William & Mary Law Review

Volume 2 | Issue 1 Article 4

Some Problems of Removal and Appeal From Courts Not of Record in Virginia

Harmon D. Maxson

SOME PROBLEMS OF REMOVAL AND APPEAL FROM COURTS NOT OF RECORD IN VIRGINIA[1]

HARMON D. MAXSON

I. *Removal*

A. General

Virginia statutes governing removal of a case from a court not of record merely outline procedure already in effect[2]. The purpose of the statutes is not stated. A defendant may remove a case without stating cause or reason. Removal from courts not of record is limited to civil cases.

In practice, the defendant may find removal an important bit of strategy in various situations. Advantages of removal include benefits of a jury trial allowed in courts of record but not available in courts not of record, and foreclosure of the

---

[1] As provided by Va. Code § 16.1-5 (1950) "Courts not of record," unless otherwise specifically provided, shall mean and include all courts in the Commonwealth below the jurisdictional level of the circuit and corporation courts. "County courts" are a specific type of court not of record, and include all courts in counties heretofore designated as trial justice courts and county courts. All existing courts in cities and towns created under former § 16-129, and all similar courts created under the provisions of municipal charters, which courts are presided over by mayors, justices of the peace, police justices or other trial officers however designated and the jurisdiction of which is limited to cases involving violations of city or town ordinances or of cases instituted for collection of city or town taxes or assessments or other debts due and owing to such city or town, are known as police courts. Unless otherwise specifically provided, police courts are not included in the designation "courts not of record." (Va. Code, § 16.1-70 (1950). Juvenile and Domestic Relations courts as covered by Va. Code §§ 16.1-139 through 16.1-217 are not treated in this paper. It should be noted however that these courts generally exercise exclusive original jurisdiction over matters within their purvue (§ 16.1-158). Such matters may be appealed but may not be removed.

[2] Va. Code, §§ 16.1-72, 16.1-92, 16.1-105 and 16.1-22 (1950). Removal under these sections is not to be confused with change of venue or removal for avoidance of prejudice provided for by Va. Code §§ 8-38(10), 8-157, 8-158 and 8-159 (1950). In the former series of statutes removal is to a court which might have had appellate jurisdiction over the case while in the latter, removal is to a court of similar jurisdiction. In addition, the latter govern removal from circuit, city or corporation courts, whereas the former are restricted to "courts not of record."

probability of an appeal. In this respect, the procedure tends to expedite justice by avoiding two trials where one will suffice. When the defendant has a good defense but feels he may lose in the lower courts, he may save himself the cost of an appeal (including expense of bond required on appeal but not on removal) by removing the case.

The defendant may wish to remove a case in order not to reveal his strategy in the lower court and thus preclude the likelihood of an appeal by the plaintiff. Such tactics may be especially effective in cases involving contracts which provide for voluntary arbitration but which have not been arbitrated at the time the original suit is filed. Where the plaintiff bases his appeal on subsequent arbitration the odds are likely to swing in his favor. The defendant may often preclude this by removing the case beforehand. Cost of appeal from a court of record includes cost of printing the record. Since this seldom is less than $1,000, it often amounts to a prohibitive sum, making such appeal much less likely than from a court not of record.

Removal may also be advantageous where a party is defendant to two similar actions brought at the same time. If the defendant loses the first case he may wish to appeal it and remove the second case so they may be tried together in the circuit court. The danger in such procedure lies in the fact that should the appeal be denied[3], the purpose for removal is defeated. Although an appeal may sometimes be withdrawn, no such statutory provision has been enacted for withdrawing a removal action. This danger is somewhat ameliorated in some localities, however, where in practice, the clerk of the court of record, acting in behalf of the judge, grants such withdrawal.

Removal from a court not of record does not preclude subsequent appeal from the court of record to which it was removed. The nature of an appeal from a court of record differs from that of a court not of record, however, and the advantages are to some extent lost. Not only are the costs of the former

[3] An appeal may be denied for failure to meet any of the requirements of paragraphs B. 1 and 2, C and D of Section II of this paper.

greater, but appeal from a court not of record is an "appeal de novo"[4] whereas appeal from a court of record is not.

Today, removal of an action from one court to another is entirely statutory. In the face of some demand for the elimination of all provisions for removal from a court not of record, broad powers have been granted courts of record to approve the removal of and to try removed civil cases[5]. In such cases, the court may permit all necessary amendments, enter such orders, and direct such proceedings as may be necessary or proper to correct any defects, irregularities and omissions in the pleadings, and bring about a fair trial on the merits of the controversy[6].

B. Jurisdiction

1. *Subject Matter*

a. Land—Virginia courts not of record lack jurisdiction to try cases involving title to realty. Section 16.1-77(2)[7] which gives civil jurisdiction to courts not of record to try attachment cases should be amended to reflect this limitation. This section is presently in conflict with section 16.1-105 which correctly states the law[8]. Thus a court not of record shall take no cognizance of attachment cases levied upon real estate, but shall forthwith remove such cases to a court of record having jurisdiction, to be further proceeded with in such court as if the attachments had originated therein[9].

2. *Amount*

a. General — in order to remove an action from courts not of record, the amount in controversy must exceed three hundred

---

[4] Va. Code, § 16.1-136 (Supp. 1958).

[5] Senate Document No. 12, Comm. of Va., p. 44 (1956).

[6] Va. Code, § 16.1-92 (1950).

[7] From this point on in this paper such references will be to the Va. Code (1950).

[8] *Cf.* section II, B. 1. a. of this paper for opposite result in cases appealed.

[9] Va. Code, § 16.1-105 (1950).

dollars, exclusive of interest, attorneys' fees and costs[10]. This figure is a full third increase over the amount previously required. The change reflects the lessened value of the dollar as well as an attempt to discourage use of removal as a delaying tactic only[11]. It also serves to reduce the volume of cases tried in courts of record.

b. Amount of Cross-claim — In theory, the defendant removing an action from a court not of record has not submitted to the jurisdiction thereof. He has not chosen the court not of record as the tribunal in which to assert his claim. Not having invoked the jurisdiction of the court not of record, the defendant's claim on removal is not limited to the jurisdictional amount of that court. Upon perfection of the removal, the case is tried in the court to which removed just as though it had been brought there in the first instance and the limitations upon the jurisdiction of the lower court are disregarded. The Supreme Court of Appeals reached this conclusion in *Hoffman* v. *Stuart*[12] where the plaintiffs brought an action in a court not of record for six hundred and nineteen dollars for damages to their truck, resulting from a collision with the auto of the defendant's decedent. Defendants, who were administrators of the estate, removed the cause to the circuit court and there filed a cross-claim for fifteen thousand dollars, alleging the wrongful death of the decedent as a result of the same collision. The cross-claim was allowed even though it was in excess of the jurisdictional amount of the lower court[13]. (The same result should follow even though the plaintiff's original claim be less than three hundred dollars.)

It is in respect to such liberality in amount of cross-claim based on the theory of the jurisdiction of the trial court not

---

10 Va. Code, § 16.1-92 (1950). *Note:* An action may be removed from a court of limited jurisdiction (e. g., police courts referred to in footnote 1.) when the amount exceeds fifty dollars: Va. Code, § 16.1-72 (1950).

11 Senate Document, No. 12, Comm. of Va., p. 44 (1956).

12 188 Va. 785, 51 S.E.2d 239 (1949).

13 Va. Code, § 16.1-77 (1950) gives courts not of record exclusive jurisdiction in certain civil matters not exceeding three hundred dollars and concurrent jurisdiction with courts of record where amounts involved do not exceed two thousand dollars.

having been invoked, that removal procedure most differs from appeal. As we shall see, a very different rule applies to appeals[14].

On principle where the case is removed, the plaintiff should likewise be permitted to amend his claim to an amount in excess of such limit.

C. Removal Requirements

Removal may be had any time on or before the return day of process or within ten days after such return day, if trial of the case has not commenced or if judgment has not been rendered[15].

Any defendant may request removal by the judge of the court not of record. However, in order to make certain that the bona fides are present, and that removal is not used merely as a delaying tactic, the defendant must file an application for removal (a letter application sufficies) as well as an affidavit that he has a substantial cause of action. In addition, he must pay the costs accrued to the time of removal, the writ tax, and the costs in the court to which removed[16]. Although there is no statutory provision for withdrawing a removal action, the clerk of the court of record sometimes grants such withdrawal whether or not the withdrawal is requested within the original ten-day period. If the defendant fails to meet any of the removal stipulations, the judge shall refuse to grant removal and shall proceed to try the case[17].

D. Trial of Removal Cases

Trial procedure in courts of record follows as nearly as possible the Rules of Court for other actions at law (Rules 3:3 through 3:22) with liberal discretionary powers in the court of record to permit all necessary amendments, enter such orders,

---

14 See section II. A.

15 Va. Code, § 16.1-92 (1950).

16 *Ibid.*

17 *Ibid.*

and direct such proceedings as may be necessary or proper to correct any defects, irregularities and omissions in the pleadings and bring about a trial on the merits of the controversy[18].

II. *Appeal*

A. General

The remedy of appeal in actions of law and in equity is purely of constitutional[19] or statutory[20] origin. Unlike removal, appeal is not limited to civil cases. When found in a statute at the present time, the meaning to be given to "appeal" must be gathered from the language of the statute itself in the light of the context[21].

An appeal is a direct attack on the judgment or order appealed from, and a challenge of the binding force of the judgment of the trial court. In the absence of some statutory or constitutional provisions, the right of appeal is a matter of privilege rather than a natural, inherent, or vested right. However, when provided for by statute or constitution, it becomes a matter of right and should not be denied except for good cause. Nor should it be denied on technical grounds if appellant is acting in good faith. The Virginia Code provides for very liberal correction of defective or irregular warrants or motions in civil appeals[22]. Similar provisions for criminal cases have not yet been provided. There is an urgent need for such legislation and in particular for a provision allowing amendment of the record on appeal of criminal cases.

An appeal from a court not of record is in effect a statutory grant of a new trial[23]. The true rule is that while the appeal

---

18 Va. Code, § 16.1-92 (1950). See further Va. Code, § 16.1-114 (1950).

19 Constitution of Va., §§ 88 *et. seq.*

20 Va. Code, §§ 8-462 *et. seq.*, 16.1-73, 16.1-106 through 114, 16.1-122, 16.1-132 through 134, 16.1-214 through 216 (1950).

21 Widgins v. Norfolk and W. Ry. Co., 142 Va. 419, 128 S.E. 516, 518 (1925).

22 Va. Code, § 16.1-114 (1950).

23 Baylor v. Comm., 190 Va. 116, 56 S.E.2d 77 (1949).

is heard and determined de novo[24] insofar as the receipt of evidence and the amendment and supplementation of pleadings is concerned, yet for the purpose of jurisdiction the proceeding on appeal is but a continuation of the original proceeding before the trial judge[25].

B. Jurisdiction

1. *Subject Matter*

a. Land — As stated in the removal section of this paper, Virginia courts not of record have no jurisdiction to try cases involving title to realty. Under such circumstances it is reversable error to allow an appeal to a circuit court in a case involving petition for attachment of property[26]. The reasoning is that in cases of appeal, the jurisdiction of the circuit court is derivative of that of the court not of record and where the latter has no jurisdiction, neither does the circuit court. This reasoning appears to be a complete quibble in view of the fact that lack of jurisdiction in the lower court is the basis for removing such attachment cases therefrom to the circuit court.

b. Persons — Section 16.1-77 grants courts not of record original jurisdiction to try cases involving injury to the person where the amount does not exceed three hundred dollars, and concurrent jurisdiction with courts of record having jurisdiction in such territory when the amount exceeds three hundred dollars but does not exceed two thousand dollars. In *Fuller* v. *Edwards*[27], it was held that a defamation suit is a suit for personal injuries within the meaning of the then existing counterpart of this statute and since a court not of record has authority to try it within these monetary limitations, it may likewise be appealed.

---

24 Wygal v. Wilder, 117 Va. 896, 86 S.E. 97 (1915); Gravely v. Deeds, 185 Va. 662, 40 S.E.2d 175 (1946); Copperthite Pie Corp. v. Whitehurst, 157 Va. 480, 162 S.E. 189 (1932).

25 See Section II.B.2.b. of this paper for the development of and comment on this rule.

26 Addison v. Salyer, 185 Va. 644, 40 S.E.2d 260 (1946).

27 180 Va. 191, 22 S.E.2d 26 (1942).

2. *Amount*

a. General — Appeal may be had as a matter of right from any order or judgment rendered in a court not of record in a civil case in which the matter in controversy is greater than fifty dollars, exclusive of interest, attorney's fees contracted for in the instrument, and costs[28].

b. Amount of Amended Claim and Cross-Claim or Set-Off — Section 16.1-114 provides that actions or proceedings appealed or removed from courts not of record shall be tried according to the principles of law and equity. In *Cooperthite Pie Corporation* v. *Whitehurst,* decided under a similar provision, set-off was authorized under the well established principles of equity[29]. The court reasoned that as statutes permit justices of the peace to hear and determine set-offs, it follows as a matter of course that on an appeal to a court of record, where greater latitude is expressly permitted, a set-off may be filed. In reaching this conclusion, the court relied in part on section 6030 of the Code of 1919 which is essentially reproduced by section 16.1-113 of the present Code as follows: "All legal evidence produced by either party shall be heard whether the same was produced or not before the court from which the appeal is taken."

The decision gave birth to the rule that the jurisdiction of the circuit court is derivative of and limited by that of the court not of record with the collateral result that although the right to set-off is established, it is limited in maximum amount to the area of concurrent jurisdiction between courts of record and courts not of record. (At present, section 16.1-77 has established this concurrent jurisdiction at two thousand dollars.)

The holding was in part based on the premise that since a justice of the peace has limited jurisdiction derived entirely from statute, he can only exercise such jurisdiction as is express-

[28] Va. Code, § 16.1-106 (1950). Sections 16.1-103 and 16.1-123 of Va. Code (1950) similarly provide respectively for appeal where fifty dollars or more is involved in connection with interrogatories in aid of execution in connection with proceedings to try title to property levied on under distress or execution.

[29] 157 Va. 580, 162 S.E. 189 (1932).

ly conferred upon him[30]. This limitation carries through to the jurisdiction of the county judge which historically is derivative of that of the trial justice[31] just as the jurisdiction of the latter was historically derivative of that of the justice of the peace[32].

In *Stacy* v. *Mullins*[33], the court extended this rule to hold that an appeal of a civil action from a court not of record a plaintiff may not, in the circuit court, amend his complaint to claim an amount in excess of the jurisdiction of the trial justice. The court cited the *Copperthite* case and numerous cases from other states holding that an appeal is a mere continuation of the original case — a proceeding in the same action. The court quoted dicta to the effect that want of jurisdiction of the subject matter in the court where the action was brought, continues in every court where the action may be appealed, for the reasons that it is the *same action,* and an appeal is authorized only where the court from which the appeal is taken, in case of the failure to appeal, would have had authority to enforce its judgment. Therefore, jurisdiction of the appellate court is limited to the highest sum which the court from which the appeal was taken was authorized to render judgment. Thus, the court in deciding this landmark case, imposed a serious and lasting limitation on the de novo nature of an appeal from a court not of record.

The egregiousness of those two decisions and of their resultant rule is as lamentable as the penumbra of specious reasoning which foreshadowed them. The following example is further illustrative of the difficulty an attorney may encounter under this rule. In a detinue action for nine hogs[34], judgment was given for the plaintiff and defendant appealed to the circuit court. During the county court trial it became apparent that this would have been a proper case to have

---

30 Wall v. American Bank, etc. Co., 159 Va. 871, 167 S.E. 425 (1933); Martin v. City of Richmond, 108 Va. 765, 62 S.E. 800 (1908); Richmond v. Sutherland, 114 Va. 688, 77 S.E. 470 (1913).

31 42 VLR 1032, *A New Law for Courts Not of Record* (1956).

32 Dotson v. Dickerson, 169 Va. 50, 192 S.E. 700 (1937).

33 185 Va. 837, 40 S.E.2d 265 (1946).

34 Tucker v. Baughm presently being appealed from the Southampton County Court, Southampton, Va.

sought punitive damages. Such damages however do not ordinarily lie in a detinue case. On appeal counsel for plaintiff wishes to take a voluntary non-suit in the circuit court followed by a motion for judgment for conversion of the hogs, asking damages for their value plus punitive damages. Section 8-220 provides that a party shall not be allowed to suffer a non-suit unless he do so before the jury retire from the bar or before the suit or action has been submitted to the court for decision before a motion to strike the evidence has been sustained by the court. The question arises whether the former adjudication is a bar to non-suit on appeal — the answer should clearly be No. Since the trial *de novo* effect of such appeal is to abrogate the lower court judgment, a non-suit may be taken on appeal before the action has been submitted to the circuit court for decision. The question remains however as to the extent of total damages which may be awarded. Under the limitations imposed by *Stacy* v. *Mullins,* the maximum allowable is two thousand dollars, which likely will be very little more than the actual value of nine hogs[35].

c. When Amount Immaterial—In civil cases, involving the constitutionality or validity of a Virginia statute or of a municipal ordinance or by-law, there shall be an appeal of right, irrespective of the amount of the matter in controversy[36].

Similarly, in criminal cases any person convicted of an offense not felonious shall have the right of appeal. There shall also be an appeal of right from any order or judgment of a court not of record forfeiting any recognizance or revoking any suspension of sentence[37].

3. *Law—Equity Problem*

In *Addison* v. *Salyer*[38] it was held that cases heard on appeal from a court not of record cannot be transferred from

35 Va. Code, § 16.1-106 (1950).

36 Va. Code, § 16.1-132 (1950).

37 185 Va. 644, 40 S.E.2d 260 (1948). Applied in Copperthite Pie Corp. v. Whitehurst, 157 Va. 480, 162 S.E. 189 (1932); Gemmel v. Svea Fire etc. Ins. Co., 166 Va. 95, 184 S.E. 457 (1936); Virginia Machinery etc. Co. v. Hungerford Coal Co., 182 Va. 550, 29 S.E.2d 359 (1944).

38 185 Va. 644, 40 S.E.2d 260 (1946).

law to equity or visa versa as this is inconsistent with sections 16.1-113 and 16.1-114 which expressly declare that every appeal shall be tried by the court in a summary way, that all legal evidence produced by either party shall be heard, whether the same was produced or not before the trial court and that every such appeal shall be determined according to the principles of law and equity. The transfer provisions of section 8-138 thus have no application in a case appealed from a county court. In theory, however, the same beneficial result should be reached since section 16.1-114 further provides that when the principles of law and equity conflict, the principles of equity shall prevail. This section is designed to provide liberal correction of any defect or irregularity to the end that justice be not delayed or denied by reason of errors in the pleadings or in the form of the proceedings.

4. *Effect of Original Jurisdiction on the Power to Remand*

In a criminal proceeding the defendant was convicted before a court not of record and appealed to the circuit court[39]. The circuit court found the warrant defective and remanded the case to the lower tribunal. This was reversable error. In cases of this sort the circuit court is exercising original jurisdiction and has no power to remand a case. This might be better explained by saying that once an appeal is perfected the court not of record is bereft of jurisdiction and it is as if there is no lower tribunal to which the case may be remanded. It is the duty of the circuit court to amend the warrant so as to remedy the defect, to try the case, and to pronounce judgment as if the case had originated in that court.

The same principle should apply in civil cases. Thus in a garnishment case appealed by the defendant to the circuit court, a motion by the plaintiff to dismiss and remand because of defect in the bond, is clearly improper. Not only is it not within the power of the circuit court to remand, but in essence dismissal and remand are inimical. A dismissal of a perfected appeal leaves the parties in the same position as though the

[39] Mailouf v. City of Roanoke, 177 Va. 846, 13 S.E.2d 319 (1941).

original action had never been brought whereas a remand, if allowed, would serve to reopen the action in the court not of record.

C. Time for Appeal and Withdrawal of Appeal

In both civil and criminal cases, appeal must be made within ten days after the order, judgment or conviction appealed[40]. Time extensions are governed by Rule 3:13. In criminal cases under section 16.1-133 any person convicted in a court of record of an offense not felonious may within ten days after such conviction, withdraw an appeal which has been noted, pay the fine and costs to such court, and serve any sentence which has been imposed.

Payment of a fine, however, is not per se a waiver of the right to appeal. In *Gravely* v. *Deeds*[41] the defendant was convicted of a misdemeanor, fined and sentenced to twelve months in jail. He paid his fine at once and sought to appeal to the circuit court five days later. In granting the appeal, the court conceded that since a man tried for a misdemeanor may not consult a lawyer until after conviction, he should have the full ten days to decide whether to appeal.

The appeal is perfected when entered on the appeal docket. The appellant has thirty days from the date of judgment in which to perfect the appeal. In order to perfect an appeal, all requirements for bond and surety must be met. In addition, within thirty days from the date of the judgment, the appellant must pay the clerk of the court to which the appeal is taken, the amount of the writ tax and costs as required by subsection (59) of section 14-123[42].

---

40 Va. Code, §§ 16.1-106 and 16.1-132 (1950).

41 185 Va. 662, 40 S.E.2d 175 (1946).

42 A ten dollar clerk's fee, or five dollars in actions not involving more than five hundred dollars.

D. Requirement of Bond and Surety

1. *Civil Cases*

Statutory requirements for appeal bonds have always been construed as mandatory[43]. Section 16.1-107 provides that no appeal shall be allowed unless and until the party or someone for him shall give bond, in an amount and with sufficient surety approved by the judge or by his clerk, to abide by such judgment as may be rendered on appeal, if such appeal be perfected, or if not perfected, then to satisfy the judgment of the court in which it was rendered. The exact meaning of "surety" is not clear from the context of the statute. It is apparently used with the same connotation as "security". The former statute[44] containing the same ambiguity, was interpreted to mean that the terms should not be looked on as synonmous, and that a deposit of cash or a certified check was not "surety" within the meaning of the statute[45]. In other words surety means a person, bonding company, etc. who is willing to act as surety in the accepted suretyship sense. This is obviously the better view and is substantiated by section 16.1-110 which provides that the surety in an appeal bond shall not be released by the appellant's being adjudicated a bankrupt at any time subsequent to the judgment rendered in the court not of record.

That the word "surety" when found in present statutes should be given its ordinary meaning is further indicated by section 16.1-113 which provides that if a judgment be recovered by the appellee, execution shall issue against the principal and his surety, jointly or separately for the amount of the judgment and the execution shall be endorsed "No security is to be taken."

The words "sufficient surety" in section 16.1-107 leave the entire matter of surety to the discretion of the judge of the court not of record, and leave the way open to the interpreta-

---

43 Covington Virginian v. Woods, 182 Va. 538, 29 S.E.2d 406 (1944).

44 Va. Code, § 16-28 (1950).

45 Brooks v. Epperson, 164 Va. 37, 178 S.E. 787 (1935).

tion that furnishing surety is optional rather than mandatory. Under present law a judge may, within his own discretion, decide that "sufficient surety" means no surety at all.

The provision of former section 16-28 for verbal acknowledgment of surety has been eliminated by section 16.1-107. Section 16.1-108 does provide that money may be deposited in lieu of bond.

Section 16.1-107 provides that if bond is furnished by or on behalf of any party against whom judgment has been rendered for money or property or both, the bond shall be conditioned for the performance and satisfaction of such judgment or order as may be entered against such party on appeal for the payment of all costs and damages which may be awarded against him in the appellate court. If the appeal is by a party against whom there is no recovery except for costs, the bond shall be conditioned for the payment of such costs and damages as may be awarded against him on appeal.

For bonding purposes, an appeal from a court not of record is a continuation of the same suit, so that the liability of the obligor on a detinue bond continues until the appeal is decided. Similarly the liability of a surety continues when a continuance is granted upon appeal. However, because of the de novo nature of an appeal from a court not of record, acts of a judge, subsequent to the first approval, disapproving the appeal bond, are ineffective.

Corporations appealing from courts not of record must affix the corporate seal to the appeal bond. In *The Covington Virginian, Inc.* v. *Woods*[46], the defendant corporation lost its case before a trial justice and appealed. The plaintiff asked the appellate court for a continuance. Later upon noticing that

[46] 182 Va. 538, 29 S.E.2d 406 (1944). Absence of corporate seal on a corporate bond was also used as grounds to attack the appeal in Noland Co. Inc. v. Aetna Casualty and Surety Co. presently pending appellate trial in the Circuit Court of James City County, Va. In this case the bond, which was signed by the attorneys for the principal and surety (American Casualty Co.), bore the printed word SEAL after each signature. In addition the corporate seal of the surety had been affixed and the principal's attorney had made his own personal scroll as a seal.

the appeal bond did not bear a seal, the plaintiff moved for and secured a dismissal of the appeal. It was held that if a certified check is not good as a bond, when the statute requires a bond, an unsealed instrument is likewise unsatisfactory. Since the ten day limit for perfection of appeal had gone by when the plaintiff asked for a continuance, the error could not have been corrected by a prompt objection, and there was no implied waiver on the plaintiff's part.

It should be noted that under the Model Business Corporations Act mandatory use of the corporate seal is abolished as an unnecessary and obsolete requirement. Its use is made permissive because of the conveyancing acts in many states. Sections 13.1-3 (c) and 13.1-20 indicate that general use of the corporate seal is permissive and not mandatory. The Rules of Court contain no requirement for corporate seal. It would seem that in the interest of streamlining legal procedure and in accordance with the tenure of the Virginia Code, that it is time to declare that use of the corporate seal is no longer mandatory in Virginia.

When a court not of record fails to require an appeal bond, it is the duty of the circuit court to correct the omission and upon due execution of the bond, to proceed to try the case[47].

Under section 16.1-109 the court to which the appeal is taken may require the appellant to give new or additional security with penalty of dismissal with costs for failure to so provide.

Section 16.1-107 provides that when appeal is proper to protect the estate of a decedent, an infant, a convict, an insane person, or the interest of a county, city or town, no bond shall be required.

2. *Criminal Cases*

There is no statutory provision for bond per se for criminal cases appealed from courts not of record. Section 16.1-135

[47] Jenkins v. Betram. 163 Va. 672, 177 S.E. 204 (1934).

provides, however, that when an appeal is taken at the time judgment is rendered, the accused shall, unless let to bail, be committed to jail by the court. When an appeal is taken subsequent to the entry of the judgment of conviction, the judge shall enter the allowance of the appeal on the warrant and may admit the accused to bail. In actual practice, verbal recognizance is sometimes accepted. Frequently the recognizance section of the appeal warrant is left entirely blank. This may indicate that a separate appearance bond has been issued by a justice of the peace. In other cases the surety blank is left incomplete or the word "cash" is written in. The judge may also allow a poor and uneducated defendant to deposit title to his realty in the court, although this is of dubious value other than the in terrorem effect on the defendant. In taking such a pocket deed of trust, justices of the peace are advised to check the tax records on the property.

E. The Record on Appeal

The record on appeal of civil cases consists of the original warrant or warrants or other notices or pleadings with the judgment endorsed thereon, together with all pleadings, exhibits and other papers filed in the trial of the case, and the bond[48]. Inferably, the same is true for appeal of criminal cases. The record is of critical importance on appeal. This is especially true in criminal cases, since the Code allows for no correction of defects in the record of criminal cases once appealed. The following two cases are illustrative of the difficulty encountered:

1. In *Sisk* v. *Town of Shenandoah*[49], the appellant was convicted of a violation of a municipal ordinance prohibiting persons from driving motor vehicles while intoxicated. Since county courts may take judicial notice of the existence of ordinances of municipalities and counties within their own territorial jurisdiction, no copy of the ordinance was incorporated in the record. However, a court of record may not take judicial notice of the ordinance. Section 8-270 provides that a copy

[48] Va. Code, § 16.1-112 (1950).

[49] 200 Va. 277, 105 S.E.2d 169 (1958).

of any ordinance of any municipal corporation in this State may be received as prima facie evidence of the ordinance. This provision negatives the authority of a circuit court to take judicial notice of town ordinances on appeal from courts not of record. Since in this case there was nothing in the record to show the provisions of the ordinance, the conviction was reversed and the case dismissed.

2. In *Peak* v. *Virginia*[50], the defendant, Peak, was prosecuted upon a warrant charging him with operating a liquor nuisance. The police justice found him guilty but in endorsing the judgment on the warrant, erroneously stated that the defendant ". . . is hereby dismissed of the within charge and is sentenced to 30 days in jail, and fined $100." The defendant appealed. No one noticed that "dismissed" had been written on the warrant in place of "convicted" until after the judgment of the police court would have become final. It was held that "dismissed" means acquitted and since the record conclusively shows that the defendant was acquitted, and as only he may appeal, it is immaterial that a trial before the corporation court is a trial de novo. There is no way to correct the error after judgment becomes final. Consent cannot give the Corporation Court jurisdiction.

These cases clearly reveal the need for statutory provisions allowing more liberal amendment of the record on appeal. Until such statutes have been passed it is suggested that the need may be partially bridged by use of the *nunc pro tunc* order[51].

F. Who May Appeal

Either party may appeal a civil case. In any case involving the violation of a law relating to State revenue tried in a court not of record the Commonwealth shall also have the right to

---

[50] 171 Va. 535, 199 S.E. 473 (1938). Although this case was appealed from a police court to a corporation court, the result would be the same on appeal from a court not of record.

[51] See 1 W. & M. L. Rev. 1, p. 135, *Council* v. *Commonwealth—Nunc Pro Tunc Orders In Virginia* (1957).

appeal to the circuit court of the county or the corporation or hustings court of the corporation as the case may be[52].

In criminal cases any person convicted in a court not of record of an offense not feloneous shall have the right to appeal any time within ten days from such conviction regardless of whether such conviction was upon a plea of guilty. There shall also be an appeal of right by any party from any order or judgment of a court not of record forfeiting any recognizance or revoking any suspension of sentence[53]. Courts not of record have no authority to try felonies so naturally there is no provision for appeal therefrom.

G. Trial of Appealed Cases

1. *Civil Cases*

Section 16.1-113 provides that appeals shall be tried in a summary way by the court of record except that either party may demand a jury trial when the amount in controversy exceeds fifty dollars. This section also provides for the de novo nature of the trial by specifically stating that all legal evidence shall be heard regardless of whether or not it was produced in the court not of record.

In general the procedure contained in Part Three of the Rules of Court shall govern the trial of appealed cases in courts of record.

2. *Criminal Cases*

Appeal of criminal cases shall be heard de novo in the court of record and shall be tried without formal pleadings in writing; and, except in the case of an appeal from any order or judgment of a court not of record forfeiting any recognizance or revoking any suspension of sentence, the accused shall be entitled to trial by jury[54]. The judge of the appellate court may amend any defective warrant or issue a new warrant.

---

52 Va. Code, § 16.1-134 (1950).

53 Va. Code, § 16.1-132 (1950).

54 Va. Code, § 16.1-136 (1950).

Should this be effected after any evidence has been heard, the accused shall be entitled to a continuance as a matter of right[55].

H. Effect of Appeal

1. *When Perfected*

An appeal, properly perfected, operates not only to suspend the judgment of the inferior tribunal, but also vacates and sets it aside, so that it cannot be used as evidence or as the foundation of an action in any court. The appeal not only annuls the judgment of the county court, but it is reversible error to permit such judgment to be introduced in evidence before the jury[56].

In *Addison* v. *Salyer*[57], the decision on appeal was to reverse and dismiss. Reversal and dismissal are incompatible. Dismissal alone would have been a sufficient and proper decision, making the lower court decision void ab initio. Technically it is incorrect to speak of a judgment of reversal on appeal where the effect of the appeal is to vacate the judgment of the inferior tribunal for the reason that there is nothing to reverse. However, the Virginia Code persists in using the term "reversed" as a convenient method of stating the appeal decision. Thus it is provided that if the lower court decision be reversed upon appeal, the party substantially prevailing shall recover his costs; and such order or judgment shall be made or given as ought to have been made or given by the judge of the lower court[58].

In criminal cases, the appeal wipes out a former plea of guilty entered before a county court. Such plea is not admissible in the circuit court as "a confession." The accused is given an opportunity and must plead anew in the court of record for

---

55 Va. Code, §16.1-137 (1950).

56 Gravely v. Deeds, 185 Va. 662, 40 S.E.2d 175 (1946); Baylor v. Comm., 190 Va. 116, 56 S.E.2d 77 (1949).

57 185 Va. 644, 40 S.E.2d 260 (1946).

58 Va. Code, § 16.1-113 (1950).

unless he does so he could not be tried by a jury in the same manner as if he had been indicted for the offense in said court[59].

Where the constitutionality of the statute is not questioned, the judgment of the corporation court, upon an appeal from the decision of a court not of record, is final in a case to recover back tax money paid under protest after a tender and refusal of coupons[60].

2. *When Not Perfected*

Until an appeal is perfected, the judgment of the inferior court is not vacated but remains in full force. In such case the judgment of the court not of record shall be satisfied from the appeal bond[61]. It follows that when an appeal from a court not of record is improvidently awarded by a circuit court, and the jurisdiction thereof is challenged in the State Supreme Court of Appeals, the judgment of the court not of record should be regarded as having been vacated conditionally and on dismissal of the appeal, is reinstated. Similarly, if the appellant fails to pay the writ tax and costs, the appeal shall be dismissed and the judgment of the lower court shall become final[62].

III. *Recommendations*

The following recommendations are offered to improve the present system of practice and procedure in the lower courts of Virginia:

1. That present removal sections 16.1-72, 16.1-92, 16.1-105 and 16.1-122 be amended to clearly show the purpose of removal and on what grounds it may be granted.

---

59 Baylor v. Comm., 190 Va. 116, 56 S.E.2d 77 (1949).

60 Bransford v. Karn, 87 Va. 242, 12 S.E. 404 (1890).

61 Va. Code, § 16.1-107 (1950).

62 Va. Code, § 16.1-112 (1950).

2. That appeal sections 16.1-73, 16.1-106, 16.1-113 and 16.1-136 be amended to provide for a trial de novo without the present jurisdictional limitation.

a. That in particular, jurisdiction both as to subject matter and amount of cross-claim, and amended claim no longer be limited by the jurisdiction of the court not of record from which appealed.

b. Further that these sections be amended to show specifically when an appeal shall be deemed perfected.

3. That appeal sections 16.1-73, 16.1-113 and 16.1-136 be amended to provide for liberal correction of purely clerical errors, errors or omissions in the record, etc.

a. That the amended statutes provide that these corrections may be made on motion of either party by the judge to the end that substantial justice prevail.

4. That section 16.1-77(2) be amended to show that jurisdiction to try attachment cases is limited to those cases dealing with personality.

5. That a statute be enacted to provide for withdrawal of removal actions any time before trial in the court of record. Such withdrawal shall be granted by the judge or clerk of the court of record upon written application and payment of costs.

6. That a statute be enacted specifically stating that a corporate seal is not necessary on an appeal bond.