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TORT AND CONTRACT CLAIMS AGAINST COUNTIES

D. BARRY HILL*

I. CLAIMS AND ACTIONS AGAINST COUNTIES

a. PROCEDURE FOR PRESENTING A CLAIM TO THE BOARD

From early times it has been recognized in Virginia, that a county is a political subdivision of the state and can only be sued in the manner set forth in the statutes.¹ The statutes require that a claimant first present his claim to the board of supervisors (the governing body of the county). This requirement is embodied in Section 15.1-554,² which states that "no action shall be maintained by any person against a county upon any claim or demand until such person shall have first presented his claim to the board of supervisors of such county for allowance."

The jurisdictional aspect of this statute is illustrated by *Fidelity and Deposit Co. v. Gill*,³ in which the plaintiff, who was surety for the sheriff of Loudoun County, was forced to pay a judgment obtained against the sheriff when he could not account for certain road taxes that had been collected by a deputy. The plaintiff sued the board of supervisors and the county treasurer, alleging the treasurer had illegally diverted the tax receipts to place the blame for their absence on the sheriff. The court said the board had nothing to do with the collection of taxes, there was no allegation that the board had any knowledge of the diverted funds, and furthermore, the plaintiff could not indirectly sue the county by suing the board of supervisors. If the plaintiff wished to sue the county, the court stated, he could only do so in the manner prescribed by statute.⁴

Fidelity suggests a rule that 15.1-554 takes jurisdiction from all courts until the statutory procedure is complied with. In *Johnson v. Black*,⁵ however, the court stated that this statute (then Section 836 of

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1. *Botetourt County v. Burger*, 86 Va. 530, 10 S.E. 264 (1889). See also *Parker v. Prince William County*, 198 Va. 231, 234, 93 S.E.2d 136 (1956).

2. VA. CODE ANN. (Supp. 1964).

3. 116 Va. 86, 81 S.E. 39 (1914).

4. The plaintiff's mistake here does not seem to have been suing the board itself, but rather that he did not first present his claim to the county, as per 15.1-550.

5. 103 Va. 477, 49 S.E. 633 (1905).

the Code of 1904), does not indicate an intention by the legislature to take away equity jurisdiction to restrain the illegal diversion of public funds at the suit of a citizen and taxpayer. The complainant in *Johnson* sought to compel the board of supervisors to restore money, which it was alleged had been illegally and fraudulently withdrawn from the county treasury (the board members had paid themselves compensation in excess of that allowed by law for eleven years), as well as to restrain the further payment of the illegal compensation. The respondents claimed that the complainant had an adequate remedy at law—the procedure for claims provided by statute. The court held equity had jurisdiction in such a case, distinguishing two earlier cases, *Pearson v. Supervisors*,⁶ and *Manley Mfg. v. Broaddus*,⁷ in which equity jurisdiction was denied, on a factual basis. In *Manley*, which contained a bill of complaint that must have been as eloquent as any in Virginia history, the complainant alleged that the president of the company, “by the exercise of many wiles and blandishments, acquired an influence over the gentlemen comprising the board of supervisors of Page County, by which they became, with the most honest motives and purposes upon their part, the pliant victims of his seductive art,”⁸ the result of which was some \$3,000 more in additions to the county jail than was authorized by the contract between the parties.

In conclusion the bill alleges that “a pertinacious and adroit attack, contrived of mixed persuasiveness and menaces had been brought to bear upon the Board of Supervisors in order to drive it into the nets thus spread and to receive commitment in writing from it to these unlawful demands.”⁹ In spite of all this, the court felt itself constrained to find that it had no jurisdiction where no fraud was charged on the part of the board, or no allegation that the board had transcended its powers, merely to settle an account between a claimant and the board.

The distinction between *Manley* and *Johnson* seems to be that in *Johnson* the board was actively engaged in wrongdoing, while in *Manley* the allegedly illegal act was completed and no restraint was necessary. *Fidelity* then fits into place, because there was no allegation there that the board had knowledge of the illegal diversion of funds and of course it was not participating in the acts complained of. As a gen-

6. 91 Va. 322, 21 S.E. 483 (1895). (Payments by board for expenses incurred in conducting an election).

7. 94 Va. 547, 27 S.E. 438 (1897). (Payments by board to a contractor to construct a county jail, in excess of that provided for by contract).

8. *Id.* at 550.

9. *Ibid.*

eralization then, it may be said that 15.1-554 does not deprive an equity court of jurisdiction where some actual wrongdoing of the board is alleged and a restraining order is necessary, but when a claim is brought against the county in contract, the procedure of 15.1-550 must be followed and the jurisdictional aspect of 15.1-554 is in force.

What constitutes a claim or demand can also be troublesome. In *County School Board v. Supervisors*,¹⁰ construction of a will was sought by a trustee under the will, who had secured an agreement from the school board of the county to purchase a tract of land from him. The board of supervisors of the county refused to provide the necessary funds for the school board to complete the deal. The court held the trustee had power to sell the land under the will and approved his acceptance of the school board's offer. The court also issued rules against the school board requiring it to show cause why it should not pay the price agreed upon for the purchase of the land, and against the board of supervisors requiring it to show cause why it should not be compelled to furnish the necessary funds to the school board. On appeal, the court held that this was not a "claim or demand" against the county, requiring the trustee to present it to the board of supervisors first.

The *Fidelity* case also held the phrase "any claim or demand" meant any claim, whether legal or equitable. It is apparent from the above cases, however, that not every equitable claim need be submitted to the board, before suit is brought on it.

The procedure for presenting a claim to the board of supervisors of the county is set forth in 15.1-550. This statute requires the separate items comprising the claim be set out, accompanied by an affidavit "when no specific fees are allowed by law." The statute provides no account is to be allowed unless this procedure is followed, but it has been held that a failure to present the affidavit does not deprive the circuit court of jurisdiction of an appeal from the disallowance of a claim by the board.¹¹

The interest of the county is safeguarded by 15.1-550, which states that the commonwealth's attorney shall represent it before the board, when it determines whether to allow or disallow the claim. By 15.1-507, the board may employ counsel to assist the commonwealth's attorney "in any suit against the county or in any matter affecting county property when the board is of the opinion that such counsel is needed."

10. 184 Va. 700, 36 S.E.2d 620 (1946).

11. *County of Campbell v. Howard*, 133 Va. 19, 112 S.E. 876 (1922).

b. APPEALS FROM BOARD DECISIONS

If the board of supervisors allows a claim which the commonwealth's attorney feels is "improper or unjust," 15.1-550 provides that he may appeal the board decision to the circuit court, serving written notices of the appeal on the clerk of the board and the party in whose favor the claim was allowed within 30 days from the board's decision. The statute also insures the interest of the county, by allowing that any six freeholders of the county may require the commonwealth's attorney to appeal a board decision to the circuit court.

The right of the commonwealth's attorney to take an appeal from a decision of the board was in question in *Hannah v. Board of Supervisors*,¹² where the board of supervisors of Appomattox County had passed a resolution affirming the viewer's report as to the value of the plaintiff's land (taken for a bridge). The commonwealth's attorney excepted to the report because the compensation was excessive and unreasonable and gave the board and the plaintiff notice of an appeal to the circuit court. The plaintiff objected to this appeal because by the statute under which the county took the land, the order of the board as to the compensation was to be final unless appealed from by the owner of the land. The court held the commonwealth's attorney had a right of appeal under Section 2579 (now 15.1-550). The court said this section "clearly authorizes the attorney for the commonwealth to invoke the judgment of the circuit court for the protection of the county funds, if in his judgment the board of supervisors has erred in allowing a claim."¹³ The court stated both statutes must be read together so while the road statute gave the landowner an appeal, Section 2579 allowed the commonwealth's attorney an appeal. The court held the circuit court should have heard the case de novo to determine the amount of compensation to be paid for the taking.

If the board of supervisors disallows the claim either in whole or in part, 15.1-552 provides an appeal procedure for the claimant. If the claimant is present when the decision is rendered, he has 30 days in which to perfect an appeal to the circuit court. If he is not present, the statute makes it the duty of the clerk of the board to serve a written notice of the disallowance on the claimant or his agent, and the claimant may then appeal within 30 days from the service of notice on him. However, 15.1-552 says "that in no case shall an appeal be

12. 147 Va. 402, 137 S.E. 463 (1927).

13. *Id.* at 406.

taken after a lapse of six months from the date of the decision, nor shall an appeal be allowed unless the amount disallowed exceeds \$10.00." The appellant must serve a written notice of the appeal on the clerk of the board within the statutory time for appeal and execute a bond with surety to the county.

The statutory time limitation for appeal was in contention in *Parker v. Prince William County*.¹⁴ In this case, the plaintiff owned a motel, across from which the county erected a sewage treatment plant. The motel owner claimed that the plant was so offensive as to injure his business and amounted to a taking without compensation. The plaintiff filed a claim with the board and on May 6, 1954, they decided adversely to him. Although he was not present at the meeting the clerk of the board subsequently sent him a notice of its action. The plaintiff then filed an appeal with the circuit court on June 2, 1954, and gave the clerk a \$50.00 check for court costs. The board filed a demurrer on June 22, 1954, which was overruled, then filed grounds of defense on November 6, 1954. At the trial the circuit court questioned its own jurisdiction to hear the case, and on March 16, 1955 (almost a year after the decision of the board), the plaintiff tendered an appeal bond with surety, petitioning the court for leave to amend his complaint to an original action against the board. The circuit court denied the petition and dismissed the case for lack of jurisdiction. On appeal, the court held the plaintiff had not perfected his appeal according to the provisions of Section 15-260 (now 15.1-552). Since he was not present the plaintiff had 30 days from receipt of notice to him of the board's action to appeal, but in no case, the court said, could this period be longer than six months from the decision of the board. The court pointed out that the board did not follow 8-51 and 8-52 as to notice, but their action was saved by 8-53 which provided that even if notice was not served according to statute, if it did in fact reach the person it was valid. Here, the court said, notice actually reached the claimant and the six months allowed by statute had expired by the time he filed the bond with surety (thus perfecting his appeal). The court held that the \$50.00 check did not amount to substantial compliance with the bond requirements of the statute.

15.1-553 provides that a determination by the board disallowing a claim, "shall be final and conclusive and a perpetual bar to any action in any court founded on such claim," unless an appeal is taken as per

14. 198 Va. 231, 93 S.E.2d 136 (1956).

15.1-552 or unless the board consents to the institution of an action by the claimant against the county.

The general application of 15.1-550 and 15.1-552 to all decisions of the county board of supervisors is illustrated by *Bragg v. Weaver*.¹⁵ In this case, the plaintiff, who owned land adjoining a public road in Virginia, sought an injunction against the taking of earth from his land to be used in repairing the road. A state statute provided that earth to be used in repairing a road might be taken from the nearest and most convenient place and allowed for compensation to the owners of the land. The plaintiff asserted that the statute made no provision for affording the owner an opportunity to be heard in regard to the necessity or expediency of the taking, or of the amount of compensation allowed and that the due process clause of the 14th Amendment was thereby violated. The Supreme Court said: "[W]hen the intended use is public, the necessity and expediency of the taking may be determined by such agency and in such mode as the state may designate," and a hearing on the taking is not essential to due process. However, the court stated, due process required that a hearing on the amount of the compensation be held. The court decided that this requirement was satisfied by Section 838 (now 15.1-552), which gave a right of appeal and trial de novo in the circuit court. The court said that Section 838 was of general application, providing for notice, even though the road statute under which the land was taken, did not.¹⁶ This decision is similar to that in the *Hannah* case, although there the court was concerned with Section 15.1-550.

C. THE PROCEDURAL ASPECT OF SUITS BY AND AGAINST COUNTIES

It has been said that the powers and authority of the county and its board of supervisors are "wholly derived from statute and neither has any power other than those expressly conferred or necessarily implied."¹⁷ It is well then to look at the statutes to determine what power counties have to maintain actions.

15.1-506 provides: "the governing body of any county by the name of 'The Board of Supervisors of . . . County' may sue and be sued in relation to all matters connected with their duties as such board." 15.1-508 states that "every county may sue in its own name

15. 251 U.S. 57 (1919).

16. *Id.* at 60.

17. *City of Lynchburg v. County of Amherst*, 115 Va. 600, 80 S.E. 117 (1913).

for forfeitures, fines or penalties given by law to such county, or upon contracts made with it . . .”

Apparently the statutes imply that where the matter concerns only the duties of the board, the board shall sue in its own name, but in any other matter against the county the suit shall be in the name of the county. It must be noted however, that the cases have made no such distinction and also that the statutes enabling the county to sue in its own name give no style of the action. It seems that it is intended that the board will do the suing, either in its own name or that of the county, no matter whether it involves strictly duties of the board or not.

The right of the board of supervisors to maintain a suit is well settled.¹⁸ That the board must sue as an entity, not in the name of its individual members may be implied from *Stewart and Palmer v. Thornton*,¹⁹ an action by certain residents of Prince William County (who made up the county school board) to subject a tract of land, owned by the defendants, to the payment of a debt. The court held that the action could not be maintained by the citizens themselves, as they had no legal or equitable interest in the subject matter of the suit. The court said that the school board itself must sue: “When the rights of a corporation are involved, they can be asserted and enforced by the corporation only—in its corporate capacity and in its corporate name.”²⁰ Even though the plaintiffs alleged that they constituted the county school board, the court said, it was not a suit by the board as a corporate entity, and therefore it could not be maintained. While this procedural technicality might give way today in the interest of justice, the principle should still obtain and should apply to a board of supervisors.

15.1-506 and 15.1-508 allow for suit against the county and its board of supervisors. Again, from a reading of the statutes, it would appear that the board could only be sued in relation to its duties, but this distinction has not prevailed in the cases. A claimant, by 15.1-554, must first present his claim to the board for approval or disapproval, but his “appeal” is in the nature of an original action, since the circuit court hears the case de novo. 15.1-506 and 15.1-508 do not then, allow an original action in contract, unless 15.1-550 and 15.1-554 are followed. The statutes allowing the county and its board to be sued apparently allow only a suit where some form of permissible equitable relief is sought, without requiring presentation of the claim to the board first. If

18. *Norfolk & W. R. Co. v. Board of Supervisors*, 110 Va. 95, 65 S.E. 531 (1909).

19. 75 Va. 215 (1881).

20. *Id.* at 216.

a legal matter is involved the claimant cannot circumvent the board by presenting his claim *ab initio* to the circuit court.

The question of the right of the claimant against the county to a trial by jury was involved in *Lambert v. Supervisors*,²¹ where the board of supervisors had disallowed a claim of the plaintiff for work done pursuant to a road contract. The plaintiff perfected an appeal to the circuit court and asked that a jury be empanelled to hear the matter. The circuit court refused this request and tried the case without a jury, giving judgment for the county. The court discussed the fact that prior to the present statutes, appeal from the board of supervisors went to the county courts and the plaintiff had a right to have the appeal tried as if it were an appeal from an order of the county court itself to the circuit court. At that time, trial by jury was allowed on appeals from orders of the county courts "in a controversy concerning the probate of a will, or the appointment or qualification of a personal representative, guardian, curator or committee, or concerning a mill, roadway, ferry, wharf or landing."²² The court in *Lambert* said that the plaintiff had a right to trial by jury, not based on the constitutional guarantees, but because the action was like the claim of one individual against another to recover money on a contract. The court held that this right obtained for either the county or the claimant on all appeals from the board of supervisors to the circuit courts, where issues of fact were to be tried.²³

15.1-508 provides that the process instituting an action against the county "may be executed by being served on the commonwealth's attorney of the county." It was held in *Marchant and Taylor v. Mathews County*,²⁴ that the commonwealth's attorney could waive process in any suit in which the county was the defendant. The question in this case however, was whether a waiver by the commonwealth's attorney had also served to make the board of supervisors a party to the action. The court held that ordinarily it would not have, but for the fact that the record showed that the waiver of process by the commonwealth's attorney was intended in this case to bind not only the county, but the board of supervisors also.

It is clear that if the board allows or disallows a claim the claimant may appeal, but what if the board should refuse to hear a claim? In

21. 140 Va. 62, 124 S.E. 244 (1924).

22. *Id.* at 69.

23. *Accord, Dickenson County v. W. Dante Sup. Co.*, 145 Va. 513, 134 S.E. 552 (1926).

24. 139 Va. 723, 124 S.E. 420 (1924).

an early case,²⁵ where the board refused to hear a claim for a refund of taxes paid by a railroad, the court held that the railroad could properly institute a suit in the circuit court for return of the money. In *Dinwiddie County v. Stuart*,²⁶ the court held that where a party presents his claim against a county to the board of supervisors within the time limited by the statute and they adjourn without taking it up, and no entry is made of the claim until a subsequent meeting of the board after the statutory time limit has run, the statute will not bar the claim. It is apparent from these cases that the board cannot forestall action on the claim by mere inaction or refusal to hear it.

The county as well as the claimant has the right of appeal from a decision of the circuit court. In *Commonwealth v. Schmeltz*,²⁷ the defendant asserted that counties and cities had no right of appeal, but the court said "counties and cities may sue and be sued, and our reports abound with cases, both at law and equity, in which their right of appeal is fully recognized."²⁸ In *Leesburg v. Loudoun Nat. Bank*,²⁹ the court held that even though the board was not a party in an action against the county, it could take an appeal either in its own name or in the name of the county because the board, by statute, was charged with the duty of representing the county.

The appellate court will give much weight to the circuit court decision in a matter involving a county as is evident in *Bennett v. Garrett*.³⁰ While one might tend to place strong emphasis on the fact that this was a proceeding by the inhabitants of an unincorporated community to obtain a town charter and therefore to limit the decision to cases where questions of fact can best be determined by the court that hears the evidence, the Supreme Court of Appeals said "in matters affecting the interests and internal affairs and control of counties, cities and towns, we are always disposed to accord much latitude to the discretion and decision of the lower courts. These matters are particularly within their province and jurisdiction."³¹

25. *Prince George County v. A. M. & O. R. R. Co.*, 87 Va. 283, 12 S.E. 667 (1891).

26. 28 Gratt. (69 Va.) 526 (1877).

27. 116 Va. 62, 81 S.E. 45 (1914).

28. *Id.* at 67.

29. 141 Va. 244, 126 S.E. 196 (1925). See also, *School Board v. Schockley*, 160 Va. 405, 168 S.E. 419 (1933).

30. 132 Va. 397, 112 S.E. 772 (1922).

31. *Id.* at 404.

d. SATISFYING THE CLAIM OR JUDGMENT

Once the board of supervisors has allowed a claim, 15.1-547 provides that it shall be paid by warrant, drawn on the county treasurer. No other method for paying these claims is provided and the county treasurer is held to a very strict standard of accountability in paying them. In *Leachman v. Board of Supervisors*,³² the chairman of the Prince William County Board of Supervisors had signed blank warrants in the treasurer's office without authority from the board and when it was not in session. Trusting the chairman, the treasurer had countersigned the warrants, only to find that some of the warrants had been paid to persons who had no claims against the board and some to persons whose names had been forged as indorsees of the warrants. The court said that fiscal officers were held to a standard of strict liability and were deemed to know the authority of the chairman of the board who was not acting as the board's agent or for its benefit when he signed the warrants. The treasurer asserted that he was bound to pay warrants that were presented to him and was not to go behind the warrants to question the validity of the actions of the board. The court said that this was true, but his assertion referred to *legal* warrants. These were not legal warrants, because the board had not passed on the claims, nor approved them. Without previous action of the board, the court stated, the warrant was a nullity and created no liability on the county. Besides, the court said, the treasurer had only to consult the clerk of the board's list of resolutions passed to determine if the claim had been allowed.

In *Jennings v. Taylor*,³³ the plaintiff presented warrants to the county treasurer to be paid and he refused to do so. In an action on the warrants, the treasurer pleaded the 3-year statute of limitations applicable to actions not specifically limited by statute. The court held on appeal, that the issuance of the warrants acted as an equitable assignment of their amounts out of the funds in the hands of the treasurer. In regards to the liability for these warrants, no statute of limitations ran as to the treasurer and a ten-year limitation applied as to his sureties.

When satisfaction of a judgment is sought, 15.1-553 provides that "no execution shall be issued upon any judgment recovered against a county, board of supervisors, or against any officer of the county, when the judgment should be paid by the county, but the same shall be pro-

32. 124 Va. 616, 98 S.E. 656 (1919).

33. 102 Va. 191, 45 S.E. 913 (1903).

vided for by the board of supervisors in the next county levy and paid by the treasurer as other county charges."

The question has arisen as to whether a writ of mandamus will lie to compel a county board of supervisors to levy a tax for various purposes. In one case,³⁴ the court held that mandamus did not lie to compel a board to levy a tax for the payment of a claim which it had no authority to pay. In *Supervisors of Cumberland County v. Randolph*,³⁵ it was held that mandamus was the proper remedy to compel a levy to pay county bonds that were legal.

In *Scott County School Board v. Board of Supervisors*,³⁶ the school board filed a mandamus action to compel the board of supervisors to impose a levy to cover the proposed school budget. The court denied the writ on the grounds that mandamus did not lie to control the supervisors' discretion to curtail the budget, a discretion given to them by statute. In *Griffin v. Board of Supervisors*,³⁷ a Prince Edward County taxpayer filed an action for mandamus to compel the board of supervisors to appropriate money sufficient to operate the county public schools, which the board had refused to do for the 1959-1960 fiscal year. The court held that it was within the discretion of the board as to how much money they appropriated for operation of the school system and mandamus would not lie to control that discretion. The court explained that whether mandamus would lie to compel the levy and assessment of taxes depended on whether the duty with respect to that matter was ministerial, in which case the writ would lie, or discretionary, in which case the court would not entertain a mandamus action.

e. ESTOPPEL, SET-OFF AND THE STATUTE OF LIMITATIONS

During the Civil War, an act was passed by the Virginia legislature, permitting the counties to purchase salt for resale to the residents of the county. The board of supervisors of Gloucester County passed a resolution making one Catlett the county agent to sell salt under the act, but attached the proviso that no distribution of salt should be made to any persons "known to be disloyal to the Confederate Government." Catlett died and his executors presented a claim for his services to the county board. The board allowed the claim but refused to pay it after

34. *Board of Supervisors v. Catlett's Ex'ors*, 86 Va. 158, 9 S.E. 999 (1899).

35. 89 Va. 614, 16 S.E. 722 (1893).

36. 169 Va. 213, 193 S.E. 52 (1937).

37. 203 Va. 321, 100 S.E.2d 540 (1962).

the Civil War, and Catlett's executors applied for a writ of mandamus to compel the board to do so. The board defended on the grounds that it had no authority to make an order allowing the claim, because it was for services rendered in aid of rebellion and therefore void as prohibited by the constitutions of Virginia and the United States. The plaintiff asserted that the board was estopped to deny its order allowing the claim. The court held, in *Board of Supervisors v. Catlett's Ex'ors*,³⁸ that the allowance of a claim by the board is not in the nature of a judgment so that the county would be estopped to deny it. The court said "the powers and duties of a board of supervisors in Virginia are not judicial in their character, but are wholly executive and administrative. If it allows a claim not properly or legally chargeable on the county, or which it has no authority to allow, it exceeds its power, and its acts are not binding on the county."³⁹

In another case,⁴⁰ the court said a board of supervisors has no judicial power of any sort and it could not refuse to pay a claim on the grounds that the board's order rejecting the claim was in the nature of a judgment.

It is true also, that even when a claim is allowed by the board, this does not estop the county from setting up a defense to the claim when it is subsequently sued on it.⁴¹ This is because, as the above cases hold, the action of the board in allowing or disallowing the claim, is not a judicial adjudication on the merits.

The county has a right to file a set-off to the claim in a subsequent suit based on it, as it has to make any other defense that is justified by the facts in the case.⁴² But while the county may plead set-off as a defense, one sued by the county may not set off a claim which has not been presented to the board of supervisors first and allowed by them as per 15.1-550.⁴³

In *Johnson v. Black*,⁴⁴ discussed above, the court held that although the board of supervisors had been paying themselves excessive and illegal compensation for eleven years, the statute of limitations, invoked by the board as a defense, barred all but a small part of the recovery. The court said "the right expressed in the maxim 'nullus tempus occurrit

38. *Supra* note 34.

39. *Id.* at 162.

40. *Supra* note 35.

41. 115 Va. 335, 79 S.E. 393 (1913).

42. *Ibid.*

43. *Botetourt County v. Burger*, *supra* note 1.

44. *Supra* note 4.

regi' is an attribute of sovereignty and cannot be invoked by counties or other subdivisions of the state. As to such subdivisions of the state, the statute runs in the same manner and to the same extent as against natural persons."⁴⁵ Although this was a suit by taxpayers of the county against the board to restrain the illegal diversion of funds, the board was entitled to the plea of the statute of limitations because the county was, in reality, the complainant.

In a later case,⁴⁶ in which the county sought to compel the Norfolk and Western Railroad to construct a public road pursuant to an agreement between the county and the railroad, the court held that the long acquiescence of the county in an old road built by the railroad, but never accepted by the county, did not bar the right of the board to specific performance of the agreement to build a new road. The court said while the board had control, management and supervision of the county roads, public highways belong to the state and the statute of limitations did not run against the sovereign, nor did laches apply. On one hand, the court permitted the county to sue because they controlled the roads, but the statute of limitations did not run since the state owned the roads.

II. THE SUBSTANTIVE LAW IN ACTIONS AGAINST COUNTIES

a. TORTS

Virginia has long been committed to the principle of non-liability of counties in tort. In *Fry v. County of Albemarle*,⁴⁷ the plaintiff was riding in a horse-drawn buggy, past a gang of county convicts working on the road, when one of the convicts led a mule into a collision with the buggy, tipping it over and injuring the plaintiff. The plaintiff sued the county for her injuries, alleging the convict was an agent of the county and thus it was liable to her for his actions. The appellate court said that although a municipal corporation might be liable in such a situation, the tort rules in regard to municipalities had but slight application to counties, because while municipal corporations were created for the interest of the locality, county government was created with a view to the policy of the state at large. "Our counties are parts of the state, political subdivisions of the state, created by the sovereign power for the exercise of the functions of local government."⁴⁸ The

45. *Id.* at 492.

46. *Norfolk & W. R. Co. v. Board of Supervisors*, 110 Va. 95, 65 S.E. 531 (1909).

47. 86 Va. 195, 9 S.E. 1004 (1890).

48. *Id.* at 197.

court held that the county was not liable in tort for the negligent acts of its agents or officers. The court pointed out that the legislature had given a remedy for cases growing out of contracts with counties (See 15.1-508), but had not made provision for tort actions and so the county retained the immunity of the state in tort.

The rule of *Fry* was reaffirmed in *Mann v. County Board of Arlington County*.⁴⁹ In this case, the plaintiff alleged he was injured as a proximate result of the county's negligent construction and maintenance of a sidewalk and adjoining parking lot in a shopping center which caused a car to jump the curb and strike the plaintiff. The court said "there is some conflict in the authorities, yet in the absence of constitution or statute provisions imposing liability, it is generally held that a county is not liable for personal injuries caused by the negligence of its officers, agents or employees. Under this view no liability is incurred by a county for tortious personal injuries resulting from negligent construction, maintenance or operation of its streets, roads or highways."⁵⁰ The plaintiff, however, claimed that Arlington County operated its own system of roads (unlike other counties in the state), and should be held to the same standard of care as a municipality. The court said that the plaintiff did not take into consideration that a county could not be sued unless and until that liability and right was conferred by law. "Though Arlington County has taken on characteristics of a city and exercises many powers and performs services rendered by a municipal corporation, yet these facts do not justify our disturbance of a settled principle of law and departure from the doctrine of stare decisis."⁵¹ The court further stated: "Years ago Virginia committed itself to the principle that counties were not liable for tortious personal injuries resulting from negligence of its officers, servants and employees,"⁵² and the court was unwilling now to change so settled a doctrine.

There is an exception to this rule of non-liability in tort due to Section 58 of the Virginia Constitution, which says that "no private property shall be taken or damaged for public uses without just compensation." In *Nelson County v. Loving*,⁵³ the court held that the county was liable for injury to realty in connection with the regrading of a road,

49. 199 Va. 169, 98 S.E.2d 515 (1957).

50. *Id.* at 173.

51. *Id.* at 175.

52. *Id.* at 174.

53. 126 Va. 283, 101 S.E. 406 (1919).

based on Section 58. In *Nelson County v. Coleman*,⁵⁴ the court held that the plaintiff might waive the tort and sue in assumpsit for the value of property wrongfully taken in the construction of a road. The rule of these cases has not been extended to situations other than those where property was taken in the construction or regrading of a road.

Where the county exercises its police power, or a discretionary authority, it will not be liable on a "taking" theory. In *Louisa County v. Yancey*,⁵⁵ the Board of Health of Louisa County was forced to quarantine the plaintiff's house during a smallpox epidemic and to use it as a hospital during the seige. The plaintiff, in addition to the residential nature of the house, used it for business purposes and certain goods had to be destroyed by the Board of Health. Also, while the quarantine was effective, goods from the plaintiff's business were used by the persons quarantined in the hospital-house (as well as the plaintiff's family). In a suit against the county, the plaintiff claimed damages for the goods consumed by those in quarantine as well as for the merchandise destroyed by the Board of Health. The county court held that the county was not liable for goods used to maintain the plaintiff and his business employees during the quarantine, and the county admitted it was liable for the goods used to maintain others in the hospital, so the only question on appeal was the claim for merchandise that had been destroyed. The court held that the county, in abating a nuisance, did not exercise the power of eminent domain, but rather the police power and therefore an action of assumpsit would not lie for the tortious taking.

In *Ferguson v. Board of Supervisors*,⁵⁶ citizens of Roanoke County filed a bill against the board for the purpose of forcing a removal of a toll gate and to enjoin the collection of tolls on the road. The court held that the establishment of toll roads was, by the Constitution of Virginia, committed to the legislative discretion of the board of supervisors and since a discretionary function was involved a court of equity had no authority to interfere with the exercise of such powers.

Although it involved a city, *Markham v. City of Newport News*,⁵⁷ would apparently apply to counties as well and is interesting on the jurisdiction of federal courts in tort matters. The plaintiff, a resident of California, sued the city in the federal court for the Eastern District

54. 126 Va. 275, 101 S.E. 413 (1919).

55. 109 Va. 229, 63 S.E. 452 (1909).

56. 133 Va. 561, 113 S.E. 860 (1922).

57. 292 F.2d 711 (4th Cir. 1961).

of Virginia, for injuries received when her vehicle fell into a sewer manhole allegedly left uncovered by the city. The federal court dismissed the action on the basis of 8-42.1, which provides that no tort action against a city, or *other* political subdivision of the state should be instituted, "except in a court of the commonwealth established under or pursuant to the Constitution of Virginia and having jurisdiction and venue." The District Court held that the intent of the statute was to prevent resort to federal diversity and it was a valid enactment binding on the court. On appeal, the United States Circuit Court held that the District Court should have exercised jurisdiction: "In determining its own jurisdiction, a district court of the United States must look to the sources of its power and not to acts of states which have no power to enlarge or to contract the federal jurisdiction."⁵⁸ The court said that a state, enjoying the protection of the Eleventh Amendment, may consent to be sued in her own courts without waiving immunity to suits in federal courts, but the Eleventh Amendment does not extend to cities. Since counties are closer to the state in their attributes than municipal corporations it would seem that diversity of citizenship would not give a federal court jurisdiction of a tort action against a county because of 8-42.1, even if the county would be liable in tort.

It is interesting to note that the House of Delegates of the Virginia Assembly in 1962,⁵⁹ requested the Virginia State Bar Association to make a study as to whether counties should be made subject to actions at law for damages, as are municipal corporations.

b. CONTRACTS

By 15.1-508, the state has consented that counties be sued in contract. The county thus may enter into any agreement and incur any obligation for a proper public purpose, and it will serve to bind the board's successors indefinitely, as long as it is not for an illegal purpose.⁶⁰ However, even if the General Assembly authorizes the county to make certain expenditures, this does not necessarily mean that the county may borrow money and issue bonds as collateral for the loan.⁶¹

In *South Hampton Apts. v. Elizabeth City County*,⁶² the court said

58. *Id.* at 713.

59. Journal of the House of Delegates, House Joint Resolution #96.

60. *Pirkey v. Grubb's Ex'ors*, 122 Va. 91, 94 S.E. 344 (1917). It is settled also that contract actions will lie against agencies of the state and the state itself. *Stuart v. Smith-Courtney Co.*, 123 Va. 231, 96 S.E. 241 (1918).

61. *Bonsack and Kiser v. Roanoke County*, 75 Va. 585 (1881).

62. 185 Va. 67, 27 S.E.2d 841 (1946).

“unquestionably a county is capable of contracting and has the power to make all contracts which are reasonably necessary to the execution of its corporate objects and purposes.”⁶³ The court adds that the general rules of contract law are applicable in reference to contracts with counties, and the county through its board of supervisors may employ agents and servants to do what the board has authority to do, including the entering into of contracts which the board has previously approved. But the court adds a caveat: “anyone dealing with its officers and agents must, at his peril, ascertain the nature and extent of their authority.”⁶⁴

In regard to agents of the counties, it has been held that where the sheriff of a county employs a special officer to enforce prohibition laws, no action for workman's compensation will lie against the county for injury to the special officer in the course of his employment, because counties are not responsible for the acts of sheriffs and because there was no express or implied contract of hire between the alleged employee and the county.⁶⁵

In dealing with county contracts, it must be kept in mind that where there is no fraud a taxpayer cannot call into question the amount of consideration of an otherwise valid contract, entered into by the board of supervisors.⁶⁶ But where a contract is based on a contingency which never occurs, the county is not liable on the contract.⁶⁷ The county board of supervisors may subsequently ratify a contract made by a county employee, whether he had the power to make the contract in the first place or not, as long as the board has authority to make such a contract.⁶⁸ Even if the board members, acting individually, have no authority to enter into a contract of hire, the board acting in its official capacity may ratify such a contract by passing a resolution approving the payment of expenses pursuant to the employment.⁶⁹

*American-La France v. Arlington County*⁷⁰ is perhaps the most interesting Virginia case on county contracts. Here the company entered into a contract with the board of supervisors of Arlington County, by which the company would supply the county with certain pieces of

63. *Id.* at 79.

64. *Id.* at 78.

65. *Board of Supervisors v. Lucas*, 142 Va. 84, 128 S.E. 574 (1924).

66. *Good v. Board of Supervisors*, 140 Va. 399, 125 S.E. 321 (1924).

67. *Royer v. County Board of Supervisors*, 176 Va. 268, 10 S.E.2d 876 (1940).

68. *Holsten Corp. v. Wise County*, 131 Va. 142, 109 S.E. 180 (1921).

69. *County of Campbell v. Howard*, 133 Va. 19, 112 S.E. 876 (1922).

70. 191 Va. 1, 192 S.E. 758 (1937).

fire apparatus and equipment. The county refused to pay for this equipment, saying the contract was void. The court upheld this contention, stating that the contract violated Section 115(a) of the Virginia Constitution, which prohibited a debt of the county payable in years beyond that in which it was contracted for, not in payment of a previous debt of the county, and thus the company could not recover for the purchase price or on a quantum meruit or valebat basis.⁷¹

In a subsequent suit,⁷² the company alleged that the county had used the equipment for six years and since it had no redress due to the prior decision, the county should at least pay rent or return the equipment. The company based its argument on the theory that the contract was not actually *malum in se*, but was rather merely invalid and void since it violated a provision of the law only in respect to the manner or mode of its performance on the part of the county and that the subject of the contract (supplying fire equipment) was not against public policy. The court agreed that the contract was not *malum in se* and held in a noteworthy opinion that the county should return the equipment to the plaintiff and pay compensation for its use. The court said, "there was no evil or vice in the object of the contract to provide the county with equipment for fire protection, nor in the acts and things forming its basis."⁷³ This decision seems to be the only one that reason and justice dictate, if counties are to carry on their activities and their purpose of serving the people who reside there.

71. 164 Va. 1, 178 S.E. 783 (1935).

72. *Supra* note 64.

73. *Id.* at 10.