

Common Law Interpleader in Equity

Kenneth H. Lambert

Repository Citation

Kenneth H. Lambert, *Common Law Interpleader in Equity*, 1 Wm. & Mary L. Rev. 450 (1958),
<https://scholarship.law.wm.edu/wmlr/vol1/iss2/13>

NOTE

COMMON LAW INTERPLEADER IN EQUITY

A. *In General*

Where there is a dispute between two or more persons, and the subject of the controversy is held by a third person who admits he has no right to the thing held, but is willing to give up the stakes according to the result of the dispute—that is, he is merely a stakeholder—he may avoid the expense and danger of defending two actions and a possible double recovery by giving up the thing in dispute to the court. This being done the stakeholder is no longer a substantial party to the action, and the court directs that the persons between whom the dispute really exists fight it out at their own expense.

The preceding is by no means an all-encompassing definition of interpleader, but is intended, rather, to provide only a very general description as a starting point.

A common situation appropriate to the use of interpleader arises in the case of bailments when a bailee is confronted by conflicting claims to the bailed property by the bailor and by an alleged assignee of the bailor. The bailor, claiming that there was no sale to the alleged assignee, or that the sale was fraudulent, brings suit. The assignee also sues. Naturally, the bailee had nothing to do with the sale, and evidence concerning it is not readily available to him. Although he assumed one obligation, he is faced with the prospect of a double suit and perhaps a double recovery, since juries in both cases could find in favor of the claimants without any error at law.

There are two early Virginia cases,¹ having substantially the same fact situation, which provide a further illustration of the remedy of interpleader in terms of local law. In *Storrs v. Payne*,² decided in 1810, the complainant as sheriff of Henrico County, took the goods and chattels of V. S. Moore under an execution

¹*Storrs v. Payne*, 4 Hen. & M. (14 Va.) 566 (1810); *Baird v. Rice*, 1 Call (5 Va.) 18, 1 Am. Dec. 497 (1797).

²4 Hen. & M. (14 Va.) 566 (1810).

from the Superior Court of Chancery for the Richmond District on behalf of one Taylor. The goods were also claimed by Payne, a defendant in this action. The court held that the sheriff might properly file bill of interpleader to settle the rights of the parties.

The purpose and general principle of interpleader is simple, just and ostensibly a very easy way out of a complex situation. The applicant has admittedly incurred one obligation; he is faced with two or more claims. Obviously, if one claim is right, the others are wrong. It cannot be denied that on its face interpleader possesses an attractiveness which is hardly equaled by any other remedy known to our system of jurisprudence. "The mere statement of the principle", declared Sir James Willis,³ "shows it justice."

Still unmentioned, however, are the procedural aspects, the vehicles by which the theory is given practical application. It is here that the bright promise and sense of satisfaction derived from the logic and justice of the purely philosophical concept begins to fade. In fact, upon further study, the mind's reaction is more likely to approximate exasperation, for one does not deal with this facet of interpleader at length without meeting, at every turn, niceties and technical quibbles not unlike those of the common law writs.

That equity, the reputed antithesis and remedy of the rigidity of the common law, should bear this burden of "legal lore" is disappointing, paradoxical and largely unjustifiable. Many of the procedural rules are essential elements of the concept which must be distinguished from those which have attached themselves by historical accident and serve no real purpose.

The present status of the law is at least partially explained by an examination of its origin and development, and although no full treatment will be attempted, the following historical sketch is included to prepare the reader for the discussion of the rules of procedure in detail to follow and in the hope that it will be at least a partial answer to the question, "why", that is bound to arise regarding present procedure in interpleader.

The remedy of interpleader was not originated in equity

³ Chafee, *Modernizing Interpleader*, 30 Yale L.J. 814 (1921).

but was adopted from the common law⁴ where it had a limited application, primarily in actions of detinue in bailment cases. With the passage of time, however, the action of trover was used with increasing frequency, gradually replacing the less satisfactory action of detinue. With trover, the relief in interpleader could not be had at law, and recourse was had to the chancellor who then began to grant interpleader in equity. This was done at first with reluctance; and it is, perhaps, because of that reluctance that the chancellor felt compelled to apply it in equity only in those instances where it would have been applied at law had the action been detinue. But whatever the reason, it is obvious that the chancellor was not compelled to follow this procedure, because the chief reason for imposing such restrictions at law, the requirement that the controversy must be between two adverse parties, had never been the rule in equity.

Nevertheless, the result was the creation in equity of something closely resembling a technical form of action with an unnecessary rigidity that has been retained over the centuries and which even yet hinders its development and usefulness.

B. *When Will the Action Lie*

The basis of equity jurisdiction in the broad sense lies in the inadequacy of the legal remedy and the prevention of a multiplicity of actions.⁵ The complainant, though willing to satisfy whichever demand is proper, is exposed to the hazard, vexation and expense of several legal actions. Manifestly, there is no adequate remedy at law.

The action of interpleader will lie even though any or all of the claims against the complainant are legal. Jurisdiction depends upon distinct claims being made rather than upon their intrinsic nature as legal or equitable claims.

One seeking the remedy of interpleader must comply not only with the ordinary procedural requirements of equity, but

⁴ Story, *Equity Jurisprudence*, §800-824 (1836); Chafee, *Modernizing Interpleader*, 30 Yale L.J. 814 (1921); Rogers, *Historical Origins of Interpleader*, 51 Yale L.J. 924 (1942).

⁵ *Storrs v. Payne*, 4 Hen. & M. (14 Va.) 566 (1810); *Baird v. Rice*, 1 Call (5 Va.) 18, 1 Am.Dec. 497 (1797).

must also bring his case within a special set of procedural dictates, rigidly drawn and peculiar to interpleader alone.

1. The first of these special procedural rules to be considered here is that which requires a complainant seeking to interplead adverse claims to prove to the satisfaction of the court that there are in fact two valid claims against complainant, and that he has only one obligation. One explanation of the generally reluctant attitude of the courts in granting interpleader is that it is often used to get a purely legal matter into equity, the only basis of equity jurisdiction being the alleged double vexation, all other issues to be determined being legal. Frequently, a complainant, being liable on one valid claim, will find it possible to "manufacture" another with the help of a friend in order to get into equity, thus avoiding a jury trial at law.

Therefore, it is readily apparent that this first requirement is a necessary one and places no undue burden upon the remedy of interpleader.

2. Because of the nature of the remedy, it is essential that the same thing, debt or duty be claimed by both parties against whom interpleader is demanded.⁶ This produces no difficulties as long as the subject of the dispute is a thing, but when a chose in action is in dispute, its identity must be determined upon the facts of each case and very nice distinctions are often the result. In one case it was held that the demands were not the same where one claimant claimed rent for certain premises and the other claimed damages for their use and occupation.⁷ However, this is no more than another manifestation of the same infirmity that is found throughout the law when theory is attempted to be given practical application. The difficulty is inherent in the remedy itself.

3. It is a different matter, however, regarding the requirement for jurisdiction that the adverse title of the claimants must be connected in some way, or dependent, or one derived from the other, or both derived from a common source. In other words, that they must not claim under titles hostile to one an-

⁶ *Runkle v. Runkle*, 112 Va. 788, 72 S.E. 695 (1911); *Bell Storage Co. v. Harrison*, 164 Va. 278, 180 S.E. 320, 100 A.L.R. 419 (1935); 4 Pomeroy, *Equity Jurisprudence* §1323 (5th Ed.) (1941).

⁷ *Dodd v. Bellows*, 29 N.J.Eq. 127 (1878).

other.⁸ This restriction, referred to briefly as privity, has acted, perhaps more than any other, to tie the hands of equity for no substantial reason in cases where relief should have been granted and it has been the recipient of much criticism.

A tenant confronted with one suit for rent by his landlord and a separate suit for rent by one who claims title paramount to the landlord, will be denied interpleader for lack of privity between the contestants. If, however, the second claimant had claimed as an assignee of the landlord, privity sufficient for jurisdiction would be established; one claim being dependent upon the other. Similarly, it has been held that interpleader will lie where suits are brought against the complainant debtor by a creditor of complainant and an assignee of the creditor.⁹

The privity requirement is a senseless limitation upon the jurisdiction of equity as it is obvious that a person may be exposed to vexation and the peril of double recovery from conflicting independent claims as well as from conflicting dependent claims. Pomeroy describes it as, “. . . a manifest imperfection of the equity jurisdiction . . .”,¹⁰ and the best thing that may be said about it is that it is not always followed by the courts in all jurisdictions. Nevertheless, it has been held to be the rule in Virginia.¹¹ The consensus is well expressed by Professor Chafee:

Whatever the psychological basis of this early insistence upon privity, the conception has long proved an outworn historical impediment to justice . . .¹²

4. It is further required that the complainant have no interest in the subject matter and that if relief is granted, he should be willing to place the res in the hands of the court and retire from the action.¹³ This restriction is rational where the complainant denies both claims or where he retains a substantial

⁸ *Haseltine v. Brickley*, 16 Gratt. (57 Va.) 116 (1860).

⁹ *Haseltine v. Brickley*, 16 Gratt. (57 Va.) 116 (1860).

¹⁰ 4 Pomeroy, *Equity Jurisprudence*, § 1324 (5th Ed.) (1941).

¹¹ *Runkle v. Runkle*, 112 Va. 788, 72 S.E. 695 (1911); 1 Barton, *Chancery Practice*, §II, (3rd Ed.) (1926).

¹² Chafee, *Modernizing Interpleader*, 30 Yale L.J. 814 at 835 (1921).

¹³ *Runkle v. Runkle*, 112 Va. 788, 72 S.E. 695 (1911); 1 Barton, *Chancery Practice*, §II, (3rd Ed.) (1926).

claim in the thing in controversy. Naturally, in such instances, the complainant would not be willing to bring the res into court and retire. On the other hand, if the complainant disputes a small part of one or both claims or has a lien or set off, his interest is small in comparison with the double vexation, and he should be allowed to put the full amount claimed into court and retire. The objection to this is found in the fact that interpleader is in two distinct stages: The first in which the complainant prays that he be allowed to interplead the conflicting claims. If this relief is granted, complainant is entirely removed from the suit and the following action, referred to as the second stage, is between the defendants. There is no substantial reason, however, why the complainant should not be allowed to voice his claims in the res in a third stage against the contestant who prevails in the second. Nor does there appear to be anything other than custom in the way of allowing the complainant to participate in the second stage and fight out his claim in a three-cornered suit analogous to a bill of peace. The case of *George v. Pilcher*¹⁴ illustrates that it is not absolutely essential that complainant withdraw at the end of the first stage. In that case a tenant interpleading rival heirs of his lessor was allowed to pay accrued rents into court, but was retained in the suit subject to the order to pay subsequent installments or rent in as they became due. The case has not been followed, however, and any interest in the subject matter of the dispute still defeats jurisdiction.¹⁵

Along similar lines, the suit will not be heard if the complainant has incurred some independent obligation, personal or otherwise, to either of the defendants before final disposition of the matter at issue.

In *Bell Storage Company v. Harrison*,¹⁶ complainant Company was denied interpleader when, purporting to act according to Section 1322 of the Code of 1930, it sold furniture belonging to appellee for failure to pay storage charges. The balance in complainant's hands after the sale was claimed by appellee and by a judgment creditor of appellee's husband. The complainant

¹⁴ 28 Gratt. (69 Va.) 299 at 305 (1877).

¹⁵ *Runkle v. Runkle*, 112 Va. 788, 72 S.E. 695 (1911).

¹⁶ 164 Va. 278, 180 S.E. 320, 100 A.L.R. 419 (1935).

was granted interpleader, and in this action a decree was rendered directing payment of the fund to the creditors. Shortly thereafter, however, appellee petitioned for a rehearing alleging that the complainant's claim was exercised and that the sale was illegal and void because not in compliance with the statute. A rehearing was granted and a final decree entered holding the sale invalid and of no effect. The bill of interpleader was thereupon dismissed because the complainant Company could no longer stand indifferent as between the contesting parties. It had, by placing itself in the position of a wrongdoer, incurred an independent liability to appellee.

The reason for denying the remedy of interpleader when the complainant has incurred an independent liability to either of the claimants is said to be that the proceeding would not determine whether the party seeking interpleader was entirely free from liability to either adverse claimant. This is true with regard to the customary procedure, but, as suggested previously, there is nothing in the nature of things which prevents the addition of a third stage, in which the complainant may settle any matter between himself and one of the claimants, or permitting complainant to participate in the second stage.

C. *Time of Filing the Bill*

A stakeholder should use reasonable diligence in bringing the contending claimants into court, and it is not necessary that he wait until conflicting writs are actually brought against him. He may file his bill for interpleader within a reasonable time after the dispute has arisen.

A complainant may generally interplead, with the court's permission, after he has filed an answer in a suit against him. In ordinary circumstances, however, he will be denied the remedy when any claim has been reduced to judgment,¹⁷ because of the doctrine of laches or equitable estoppel, when the complainant had notice of the conflicting claim prior to rendition of the judgment.

¹⁷ *Haseltine v. Brickley*, 16 Gratt. (57 Va.) 116 (1860); *Ayers v. Morehead's Adm'r*, 77 Va. 586 (1883); *Hoge v. Fidelity Loan & Trust Co.*, 103 Va. 1, 48 S.E. 494 (1904); *Green v. Suttle & Massie*, 21 Gratt. (62 Va.) 356 (1871).

In *Haseltine v. Brickley*,¹⁸ complainant was indebted to one Hicks to the extent of \$725 for land purchased from Hicks. Haseltine, in an action against Hicks, attached the debt owed to Hicks by the complainant. Complainant testified at that trial that he was indebted to Hicks in the amount of \$725. Later in the same year the second action was brought against complainant on his note to Hicks by the assignee of that note and judgment was had thereon. Complainant's plea that the claimants be required to litigate their respective rights to the fund was denied.

Justice Lee stated the law as follows:

When a party has had a day in which he could make his defense in proper form, before a verdict and judgment against him, equity will not entertain him and grant relief after such verdict and judgment, unless in cases of fraud, accident or surprise, or some adventitious circumstances, unmixed with negligence on his part, which shall sufficiently account for the omission to seek the intervention before judgment.¹⁹

Interpleader having been denied, complainant was liable on both judgments.

The rule of *Haseltine v. Brickley* is not strictly applied, however, in cases of defaulting administrators, nor when a trust fund is effected. In *Biedle v. Chrismon*,²⁰ the rule was not followed when a trustee and personal representative allowed dual default judgments for the same thing to be rendered against the trust when the statute of limitations was available as a defense.

D. *Parties to the Bill*

The plaintiff or complainant in bill of interpleader remains a necessary and substantial party until he has fully rendered the debt or duty or other thing required of him.

Under the general rule for determining whether the requisite diversity of citizenship exists to support the original jurisdiction of the Federal Courts, merely nominal parties or parties without

¹⁸ 16 Gratt. (57 Va.) 116 (1860).

¹⁹ *Haseltine v. Brickley*, 16 Gratt. (57 Va.) 116 at 120 (1860).

²⁰ 76 Va. 678 (1882).

real interest may be disregarded. In the *Pilcher* case, *supra*, complainant, a tenant of decedent, filed a bill of interpleader against rival claimants of decedent's estate with respect to rents owing by the complainant. The decree directed that the rent be paid into the bank "from time to time" pending final outcome of the suit, complainant being retained as a party until such time. The claimants petitioned for removal to the federal courts on grounds of diversity of citizenship existing between claimants, but removal was not allowed because some of the claimants and complainants were co-citizens of the same state, Virginia. Therefore, until allowed to retire the complainant is a substantial rather than a nominal party to the action.

After he has fully rendered the debt or duty required of him, the complainant may withdraw from the action and the subsequent proceedings are strictly among the claimants. In the ensuing proceedings the usual presumptions of fact and rules regarding weight and sufficiency of evidence apply.²¹

It has been held that one who has a valid contract with another for after acquired goods may maintain interpleader against a judgment creditor who seeks execution against the goods when they come into being.²²

Where a debtor's property is taken under a writ of *feri facias*, a deed of trust creditor may file a bill of interpleader against the other attacking creditors.²³

Note, that in the *Turnbull* case, interpleader is not brought by the stakeholder but by one of the parties claiming the fund. This is the usual procedure in cases in which the fund is seized by one of the claimants through judicial process. In such situations the stakeholder is relieved of his duty of due diligence in bringing interpleader and it becomes the duty of the other adverse claimant to intervene for his own protection.²⁴

²¹ *Fidelity & Deposit Co. of Maryland v. Moore*, 177 Va. 341, 14 S.E.2d 307 (1941).

²² *First Nat. Bank v. Turnbull*, 32 Gratt. (73 Va.) 695, 34 Am.Rep. 791 (1880); *Leftwich v. Wells*, 101 Va. 255, 43 S.E. 364, 99 Am.St.Rep. 865 (1903).

²³ *First Nat. Bank v. Turnbull*, 32 Gratt. (73 Va.) 695, 34 Am.Rep. 791 (1880).

²⁴ *Whan v. Hope Natural Gas Co.*, 81 W.Va. 338, 94 S.E. 365 (1917).

The defendants or claimants in an action of interpleader shall be all those who assert a claim to the fund or other thing in dispute, whether in their own right or as the lawful representatives of others.²⁵

E. *An Outline of the Bill and its Contents*

The complainant must allege in the bill that all the elements requisite to interpleader exist in the case. This includes the special jurisdictional elements already treated in the section on jurisdiction. Therefore, the bill will allege:

1. That the same thing, debt or duty is claimed by both or all parties against whom relief is sought;
2. That there is privity between the adverse claims;
3. That complainant has no interest in the subject matter; and
4. That complainant has not and will not incur any independent liability to either or any of the claimants prior to final disposition of the matter at issue.²⁶

The bill must be accompanied by an affidavit affirming the fact that the complainant does not collude with any claimant.²⁷

When the subject matter is money, the complainant must expressly offer in his bill to bring the same into court. However, a demurrer will not be sustained upon failure to do so, although the fund must be brought into court before any orders will be made in the case.²⁸

Also to be included in the bill is a prayer for relief asking that the claimants be required to set forth their claims.

An injunction is sometimes requested to stay proceedings of any claimant already in motion.

F. *Hearing, Decree and Appeal Thereon*

Claimants are entitled to a hearing, generally limited in

²⁵ *George v. Pilcher*, 28 Gratt. (69 Va.) 299, 26 Am.Rep. 350 (1877).

²⁶ *Runkle v. Runkle*, 112 Va. 788, 72 S.E. 695 (1911).

²⁷ *Barton, Chancery Practice*, Sec. V (3rd Ed.) (1926).

²⁸ *Ibid.*

scope to the issue, should interpleader be granted. It is this portion of the proceedings that was referred to earlier as the "first stage" of interpleader.

In an action properly brought the complainant is dismissed with his costs, and if the question between the claimants is ready for decision, the court will make a decree at the first hearing. If the question is not ready as between the claimants, the court will direct an action or an issue, or will refer the matter to a master to ascertain the disputed facts, depending upon the nature of the suit.

The only decree which can be made in favor of the complainant and against the claimants in the initial stage of an interpleader suit is that the bill has been properly filed giving the complainant leave to bring the disputed property into court, discharging him from further liability, and directing the defendants to interplead the conflicting claims among themselves. When the property is brought into court and accepted, the decree is final as to the complainant.²⁹

In accord with the settled rules of procedure governing appeal, a decree dismissing the bill will not be disturbed on appeal when there is no bill of exceptions, no certificate of evidence, and no intimation of what documents were read or rejected. There were depositions in the record, but the decree did not refer to them, although it stated that evidence was heard. The court concluded that they had been inserted in the record after the decree and thus could not be considered on appeal.³⁰

G. *Costs.*

The rule is rather liberal regarding costs, at least where the complainant is concerned. It has been held that where a bill of interpleader has been filed in good faith, the complainant should have his costs, including attorney's fee, out of the fund brought by him into court.³¹

If infants who are necessary parties to the suit have no estate which the court can reach, the fee to their guardian ad litem is a

²⁹ Jones v. Buckingham Slate Co., 116 Va. 120, 81 S.E. 28 (1914).

³⁰ Joslyn v. State Bank, 86 Va. 287, 10 S.E. 166 (1889).

³¹ Pettus v. Hendricks, 113 Va. 326, 74 S.E. 191 (1912).

proper charge in the first instance upon the fund to be administered.³²

Ultimately, the claimant against whom the decree is rendered will bear the burden of the costs of the complainant as well as those of the other claimant.³³

PART II. STATUTORY INTERPLEADER

In Virginia, as in most jurisdictions, the application of the remedy of interpleader has been clarified and extended by statute. It is well established, nevertheless, that the statutory provisions do not supersede the ancient equitable remedy, which remains available, but merely provide an additional and concurrent remedy.³⁴

In this section, as in those which have preceded it, particular emphasis shall be given those special rules of procedure peculiar to interpleader alone.

Practically all jurisdictions now have what may be called a "general" statutory provision for interpleader varying somewhat in different jurisdictions, of course, but alike in nearly all cases in that they make the remedy available at law, and again in varying degrees, as we shall see, remove some of its procedural hardships. It is necessary in regard to the restrictive aspects of the procedure in interpleader at common law to understand to what extent these restrictions have been retained in connection with the general statutory remedy. This section will state the present state of procedural law surrounding interpleader by statute in Virginia with special reference to those procedures peculiar to interpleader in particular.

In Virginia the general interpleader statute, which also has a provision for a summary proceeding, provides as follows:³⁵

Interpleader: Upon affidavit of a defendant in any action that he claims no interest in the subject matter of the action, but that some third party has a claim

³² *Ibid.*

³³ *Beers v. Spooner*, 9 Leigh (36 Va.) 153 (1838).

³⁴ *Runkle v. Runkle*, 112 Va. 788, 72 S.E. 695 (1911); Report of Revisors, p. 764 (1849).

³⁵ Va. Code, §8-226 (1950).

thereto, and that he does not collude with such third party, but is ready to pay or dispose of the subject matter of the action as the court may direct, the court may make order requiring such third party to appear and state the nature of his claim, and maintain or relinquish it, and in the meantime stay the proceedings in such action. If such third party, on being served with such order, shall not appear, the court may, on proof of the plaintiff's right, render judgment for him, and declare such third party to be forever barred of any claim in respect to the subject matter, either against the plaintiff or the original defendant, or his personal representative. If such third party, on being so served shall appear, the court shall allow him to make himself defendant in the action, and either in such action or otherwise, cause such issue or issues to be tried as it may be prescribed, and may direct which party shall be considered the plaintiff in the issue, and shall give judgment upon the verdict rendered on such trial, or, if a jury be waived by the parties interested, shall determine their claims in a summary way.

It is hardly necessary to point out that it is required now as at common law that the same thing, debt or duty be claimed by each adverse claimant. As pointed out previously, any restriction upon jurisdiction imposed by this rule is inherent in the concept of interpleader itself.

The words of the statute leave no doubt that interpleader under the Virginia statute is still limited to those complainants who have no interest in the subject matter of the dispute as was the case under the common law remedy. Without repeating the criticisms and suggestions made with regard to this limitation as applied to the common law equitable doctrine, it is well to refer to them here and to note that they apply to the statutory remedy as well.

A further limitation on the common law doctrine was that the remedy was available only to those complainants who had incurred no independent liability to either of the claimants before final disposition of the matter at issue. The statute does not indicate whether this restriction is to be retained. However, in the case of *Nicholas v. Harrison Building & Supply Com-*

pany,³⁶ a rule is presented which is at least analogous, if not identical, to the common law limitation. In that case, defendants, for whom a building was being erected, agreed with plaintiff, who furnished supplies to a contractor, to retain sufficient funds to pay plaintiff for the material furnished. It was held that defendants were not mere stakeholders of this fund, because they guaranteed the debt to plaintiff, and hence were not entitled to have plaintiff and mechanics lienors interpleaded but were required to litigate their respective claims. Note that this result ensued even though complainant was quite willing to give up the subject matter in dispute and claimed no interest therein. The remedy was denied because of the independent liability which complainant had incurred to one claimant.

Another important limitation of the statutory version of interpleader, and one which did not exist at common law, is that the statute applies only when there is an action pending.³⁷ In *Runkle v. Runkle*,³⁸ the complainant was denied relief under the statute because there was no action pending and was, therefore, left to resort to the common law remedy in equity. Complainant's bill in equity was dismissed, however, on the grounds of lack of privity between the claimants.

Because complainant in the *Runkle* case could not bring his suit within the scope of the statute, it was not necessary for the court to determine whether the most important common law limitation upon interpleader, that which requires privity between the claimants, applies to the statutory remedy. The court was entirely silent upon this point, and, unfortunately, there seems to have been no case which expressly determines the applicability of the privity limitation to the statutory version of interpleader. The statute itself does not expressly require privity.

Furthermore, a brief review of the law in other jurisdictions indicates that there is no uniformity regarding the retention or removal of the privity requisite regarding statutory interpleader, although (as might be expected) the trend is away from privity.

It has been held that in states practicing under a code, where

³⁶ 181 Va. 207, 24 S.E.2d 452 (1943).

³⁷ Va. Code, §8-226 (1950).

³⁸ 112 Va. 788, 72 S.E. 695 (1911).

an action of interpleader is merely a substitute for a bill in equity, the action is governed by the same rules.³⁹

The rule with regard to privity was specifically abrogated by the general statute on interpleader in California in 1881.⁴⁰

In *Gillespie v. Citizens National Bank of Weatherford*,⁴¹ the Court of Civil Appeals of Texas determined that privity was not one of the essential elements of interpleader provided by statute in Texas.⁴²

However, the Supreme Court of Iowa in *Hoyt v. Gouge*,⁴³ interpleading under an Iowa statute⁴⁴ similar to the Virginia statute in question which also made no mention of privity, held that an action under the statute would not lie where the defendants are making claims against the plaintiff under distinct and independent contracts, not necessarily in conflict, but payment of one of which would not extinguish the other.

The Federal Rules of Civil Procedure provide that persons having claims against the plaintiff may be joined as defendants and may be required to interplead when their claims are such that the plaintiff may be exposed to double or multiple liability. No ground for objection to this joinder is furnished by the fact that the claims of the several claimants or the title on which their claims depend do not have a common origin or are not identical, but are adverse to and independent of one another.⁴⁵

The present transition is indicated by the cases in Alabama. The Supreme Court held that since the statutory remedy provided a short method of accomplishing the purpose of a bill of interpleader in equity, it would lie only when the facts would authorize relief in equity.⁴⁶ In *Gibson v. Goldthwaite*,⁴⁷ the Alabama Court said:

³⁹ *Board of Education v. Scoville*, 13 Kans. 17 (1874); *St. Louis Life Ins. Co. v. Alliance Mut. Life Ins. Co.*, 23 Minn. 7 (1876).

⁴⁰ Sec. 386, Code of Civil Procedure (1881); See *Fox v. Sutton*, 127 Cal. 515, 59 Pac. 939 (1900).

⁴¹ 97 S.W.2d 310 (1936).

⁴² Art. 4656, Vernon's Tex. Civ. St. (1936).

⁴³ 125 Iowa 603, 101 N.W. 464 (1904).

⁴⁴ Sec. 3407, Iowa Code (1897).

⁴⁵ Rule 22(1), Federal Rules of Civil Procedure (1949).

⁴⁶ *Stewart v. Sample*, 168 Ala. 274, 53 So. 182 (1910).

⁴⁷ 7 Ala. 281, 42 Am.Dec. 592 (1845).

In the case of adverse independent titles or demands not derived from a common source, but each asserted as wholly paramount to the other, the party holding the fund or other thing in dispute must defend himself as well as he can against each separate demand, and a court of equity will not grant him relief on a bill of interpleader.

However, in *McDonald v. McDonald*,⁴⁸ the Alabama Supreme Court cites with approval the case of *Northwestern Mutual Life Insurance Company v. Kidder*,⁴⁹ in which it was indicated that the more recent authorities feel that it is, “. . . questionable, however, whether the doctrine of privity commonly recognized in respect of bills of interpleader applies to the statutory interpleader.”

With the preceding review of the law in other jurisdictions as a background, we may proceed to determine the state of law in Virginia in this connection. As stated previously, neither the statute nor the case law tells us specifically whether the privity limitation applies to the general statutory provision for interpleading; therefore, any conclusion must be by implication from cases applying the statute, and the cases have not been numerous. In the majority of cases under the statute, there was privity between the claimants sufficient to meet the common law concept of privity.⁵⁰ In fact, only one case was found in which relief was granted under the statute where no privity in any sense existed between the parties claiming the subject matter.⁵¹ In that case the subject matter of the controversy was funds paid by decedent to a mutual benefit society. Under its contract with decedent the society was to “assign” those funds as stipulated by decedent. The funds being held by the mutual benefit society

⁴⁸ 212 Ala. 137, 102 So. 38 (1924).

⁴⁹ 162 Ind. 382, 66 L.R.A. 89, 70 N.E. 489, 1 Ann. Ca. Note, p. 513 (1904).

⁵⁰ See *Turner-Jennings Motor Co. v. Beckley's Administrators*, 137 Va. 435, 119 S.E. 115 (1923): claims by assignee of the same lease; *Parks v. Whitbank*, 177 Va. 461, 14 S.E.2d 281 (1941): tenant granted interpleader against dual claimants of the rent, both claimants having denied their title from the same grantor; *Hartford Fire Ins. Co. v. Mutual Ins. etc. Co.*, 193 Va. 269, 68 S.E.2d 541 (1952): Insurance Company allowed to interplead claims by the insured and an alleged assignee of the insured.

⁵¹ *Leftwich v. Wells*, 101 Va. 255, 43 S.E. 362 (1903).

were claimed by the beneficiary under the decedent's contract with the company and by decedent's husband who alleged a separate contract between himself and decedent. Clearly there was no privity between the claimants; yet relief was granted, and the funds were awarded to the beneficiary.

Therefore, on the basis of this decision, considering the silence of the Code regarding the privity requirement, and in the absence of any case specifically denying the remedy for want of privity between the claimants, it is thought that the privity requirement does not limit the application of the statutory remedy under this general and most important statute. Certainly, it has not been a limitation thus far.

There are also other statutes providing interpleader and similar remedies in certain specific instances which should receive some consideration. These statutes, which for the sake of convenience can be called "specialized statutes", are the "more distant relatives" of equitable interpleader and are of little importance in the scope of this paper.

The foregoing discussion of the procedure under the general statute does not apply in most instances to the specialized statutes. In general, however, it may be said that the privity requirement does not apply. That requirement, if applicable, would all but totally defeat the purposes of any of the specialized statutes because of their very nature. Their application in a number of cases indicates that the privity requirement does not apply.⁵² The other common law restrictions on interpleader apply in varying degrees, but they do not constitute an important limitation. The remainder of this section on statutory interpleader is a summary of the specialized statutes provided by the Code.

A substitute for replevin, first established by the Code in 1849,⁵³ provides for interpleader to test the ownership of property levied on by a warrant or distress or execution.⁵⁴ The rem-

⁵² See *Barnes v. American Fertilizer Co.*, 144 Va. 692, 130 S.E. 902 (1925); *Littell v. Lansburg Furniture Co.*, 96 Va. 540, 32 S.E. 63 (1899); *Starke v. Scott*, 78 Va. 180 (1883); *Kern v. Wyatt*, 89 Va. 885, 17 S.E. 549 (1893).

⁵³ Cited, *Kiser v. Hensley*, 123 Va. 536, 541, 96 S.E. 777, 779 (1918).

⁵⁴ Va. Code, §8-227 (1950).

edy is available to the officer making the levy, to the plaintiff in the distress warrant or execution, and to the claimant of the property.

A further provision⁵⁵ allows warehousemen to interplead conflicting claims to goods in storage:

If more than one person claim the title or possession of the goods, the warehouseman may, either as a defense to an action brought against him for non-delivery of the goods, or as an original suit, whichever is appropriate, require all known claimants to interplead.

Interpleader is also provided in cases of attachment to protect the claims of third parties in the property attached. The Code allows any person having a claim to property attached to file a petition to have his rights determined at any time before the property attached is sold or the proceeds of the sale paid to the plaintiff under the judgment. Upon the demand of either claimant, a jury may be impanelled to hear the cause.⁵⁶

It has been held with regard to this section that its evident purpose was to protect the equitable as well as the legal rights and interests of third persons in the attachment proceedings, and the lien of the attaching creditor should be subordinated to all such rights and interests as exist at the time the attachment is levied.⁵⁷

Virginia additionally provides a remedy in interpleader to determine the validity of a claim in property held under a distress warrant or under execution of a judgment. The petition may be made by the claimant, the officer having such process, or the party who had the same issued.⁵⁸

In Chapter 4 of the Code concerning liens of innkeepers, livery stable and garage keepers, mechanics and bailees, a remedy in interpleader is given to one having an interest in the property against which such liens are sought to be enforced. The petition

⁵⁵ Va. Code, § 61-20 (1950).

⁵⁶ Va. Code, §§8-560 (1950); And see *Littell v. Lansburg Furniture Co.*, 96 Va. 540, 32 S.E. 63 (1899).

⁵⁷ *Barnes v. American Fertilizer Co.*, 144 Va. 692, 130 S.E. 902 (1925).

⁵⁸ Va. Code, §16.1-119 (1950).

to be filed by the claimant must be filed before the property is sold or the proceeds of the sale paid to the plaintiff under the judgment of the trial justice or court.

A specialized statutory provision⁵⁹ for interpleader determines rights with regard to money or securities deposited with the Virginia Division of Motor Vehicles. The deposit is one method of proving the financial responsibility required by the Motor Vehicle Regulations. The Code states:

The Commissioner and the State Treasurer, or either, may proceed in equity by bill of interpleader for the determination of any dispute as to ownership of or rights in any deposit and may have recourse to any other appropriate proceeding for determination of any question that arises as to their rights or liabilities or as to the rights or liabilities of the Commonwealth under this Chapter.⁶⁰

Conclusion

In drawing any conclusion, it is first observable that a broader and more useful remedy in interpleader is now available in Virginia because of the statutory improvements on the common law version. Even at present, however, the remedy is certainly not without unneeded limitations, the abrogation of which will be required before it may fully expand to meet new situations and realize its true potential in terms of service.

The specialized statutes have been a definite forward step within their limited design and have generally not been limited by the common law restrictions. Because of their limited application, however, one seeking to interplead rival claims will more often find it necessary to bring his case within the bounds of the general statutory provision, which is applicable only when an action is pending against the complainant. A complainant, filing his bill for interpleader before an action by one of the claimants is brought against him, will find himself required to meet the rigid jurisdictional requisites of the ancient equitable version of interpleader. These were the circumstances in *Runkle v. Run-*

⁵⁹ Va. Code, §46-478 (1950).

⁶⁰ *Ibid.*

kle,⁶¹ complainant's bill being finally dismissed for want of privity between the claimants.

Even when the general statutory provision is applicable, any interest retained by the complainant in the subject matter of the dispute or any independent liability which the complainant may incur to either of the claimants before final disposition of the matter defeats jurisdiction. A statute expressly removing both of these limitations is desirable as both limitations are artificial and without any basis in the nature of interpleader itself.

While there is no reason to believe that the privity requirement is presently a limitation upon the jurisdiction of courts applying any interpleader statute, a specific provision expressly removing the privity requirement, similar to that of the Federal Rules of Civil Procedure of the California Code considered above, would be more satisfactory from the standpoint of certainty.

K. H. L.

⁶¹ 112 Va. 788, 72 S.E. 695 (1911).