 505 (1917).

²⁸ *Ballantine Law Dictionary*, 2d Ed., 1948.

²⁹ Proceeding by Client Against Attorney for Failure to Pay on Demand Money Received for the Client (§54-46); Procedure is by "warrant", "motion", or "suit". Recovery of Claims against the State, (§§8-752 through 8-757, 2-103); Procedure is by "petition" or "bill in chancery"; Recovery of Debts Due the State (§§8-758 through 8-788), Procedure is by "action" or "motion"; Recovery on Bonds Taken or Given by Officers (§8-140.2); Procedure is by "motion" or "motion for judgment" under Rule 3:1.

³⁰ *Com. v. Hall*, 194 Va. 914, 76 S.E.2d 208 (1953). "The phraseology plainly indicates that the legislature did not intend that the statutory remedy should supersede the long established action for breach of condition of a bond, but intended, on the contrary, that such action should continue as a concurrent, alternative remedy." *Fowler v. Tobacco Growers, Inc.*, 195 Va. 770, 80 S.E. 2d 554, 10 A.L.R. 782 (1954). "The remedy of enforcement of the rights determined by the declaratory judgment prescribed by this Section (§8-581) is not exclusive. Such a proceeding is intended to supplement rather than supersede ordinary causes of action." On this same point, see also *Winborne v. Doyle*, 190 Va. 867, 59 S.E. 2d 90 (1950).

ing at the overall situation it would seem that a great benefit would be conferred in the interests of simplification by a provision that, in every advisable case, these summary proceedings should be identified by a single uniform term, except where a clear alternative procedure is set out in the statute. The task of selecting such a term, however, would be far from an easy one. To create a completely new term to be applied to these proceedings, some of which have been in existence for as long as two-hundred and twenty-five years, would undoubtedly be opposed on the ground that, rather than creating a more efficient form of proceeding, it would lead to uncalled-for and unreasonably change in the established customs and practices of the legal fraternity. Years of continued practice under the old procedures brings with it concrete associations between term and proceeding itself. Such ingrained associations militate against any type of change, but such has been the situation confronting any attempted simplification of the law. The advisability of alteration must in every case be weighed against the efficacy of allowing established practices to remain undisturbed. Theoretical benefits to be gained from such simplification must be balanced against the practical efforts of attempting to change custom.

With all these points considered it seems that a compromise might be reached by adopting the combination term "summary motion", such term to replace the varied terms presently used to describe the methods of procedure. The second and final general recommendation is, therefore, that above the list of summary proceedings recommended previously there could be entered the following provision:

In the interest of uniformity, all the summary proceedings hereinafter listed shall be instituted by a uniform method of procedure, such procedure to be by an informal 'summary motion' before any court which would have jurisdiction over the subject matter of proceeding if brought as an action at law under Rule 3:1, or a suit in equity, with the qualification that if the governing statute lists an alternative method of procedure, such alternative method may be followed, notwithstanding the foregoing provision. Section 8-140.1 shall be followed with respect to notice required. Under no circumstances shall this 'summary motion' be confused with the notice of motion for judgment procedure set forth by Rule 3:3, or the motion for summary judgment procedure of Rule 3:20.

With the adoption of these two general recommendations—the

list of cross-referenced summary proceedings, and the provision for the procedure to govern the component parts of the list—we are given a simplified and solid basis on which all the Virginia summary proceedings may rest.³¹ If all the special statutes governing the summary proceedings are made compatible with the foregoing recommendations, the hoped for result of an easily located, cross-referenced group of statutes governed by a single informal method of procedure and drafted in concise, unequivocal terms will be a reality.

APPENDIX³²

“In the interests of uniformity, all the summary proceedings hereinafter listed shall be instituted by a uniform method of procedure, such procedure to be by an informal ‘summary motion’ before any court which would have jurisdiction over the subject matter of the proceeding if brought as an action at law under Rule 3:1, or a suit in equity, with the qualification that if the governing statute lists an alternative method of procedure, such alternative method may be followed, notwithstanding the foregoing provision. Section §8-140.1 shall be followed with respect to notice required. Under no circumstances shall this ‘summary motion’ be confused with the notice of motion for judgment procedure set forth by Rule 3:3, or the motion for summary judgment procedure of Rule 3:20.”

1. Interpleader, (§§8-226, 8-227, 16.1-119 to 16.1-122).
2. Proceedings against commissioners, receivers of their sureties, appointed by or acting under authority of the court, and against purchasers at a judicial sale under a decree or order of such court and their sureties. (§8-664 to 8-667).
3. Proceeding against county treasurers for failure to pay warrant. (§58-928).
4. Proceedings against delinquent treasurers and sureties. (§58-976).
5. Proceedings against officer for failure to make a return. (§§15-515, 15-516).

³¹ For combined recommendations, see Appendix.

³² In the interest of brevity, the questions of location of these suggested provisions are not covered herein. These are problems which the Legislature is better able to resolve.

6. Proceeding against officer for money due from him. (§15-520).
7. Proceeding by client against attorney for money received and not paid. (§54-46). See §26-5 for defenses.
8. Proceeding by officer against deputy for default or misconduct in office. (§15-521).
9. Proceeding by surety against principal for money paid. (§49-27).
10. Proceeding for recovery of damages for property withheld during detainee action. (§8-545).
11. Proceeding on certain bonds taken or given by officers. (§8-140.2).
12. Proceeding to change name of person. (§8-577.1).
13. Proceeding to obtain further relief on declaratory judgments. (§8-581).
14. Recovery of claims against the State. (§§8-752 through 8-757 and §2-193).
15. Recovery of debts due to the State. (§§8-758, 8-788).
16. Recovery of Fines. (§§19-298 through 19-302).