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THE MERGER OF COMMON-LAW AND EQUITY PLEADING IN VIRGINIA

*W. Hamilton Bryson **

As of January 1, 2006, all civil actions governed by the Rules of Court of the Supreme Court of Virginia are pleaded by a single form of action,¹ and the parties can put into one single action all causes of action sounding in common law, equity, and admiralty so far as permitted by the law of joinder of actions.² The Rules of Court, however, do not apply to causes of action for which the procedure is provided by statute, such as mandamus,³ prohibition,⁴ quo warranto,⁵ eminent domain condemnations,⁶ probate,⁷ and habeas corpus.⁸ Substantive rights, whether sounding in common law, equity, probate, divorce, admiralty, or whatever, remain as before.

The English common law and equity are separate bodies of substantive law, although they are interconnecting. The procedural law by which these different substantive bodies of law are put into effect can be the same or different, and the courts can be the same or different. Over the past five centuries or so, the English legal establishment developed in such a way that some courts had only common-law jurisdiction, such as the Court of King's Bench⁹ and the Court of Common Pleas.¹⁰ Some courts had a

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1. VA. SUP. CT. R. 3:1.

2. VA. CODE ANN. §§ 8.01-221, -272, -281 (Repl. Vol. 2000 & Cum. Supp. 2006); VA. SUP. CT. R. 1:4(k), 1:6.

3. VA. CODE ANN. §§ 8.01-644 to -653.1 (Repl. Vol. 2000 & Cum. Supp. 2006).

4. *Id.*

5. *Id.* §§ 8.01-635 to -643 (Repl. Vol. 2000).

6. *Id.* §§ 25.1-205 to -222 (Repl. Vol. 2006).

7. *Id.* §§ 64.1-75 to -93 (Repl. Vol. 2002 & Cum. Supp. 2006).

8. *Id.* §§ 8.01-654 to -668 (Repl. Vol. 2000 & Cum. Supp. 2006).

9. See MARJORIE BLATCHER, *THE COURT OF KING'S BENCH, 1450-1550: A STUDY IN SELF-HELP* 1-9 (1978).

fused jurisdiction, such as the Court of Chancery, which was primarily a court of equity,¹¹ but it had a limited common-law jurisdiction in matters involving litigation against officers of the King.¹² The Court of Exchequer, between the mid-sixteenth century and 1841, heard both common-law and equity cases with the jurisdictions and lawsuits being kept strictly separate.¹³ This was the situation of the trial courts in Virginia from their beginning in the early seventeenth century until 2006, except for the period of 1777 to 1831 when there were courts of chancery that had equity jurisdiction only.¹⁴ Another alternative is to have a merged system whereby common-law and equity claims are pleaded the same way in a single method of pleading, whether the plaintiff has a common-law right or an equitable one or both. The merged system of pleading has always been used in Texas.¹⁵ It was adopted in New York by the Field Code of 1848.¹⁶ It has been used in England and Wales since the Judicature Act of 1873,¹⁷ in the federal courts of the United States since the Federal Rules of Civil Procedure of 1938,¹⁸ and now in Virginia as of 2006.¹⁹

The merger of common-law and equity procedure in Virginia has proceeded incrementally over a long period of time. In Virginia, there were never any institutional rivalries, jealousies, or competition for fees, as happened in England, since there was a

10. See MARGARET HASTINGS, *THE COURT OF COMMON PLEAS IN FIFTEENTH CENTURY ENGLAND: A STUDY OF LEGAL ADMINISTRATION AND PROCEDURE* 16–27 (1947).

11. See generally W.J. JONES, *THE ELIZABETHAN COURT OF CHANCERY* 418–22 (1967); CONWAY ROBINSON, *HISTORY OF THE HIGH COURT OF CHANCERY* (photo. reprint 2002) (1882); GEORGE SPENCE, *THE EQUITABLE JURISDICTION OF THE COURT OF CHANCERY* (Philadelphia, Lea and Blanchard 1846).

12. See W.S. Holdsworth, *The History of Remedies Against the Crown* (pts. 1 & 2), 38 L.Q. REV. 141, 280 (1922).

13. See W.H. BRYSON, *THE EQUITY SIDE OF THE EXCHEQUER: ITS JURISDICTION, ADMINISTRATION, PROCEDURES, AND RECORDS* 9–27, 160–66 (1975).

14. Act of Apr. 16, 1831, ch.11, 1830–31 Va. Acts 42; Act of Oct. 2, 1777, ch. 15, reprinted in 9 *THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA* 389–90 (photo. reprint 1969) (William Waller Hening ed., Richmond, J. & G. Cochran 1821).

15. See 1846 Tex. Gen. Laws 363; *Smith v. Clopton*, 4 Tex. 109, 113 (1849); 1 TEX. JUR. *Actions* § 55 (2004).

16. 1848 N.Y. Laws 521; see N.Y. C.P.L.R. § 103(a) (Consol. 1999). This change was soon followed by many other common law jurisdictions. William D. Mitchell, *The Federal Rules of Civil Procedure*, in DAVID DUDLEY FIELD, *CENTENARY ESSAYS* 73, 73–74 (Alison Reppy ed., 1949).

17. Supreme Court of Judicature Act, 1873, 36 & 37 Vict., c. 66, § 24 (Eng.).

18. FED. R. CIV. P. 2 advisory committee's note.

19. VA. SUP. CT. R. 3:1.

fused system of courts. From the beginning of the colonial courts, the judges and the clerks of the court were the same, whether the plaintiff filed an action at law or a suit in equity. The incremental merger of common-law and equity procedure in Virginia has proceeded as follows.

If a party in equity desires a jury, a court of equity can summon an advisory jury, whose verdict the equity judge will normally follow.²⁰ *De bene esse* depositions have been allowed at common law since 1645.²¹ Since 1788, a common-law writ of *fiery facias* has been available to enforce a final order in equity for the payment of a sum certain;²² this legislation gave the courts of equity an *in rem* power. From 1792, equity courts could appoint special commissioners to execute a common-law conveyance.²³ Pre-trial discovery has been allowed in common-law actions by means of interrogatories since 1831.²⁴ Statutory interpleader by a stakeholder, an ancient equitable remedy, has been available in common-law actions since 1849.²⁵ Ever since 1873, equitable defenses could be pleaded in actions at common law sounding in contract.²⁶ In 1922, the declaratory judgment act was enacted in order to allow actions at law with a right of trial by jury, giving the same relief in substance as a bill in equity *quia timet* allowing a plaintiff to get a judgment of his or her rights before any damage is done.²⁷

20. VA. CODE ANN. § 8.01-336(E) (Cum. Supp. 2006); VA. SUP. CT. R. 3:22(c)(1). These provisions merely restate the traditional equity practice. See 1 R.T. BARTON, PLEADING AND PRACTICE IN THE COURTS OF CHANCERY 493-517 (Robert T. Barton, Jr. ed., 3d ed. 1926); EDWIN B. MEADE, LILE'S EQUITY PLEADING AND PRACTICE 145-47 (3d ed. 1952); 2 CONWAY ROBINSON, PRACTICE IN THE COURTS OF LAW AND EQUITY IN VIRGINIA 352-58 (Richmond, Samuel Shepherd 1835).

21. Act of Nov. 20, 1645, Act 10, reprinted in 1 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 303-04 (photo. reprint 1969) (William Waller Hening ed., New York, R. & W. & G. Bartow 1823); see, e.g., VA. SUP. CT. R. 4:7(a)(4); *Minnis v. Echols*, 12 Va. (2 Hen. & M.) 31 (1808).

22. VA. CODE ANN. §§ 8.01-426, -427, -466 (Repl. Vol. 2000 & Cum. Supp. 2006); VA. CODE ch. 186, § 1 (1849); Act of Jan. 5, 1788, ch. 10, § 4, reprinted in 12 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 473 (photo. reprint 1969) (William Waller Hening ed., Richmond, George Cochran 1823).

23. VA. CODE ANN. §§ 8.01-110, -111 (Repl. Vol. 2000 & Cum. Supp. 2006); Act of Dec. 13, 1792, ch. 90, 1792 Va. Acts 167, reprinted in 1 THE STATUTES AT LARGE OF VIRGINIA 84-88 (photo. reprint 1970) (Samuel Shepherd ed., New York, AMS Press 1835).

24. Act of Apr. 16, 1831, ch. 11, 1830-31 Va. Acts 42; see, e.g., *Poindexter v. Davis*, 47 Va. (6 Gratt.) 481, 483 (1850); *Vaughn v. Garland*, 38 Va. (11 Leigh) 251, 251 (1840); *MFarland v. Hunter*, 35 Va. (8 Leigh) 489, 489 (1836); see also VA. SUP. CT. R. 4:8.

25. VA. CODE ch. 152, § 1 (1849).

26. Act of Mar. 22, 1873, ch. 216, 1872-73 Va. Acts 196; see VA. CODE ANN. § 8.01-422 (Repl. Vol. 2000 & Cum. Supp. 2006).

27. VA. CODE ANN. § 8.01-184 (Repl. Vol. 2000 & Cum. Supp. 2006); Act of Mar. 28,

Originally, the courts of equity received the testimony of witnesses only in the written form of depositions. Since 1930, however, evidence in a suit in equity can be taken *ore tenus*.²⁸ The equity procedure of discovery depositions has been allowed at common law since 1954,²⁹ and a plaintiff in equity can suffer a nonsuit.³⁰ The equity procedure of intervention has recently been allowed at common law.³¹ Now, the procedures for pleading cases at common law and in equity are merged into a single form of action.³²

However, this merger is not the universal panacea for all of the problems of pleading and practice. In the past Virginia practice, where law and equity were not merged, when the plaintiff filed a lawsuit, the clerk had to be told whether to docket it on the common-law side of the court or the equity side. Now the clerk has to know which it would have been because, if equity relief solely is requested, there will be a different filing fee than where common-law relief is demanded.³³ Formerly, the defendant might demur on the ground that the action was filed on the wrong side of the court, and then the court had to decide whether the plaintiff's claim was one of common law or one of equity. In the current practice, where law and equity procedures are merged, when the plaintiff files a civil action and demands a trial by jury, the defendant may move the court to strike the demand for a jury because the plaintiff is seeking equitable relief,³⁴ and now the court must decide whether the plaintiff's claim would have been one of common law or one of equity but for the merger.

In an action sounding in contract, is the plaintiff entitled to the equitable relief of specific performance, or are monetary damages at common law an adequate and complete remedy? This is still problematical because a claimant is not always entitled to an eq-

1922, ch. 517, 1922 Va. Acts 902; *see, e.g.*, *Patterson's Ex'rs v. Patterson*, 144 Va. 113, 131 S.E. 217 (1926).

28. Act of Mar. 20, 1930, ch. 132, 1930 Va. Acts 346; *see* VA. SUP. CT. R. 2:17 (repealed 2006); *see, e.g.*, *Armstrong v. Bryant*, 189 Va. 760, 764-65, 55 S.E.2d 5, 6-7 (1949).

29. VA. SUP. CT. R. 3:23(c) (current version at VA. SUP. CT. R. 4:5).

30. VA. CODE ANN. § 8.01-380(A) (Cum. Supp. 2006); *see* VA. CODE ANN. § 8-220 (Repl. Vol. 1957); Act of Apr. 1, 1954, ch. 333, 1954 Va. Acts 411; *see also* *Moore v. Moore*, 218 Va. 790, 795 & n.4, 240 S.E.2d 535, 538 & n.4 (1978).

31. VA. SUP. CT. R. 3:19 (current version at VA. SUP. CT. R. 3:14).

32. VA. SUP. CT. R. 3:1.

33. VA. CODE ANN. § 17.1-275(13), (26) (Cum. Supp. 2006).

34. VA. SUP. CT. R. 3:21, 3:22.

uitable remedy in order to right a wrong. A person is only so entitled if the common-law remedy is inadequate or incomplete.³⁵ A bill of review lies only to judgments that determine equitable claims, not common-law ones.³⁶ Thus, before and after the merger of law and equity pleading, the same issues cannot be avoided, but must be confronted.

In addition, some issues have now been created for the courts to decide. If the plaintiff needs both common-law relief and an equitable remedy to have complete justice done, this is available on the equity side of the court under the “clean-up doctrine.”³⁷ “No question is better settled than that where a court of equity has jurisdiction for one purpose, it will not send the parties back to a court of law, but will retain the jurisdiction for all purposes, and do complete justice between the parties. . . .”³⁸ In such a case, the parties were not entitled to a trial by a common-law jury because the suit was one in equity.³⁹ However, in the federal courts, the right to trial by jury on the common-law issues has been granted, which changed the traditional practice.⁴⁰ The new Virginia rules of pleading are not intended to extend the right to trial by jury, and this is clearly stated. According to Rule 3:21(a), “The right of trial by jury . . . is unchanged by these rules.”⁴¹ The idea of jury trials in domestic relations cases, for example, is not

35. See, e.g., *Lanston Monotype Mach. Co. v. Times-Dispatch Co.*, 115 Va. 797, 805, 80 S.E. 736, 738 (1914); *Alderson v. Biggars*, 14 Va. (4 Hen. & M.) 470, 470–71 (1809); *Yancy v. Fenwick*, 14 Va. (4 Hen. & M.) 423, 423–24 (1809); *Sowers v. Hamilton Dev. Co.*, 14 Va. Cir. 311, 313 (Cir. Ct. 1989) (Chesterfield County). See generally W. HAMILTON BRYSON, BRYSON ON VIRGINIA CIVIL PROCEDURE § 2.02[2] (4th ed. 2005).

36. VA. CODE ANN. § 8.01-623 (Repl. Vol. 2000 & Cum. Supp. 2006) (restating the traditional practice, but giving a time limit); see also 1 BARTON, *supra* note 20, at 302–14; MEADE, *supra* note 20, at 94–102; 2 ROBINSON, *supra* note 20, at 417.

37. See, e.g., *Fidelity & Cas. Co. of N.Y. v. First Nat'l Exch. Bank*, 213 Va. 531, 538, 193 S.E.2d 678, 684 (1973); *Dobie v. Sears, Roebuck & Co.*, 164 Va. 464, 475, 180 S.E. 289, 293 (1935); *Harris v. Thomas*, 11 Va. (1 Hen. & M.) 18, 19 (1806); *Beacon Masonry Co. v. Eugene Simpson & Brother, Inc.*, 23 Va. Cir. 270, 271 (Cir. Ct. 1991) (Alexandria City); *Pillis v. Nash*, 2 Va. Cir. 377, 379 (Cir. Ct. 1973) (Richmond City).

38. 7A MICHIE'S JURISPRUDENCE OF VIRGINIA AND WEST VIRGINIA *Equity* § 12 (2006) (citing many Virginia cases).

39. See, e.g., *Builders Floor Serv., Inc. v. Kirby*, 60 Va. Cir. 171, 176, 178 (Cir. Ct. 2002) (Fairfax County).

40. See *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 479 (1962); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 508 (1959). “In effect, the *Beacon Theatres* approach results in a greater availability of jury trial than before the merger of law and equity.” LARRY L. TEPLY & RALPH U. WHITTEN, CIVIL PROCEDURE 881 (3d ed. 2004).

41. VA. SUP. CT. R. 3:21(a).

at all a good one.⁴² Will the Virginia courts follow the federal courts in expanding the right to a common-law jury to cases that were formerly on the equity side of the court under the clean-up doctrine? The new Virginia Rules 3:21(b) and (c) and 3:22(a) appear to anticipate this change.⁴³ Indeed, these rules are copied from the Federal Rules of Civil Procedure 38(b) and (c) and 39(a).⁴⁴

Can punitive damages be awarded in actions sounding in equity? Such damages are absolutely forbidden in the well-established equity practice.⁴⁵ Further, discovery was originally only allowed in equity and, since the courts of equity would never give criminal or quasi-criminal punitive awards, they refused to allow discovery which might lead to either, even though such sanctions might be given by the common-law courts.⁴⁶ However, the modern practice has allowed discovery leading to punitive damages in common-law actions, though they have continued to maintain the prohibition of discovery leading to self-incrimination and civil forfeitures.⁴⁷ It appears to this writer that punitive damages and civil forfeitures are the same. As Chief Justice John Marshall said, "The rule clearly is, that a party is not bound to make any discovery which would expose him to penalties."⁴⁸ Lord Chancellor Hardwicke said, "[T]here is no rule more established in equity, than that a person shall not be obliged to discover what will subject him to a penalty, or any thing in the nature of a penalty."⁴⁹ The current practice seems to this writer to be contrary to this long-established and most salutary principle of law.

The clean-up doctrine would never have allowed a claim for punitive damages to be added to an equitable claim. Can it now?

These riddles will in due time be solved by the Virginia courts in the course of litigation in the next few years.

42. See, e.g., *Moore v. Moore*, 61 Va. Cir. 668 (Cir. Ct. 2002) (Roanoke City).

43. VA. SUP. CT. R. 3:21(b), (c), 3:22(a).

44. FED. R. CIV. P. 38(b), (c), 39(a).

45. See, e.g., *Colonna Dry Dock Co. v. Colonna*, 108 Va. 230, 240-44, 61 S.E. 770, 774-75 (1908); *Wojcik v. Burgess*, 40 Va. Cir. 96, 103 (Cir. Ct. 1995) (Warren County); *Winslow v. Sadler*, 16 Va. Cir. 493, 499 (Cir. Ct. 1980) (Alexandria City); *Evans v. Offutt*, 6 Va. Cir. 528, 531 (Cir. Ct. 1978) (Arlington County); *Pillis v. Nash*, 2 Va. Cir. 377, 380 (Cir. Ct. 1973) (Richmond City).

46. See, e.g., *Poindexter v. Davis*, 47 Va. (6 Gratt.) 481, 490-91 (1850).

47. BRYSON, *supra* note 35, § 9.04[1].

48. *United States v. Saline Bank of Va.*, 26 U.S. (1 Pet.) 100, 104 (1828).

49. *Smith v. Read*, 1 Atkyns 526, 527, 26 Eng. Rep. 332, West temp. Hardwicke 16, 17, 25 Eng. Rep. 796 (Ch. 1737).