Volume 42 | Issue 3 Article 3

April 1936

Splitting the Cause of Action before a Justice--The Strange Case of Bane v. Wilson

Robert T. Donley
West Virginia University College of Law

SPLITTING THE CAUSE OF ACTION BEFORE A JUSTICE—THE STRANGE CASE OF *BANE V. WILSON*

ROBERT T. DONLEY*

In these days of turbulent controversy over the federal constitution one must offer prayers of forgiveness or at least an apology for venturing upon a discussion of an apparently innocuous provision of his state constitution, limiting the jurisdiction of a justice of the peace to claims involving $300 or less. When, however, such provision is made the foundation of a superstructure of law running counter to propositions which one had hitherto supposed settled and sound, an excuse, if not a justification for comment may be found. The recent case of *Bane v. Wilson*[1] furnishes the material for such a discussion. The facts were thus: Wilson was indebted to the Farmers Bank[2] upon two notes in the sum of $2,000 and $800, representing indebtedness incurred in 1920 and 1925 respectively. In January, 1933, Wilson executed to the bank ten notes of $280 each. Upon learning that plaintiff, as receiver of an insolvent bank, was instituting action in the circuit court against Wilson to recover upon a capital stock assessment, the Farmers Bank immediately instituted suit before a justice of the peace upon the ten notes. On February 3, 1933, Wilson confessed judgment. Plaintiff proceeded with his action in the circuit court and recovered judgment on March 28, 1933. At May Rules, 1933, plaintiff instituted the present suit in chancery, attacking the judgments rendered by the justice of the peace. Upon further proceedings therein, the circuit court held that these judgments were void and did not constitute a lien upon the real estate of Wilson. It further appeared that at the time of confessing the ten judgments, Wilson was insolvent and that the arrangement was made for the purpose of enabling the Farmers Bank to secure judgments prior to that of plaintiff.

The Supreme Court of Appeals upheld this decision upon the ground that "a justice of the peace in this state cannot, under any pretext of acquiescence of the parties, acquire jurisdiction beyond $300."

The case suggests the propriety of a discussion of at least three

* Assistant Professor of Law, West Virginia University. Member of the Monongalia County Bar.

[1] 182 S. E. 678 (W. Va. 1936).

[2] Wilson was also indebted to other defendants. For purposes of simplification those rights are not discussed, the facts as above stated being sufficient to present the problem.

problems: (1) discharge of a pre-existing debt by the acceptance of promissory notes; (2) the jurisdiction of a justice of the peace; and (3) the status of the judgments. These problems will be discussed in the order named.

The original indebtedness of Wilson to the Farmers Bank, represented by the notes for $2,000 and $800 was admittedly valid. What, then, was the effect of substituting in lieu thereof ten notes for $280? From the earliest days of the Supreme Court of Appeals, it has been held that parties may make such a substitution, and that the effect thereof is a discharge of the old obligation, *if it be so expressly agreed.*[3] The presumption, however, is that when the new note is between the same parties, a discharge of the old obligation was not intended.[4] On the contrary, if the new note is that of a person not previously bound, surrender of the old note, will *prima facie* be treated as a discharge of the old indebtedness.[5] Retention by the creditor of the old note is a circumstance (not amounting to a presumption) indicating an intent that it was not to be discharged.[6] It is perhaps not material whether such discharge be regarded as an accord,[7] as an accord which is itself accepted in satisfaction of the pre-existing obligation,[8] or as a merger.[9]

---

[3] Lazier v. Nevin, 3 W. Va. 622 (1869); Miller v. Miller, 8 W. Va. 542 (1875); Poole v. Rice, 9 W. Va. 73 (1876); Dunlap's Ex'rs v. Shanklin, 10 W. Va. 662 (1877); Stephenson v. Rice, 12 W. Va. 575 (1878); Feamster v. Withrow, 12 W. Va. 611 (1878); Bants & Co. v. Basnett, 12 W. Va. 773 (1878); Bowyer v. Knapp, 15 W. Va. 277 (1879); Sayre v. King, 17 W. Va. 562 (1880); Bank v. Good, 21 W. Va. 455 (1883); Hess v. Dille, 23 W. Va. 90 (1883); Moore v. Johnson, 34 W. Va. 672, 12 S. E. 918 (1891); Hull's Adm'r v. Hull's Heirs, 35 W. Va. 155, 13 S. E. 49 (1891); Wolf v. McGugin, 37 W. Va. 552, 16 S. E. 797 (1893); Mansfield v. Dameron, 42 W. Va. 794, 26 S. E. 527 (1896); Cushwa v. Improvement L. & B. Ass'n, 45 W. Va. 490, 32 S. E. 259 (1898); Crim v. England, 46 W. Va. 480, 33 S. E. 310 (1899); Lawson v. Zinn, 48 W. Va. 312, 37 S. E. 612 (1900); Bank v. Handley, 48 W. Va. 690, 37 S. E. 536 (1900); Ritchie County Bank v. Bee, 62 W. Va. 457, 59 S. E. 181 (1907); Acme Food Company v. Older, 64 W. Va. 255, 61 S. E. 235 (1908); Lowther v. Lowther-Kaufmann Oil, *etc.* Co., 75 W. Va. 171, 83 S. E. 49 (1914); Wyoming County Bank v. Nichols, 101 W. Va. 553, 133 S. E. 129 (1926). See collection of cases in (1928) 52 A. L. R. 1416.

[4] Moore v. Johnson, *supra* n. 3.

[5] *Ibid.*

[6] Bank v. Good, *supra* n. 3.

[7] RESTATEMENT, CONTRACTS (1932) § 417 (b): "If the debtor breaks such a contract the creditor has alternative rights. He can enforce either the original duty or the subsequent contract."

[8] *Ibid.* § 418: "A subsequent contract may itself be accepted as immediate satisfaction and discharge of pre-existing contractual duty, or duty to make compensation; and if so accepted the pre-existing duty is discharged and is not revived by the debtor's breach of the subsequent contract."

[9] *Ibid.* § 448: "A contractual duty based on an unsealed contract, or a duty to make compensation for breach of either a sealed or unsealed contract

While it was not pleaded in the *Bane* case that the Farmers Bank and Wilson agreed that the ten new notes should be accepted in satisfaction of the two old notes, such as agreement, in all probability, would not have affected the decision. It is arguable, of course, that in such case the Farmers Bank should be able to enforce the new notes to the same extent that it could have enforced them had they been given for any other valid consideration. Undoubtedly, the discharge of the two old notes would constitute a good consideration to support the ten new ones, and as between the parties the court will not ordinarily inquire into the adequacy of that consideration. Upon the other hand, in the absence of such an agreement of discharge, the new notes are valid and enforceable, at least by action in the circuit court, although the creditor would probably be required to produce and surrender the old notes before the entering of judgment. Since, however, the Supreme Court did not hold that the new notes were invalid, the foregoing discussion becomes pertinent only to the extent of indicating that in other cases the court might inquire into the consideration. For example, suppose that the original loan of $2,800 had been in the first instance evidenced by ten notes for $280 each, being so drawn for the express purpose of permitting the bank to obtain speedy action before a justice of the peace. The prevalence of this practice in the commercial world is too well-known to require discussion. If the implications of the present case are followed to their logical conclusion it would seem that such an arrangement may be similarly condemned. No logical or realistic distinction can be made between (a) ten notes, the consideration for which is the present loan of money, and (b) ten notes, the consideration for which is the present discharge of a pre-existing obligation. The distinction apparently made by the court is that in the latter case there is a "splitting" of a cause of action. This involves the assumption that such cause of action was in existence at the time when suit was brought before the justice, otherwise there would be nothing to be split. This is clearly a *non sequitur* if the original cause of action has been discharged. Again, suppose that *A* commits a tort against *B*, and the parties agree that *B*'s damages amount to $500. *A*, being financially unable to make payment in cash, offers to execute his note for $500. *B* states that he will accept two notes for $250 each, in order that he may sue

is discharged by a negotiable instrument made by the party subject to the duty and promising performance of it, if given as full satisfaction by him and accepted as such by the party entitled to performance."

upon them before a justice in the event of non-payment. The parties so agree and the two notes are executed, in return for which *B* executes to *A* a sealed release of all damages arising out of the tort. The logic of the *Bane* case would require a holding that *B* cannot recover upon these notes in an action before a justice. The number and variety of such examples is limited only by the powers of imagination, yet it would seem that such accords so accepted in satisfaction should in all cases be upheld.

The Jurisdiction of a Justice of the Peace

In deciding the *Bane* case, the court said that "According to our decisions, a debt, in its inception in excess of the jurisdiction of a justice of the peace, may not be split into particles for the mere purpose of obtaining jurisdiction before a justice of claims exceeding $300." Certain cases were cited in support of this proposition.[10] It is now proposed to examine those cases in order to determine to what extent, if any, they are controlling as applied to the facts under consideration.

In the *Hugheston* case,[11] one Hodges had been employed by the plaintiff for a number of years. He resigned his position and thereafter brought nine separate suits against plaintiff before a justice of the peace, eight of them for $175 each and the other for $295. Judgment was rendered in the last action for $195 and plaintiff thereupon pleaded the same as *res judicata* to the other eight actions. The case then proceeded by writ of prohibition upon the ground that Hodges' demand was one indivisible claim for arrearages of salary. Hodges answered that his salary was $175 per month and that each of the first eight suits was for one month's salary and the last suit was for salary for the period from March 9th to May 1st, 1934. It was held that a demand for salary accruing under a single contract of employment, although payable monthly, is an indivisible claim and cannot be split into separate demands for the monthly instalments. Conceding the correctness of the assumption that Hodges had but one claim of $1,695,[12] the case is undoubtedly sound, but it is not authority for the proposition that plaintiff and Hodges could not have substituted

[10] Hugheston Gas Coal Corporation v. Hamilton, 181 S. E. 549 (W. Va. 1935); Cline v. Comer, 108 W. Va. 78, 150 S. E. 229 (1929); Rosenbloom and Co. v. Russ, 103 W. Va. 203, 136 S. E. 846 (1927); Clay v. Meadows, 100 W. Va. 487, 130 S. E. 656 (1925).

[11] *Supra* n. 10.

[12] *Quaere*: Why could not Hodges have recovered in a separate action at the end of each month for that month's wages?

promissory notes for the monthly instalments so that separate actions thereon could be maintained before a justice.

In *Cline v. Comer,*[13] the defendant, Comer, had from time to time made loans, each less than $300, to his father and mother. Thereafter, he secured from them a note in the sum of $1,551.77 "with a view (as the evidence discloses) of recovering judgment immediately for these loans." Later, Comer's attorney secured from the father and mother a series of five notes, each under $300, for the purpose of recovering judgment thereon before a justice. Judgment was rendered in May, 1926. In February, 1927, the plaintiff, a subsequent judgment creditor of the father and mother, instituted suit in chancery for the purpose of setting aside the five judgments upon the ground that they had been obtained for the purpose of hindering, delaying and defrauding creditors. Relief was denied. The court finding that there had been no fraud, and that since the loans as originally made to the father and mother were in sums less than $300 each, there was no objection to combining them into notes. The effect of Comer's acceptance of the note for $1,551.77 was entirely disregarded. Rather than being an authority in support of the instant case, it is arguable *contra,* that the note for $1,551.77 was a merger and consolidation of the pre-existing loans, or at least *prima facie* taken in satisfaction thereof since it involved the taking of a higher and better form of indebtedness.[14] If such is the correct view it would be difficult, if not impossible to distinguish it from the instant case. At any rate, it can hardly be cited in support of the proposition that the original cause of action cannot be split.

The *Rosenbloom* case[15] is, on its facts, very similar to *Cline v. Comer,* except that there was no evidence to show the amount of the loans as originally made by the son to his father and mother. The judgments were obtained by the defendant son before a justice, pending a motion for judgment in the circuit court upon the plaintiff's claim against the father and mother. It is to be observed that the opinion in this case does not even mention the point as to the jurisdiction of a justice, nor the question of splitting a cause of action, for which it is cited in the *Bane* case. Consequently, it cannot be regarded as authority thereon.

[13] *Supra* n. 10.

[14] *Cf.* McGuire v. Gadsby, 3 Call 234 (Va. 1802). Roane, J., said: ". . . . in order to make one instrument an extinguishment of another, the latter must be of a higher dignity than the former, or must put the plaintiff in a better condition."

[15] *Supra* n. 10.

In *Clay v. Meadows,*[16] the plaintiff sold defendant several bills of flour from time to time, totaling $498.50. Thereafter, plaintiff brought two suits against defendant, before a justice, one for $276 for part of these bills, and the other for the remainder. It was held that each sale of flour should be treated as a separate demand, maturing at different times, and that the terms of credit having expired plaintiff could combine as many as possible into units of not more than $300 and maintain separate suits thereon before a justice. This case, again, is not authority for the proposition for which it was cited.

Continuing its discussion in the *Bane* case, the court said that "The only way that one having a claim under contract for more than $300 may get jurisdiction before a justice is by releasing part of it and declaring on a less sum." The case of *Richmond v. Henderson*[17] was cited in support of this statement. There, the plaintiff sued before a justice, claiming $300 damages, and filed two bills of particulars, one setting up a breach of a written contract and the other a claim for work and labor in performing services on the defendant's land. Judge Brannon said that while the plaintiff might be required to elect upon which bill of particulars he would proceed, this point had nothing to do with the jurisdiction of the justice. Or, assuming that the plaintiff could not be required so to elect, he might prove both causes of action if he recovered on both together not more than $300, waiving the excess. The defendant could not complain for the reason that he would not be injured. The case does not hold, nor does the opinion state the proposition for which it is cited in the *Bane* case.

If then, the foregoing cases did not constitute binding authorities upon the question, nor, it is submitted, even persuasive authority, and none having been found, the proposition is open for discussion upon principle.

What was the purpose of the constitutional provision[18] that "in suits to recover money or damages, their [justices of the peace] jurisdiction and powers shall in no case exceed three hundred dollars"? One can conceive of many reasons: justices are not trained lawyers and should properly be confined to the disposition of relatively trivial claims. Enlargement of jurisdiction would tend to encroach upon the jurisdiction of the circuit court, of which it is presumably jealous. The machinery and personnel of the jus-

[16] *Ibid.*
[17] 48 W. Va. 389, 37 S. E. 653 (1900).
[18] W. VA. CONST. art. 8, § 28. W. VA. REV. CODE (1931) c. 50, art. 2, § 1.

tice's court is not well adapted to obtaining satisfaction of large judgments. Whatever the true object which the Constitution-drafters had in view, it is submitted that it will be subserved so long as justices are not permitted to deal in any one case with matters which would result in a judgment in excess of $300, nor to re-try the same case. It should be noted that no restriction is placed upon the *number* of claims upon which a justice may render judgment. Again, the constitutional provision does not purport to prohibit the splitting of causes of action except in so far as that may constitute a shift or device for enabling justices to deal with claims involving more than $300. It would seem, however, that the objection to splitting a cause of action is based not so much upon constitutional necessity as upon the policy of the law to discourage litigation, multiplicity of suits and consequent vexation of the defendant.[19] These considerations of policy are not constitutional guarantees which the defendant may not waive.[20] Prior to the adoption of the 1931 Code, the plaintiff was required to combine in one action all his claims against the defendant or be forever barred from recovering upon those not included.[21] Under the 1931 Code provisions[22] no penalty is imposed save the denial of recovery of costs. Whether the matter be one of joinder of causes of action or of splitting them, in either case the objection from the standpoint of public policy would appear to be the same, *viz.*, protection of the defendant from multiple litigation. It is submitted, therefore, that a clear distinction should be made between questions of constitutionality and questions of public policy as expressed in legislative enactments. Public policy, independently of the Constitution, fully accounts for the doctrine forbidding the splitting of the cause of action. The latter purports to deal only with jurisdiction: the *power* to hear and determine causes; not with the *immunity* of the defendant from vexatious and repeated actions. This is not to say, of course, that if *A* is entitled to recover $900 from *B* arising either from the commission of a tort or from breach of a contract, the parties can by consent confer jurisdiction upon a justice to dispose of the case, by bringing three

[19] See remarks of Miller, J., in Pocahontas Wholesale Groc. Co. v. Gillespie, 63 W. Va. 578, 581, 60 S. E. 597 (1908).

[20] *Cf.* Bodley v. Archibald, 33 W. Va. 229, 10 S. E. 392 (1889), holding that joint obligees of a debt in the sum of $600 could not, *without the consent of the debtor,* divide it among themselves into several debts each under $300 and each sue thereon before a justice. (Italics by the Court). McDowell County Bank v. Wood, 60 W. Va. 617, 55 S. E. 753 (1906).

[21] W. VA. CODE (Barnes, 1923), c. 50, § 48.

[22] W. VA. REV. CODE (1931) c. 50, art. 4, § 18.

suits each for $300. Such suits would not be the assertion of three causes of action, but of one, and any other construction would obliterate the constitutional provision. Thus, the point of distinction here suggested turns upon the status of the plaintiff's case at the time of the institution of his suit. If it is then one cause of action in excess of $300 no splitting should be permitted. If they are then separate causes of action the doctrine against splitting has no application for the reason that no larger claim is in existence which is susceptible of division.

The Status and Effect of the Judgment

In the *Bane* case an indeterminate amount of emphasis is placed upon the fact that the execution of the ten notes was for the purpose[23] of enabling the bank to sue upon them before a justice. As previously stated, it is submitted that, as between the immediate parties, the point presents no ground of differentiation. It becomes important only in so far as it may be evidence of a fraudulent conveyance or charge upon the real estate of Wilson. If the ten judgments are absolutely void they create no lien upon that real estate nor do they have the effect of operating as an assignment for the benefit of all Wilson's creditors. The result is that plaintiff's judgment rendered in the circuit court constitutes a lien which must be paid in full before the Farmers Bank may participate in the proceeds of sale of the land.

This result, it is submitted, is contrary both to principle and to authority. The *bona fides* of the original notes for $2,000 and $800 being admitted, and secondly, the validity of the ten new notes not being questioned, the Farmers Bank was plainly in the position of a creditor entitled to acquire preferential advantage from its debtor in such manner and to such extent as the law permits any other creditor. That the debtor is insolvent is of no consequence, the preference being perfectly valid if not attacked by other creditors by suit in chancery within the statutory period of limitation.[24] Thus, Wilson might have conveyed the real estate to the bank by absolute deed in satisfaction of his debts, or he might

[23] Several Georgia cases have held that it is permissible for the debtor and creditor to divide a large debt into smaller sums for the purpose of bringing suits before a justice, and that the fact that such action was taken for the purpose of preferring the creditor does not establish a case of fraud and collusion. Andrews & Co. v. Kaufmans, 60 Ga. 669 (1878) and cases therein cited. The effect of a code provision upon these decisions is not clear.

Cf. Cline v. Comer, *supra* n. 10, where the facts showed that the small notes were executed for the purpose of permitting suit before a justice.

[24] W. VA. REV. CODE (1931) c. 40, art. 1, § 5.

have executed a deed of trust as security therefor. And, since a judgment consitutes a lien upon all the lands of the debtor, he might have confessed judgment in the circuit court, and thereby have given security. Ever since the cases of *Mack v. Prince*[25] and of *Nuzum v. Herron*,[26] it has been undisputed that such a confessed judgment operates as an assignment of all the real estate of the judgment debtor, for the benefit of all his creditors, which, if not set aside in the statutory manner, constitutes a valid preference in favor of the judgment creditor.

It is apparent, therefore, that in the *Bane* case no weight should be given to the fact that Wilson *confessed* the ten judgments in favor of the bank. And, if those judgments were not void upon jurisdictional grounds, for the reasons previously suggested, then upon principle the court should have held that the Farmers Bank, plaintiff and all other creditors of Wilson who would contribute to the costs of the plaintiff's suit, share equally and ratably in the proceeds arising out of the sale of the land.

Secondly, the decision is opposed to the result reached in *New River Grocery Company v. Trent*,[27] which is strikingly similar upon its facts. There, the defendant, a retail merchant, was indebted to Lewis, Hubbard & Company in the sum of $878.98, and also owed other debts and was insolvent. Lewis, Hubbard & Company split its claim into demands of $300 and under, in order to acquire jurisdiction before a justice. Trent accepted service of the summonses and confessed judgments. The plaintiff, another creditor of Trent's then filed suit in chancery charging that these judgments had been secured with the intent to defraud Trent's creditors. These allegations were taken for confessed and therefore admitted to be true. It was held that "Such *charge* or *transfer* is not *ipso facto* void, but will be adjudged so if suit be brought by a creditor within the time fixed by the statute, as this suit was brought. Under the allegations of the bill, the judgments Trent permitted to be obtained against him, (three by confession and one by connivance and default) are by the statute declared 'void as to such preference or security, but shall be taken to be for the benefit of all creditors of such debtor.' " The result was that the claims of the plaintiff and of Lewis, Hubbard & Company were paid *pro rata*. The jurisdictional point was not discussed and apparently not raised by counsel. Consequently, although the case may not be

[25] 40 W. Va. 324, 21 S. E. 1012 (1895).
[26] 52 W. Va. 499, 44 S. E. 257 (1903)).
[27] 101 W. Va. 118, 132 S. E. 487 (1926).

a binding authority it is nevertheless persuasive and, in the absence of other authority, should have exerted a strong influence upon the decision in the *Bane* case.

The upshot of the matter is that in the future in any case of an insolvent debtor, the creditor whose claim exceeds $300 will be driven into the circuit court in order to obtain a legitimate judgment lien security for his claim. What, then, is the position of the creditor of an insolvent debtor, who in the past has obtained judgments before a justice upon a split cause of action as defined in the *Bane* case? Suppose that those judgments are more than one year old, or have been docketed in the county clerk's office within eight months after rendition and no creditor's suit attacking them has been filed within four months thereafter.[28] The creditor, having been lulled into a feeling of safety and having taken no further steps to obtain security by way of deed or deed of trust, finds not only that he has no prior lien, but that he cannot participate equally with a subsequent lienor, and for his pains is relegated to the position of a common creditor.

Again, suppose that the judgment debtor were solvent at the time when his creditor obtained judgments upon the split cause of action. If valid, such judgments would constitute an immediate lien and unassailable within four months. The debtor may continue to be solvent for several years thereafter. Yet, since the judgments are *void* by the rule in the *Bane* case, they are complete nullities, and a less diligent creditor is preferred whether the debtor remains solvent or subsequently becomes insolvent. The field for attack upon such judgments and inquiry into the previous status of the claim is opened wide. This would seem to be productive of litigation and tedious and expensive investigations before commissioners in chancery to whom judgment creditor's suits have been referred for the ascertainment of liens and their priorities. The considerations of public policy which presumably gave birth to the rule against splitting causes of action are thereby confounded and rendered nugatory, and all this as the result of the construction of a constitutional provision limiting the jurisdiction of a justice of the peace. No remedy for the correction of these untoward results suggests itself other than the overruling of the *Bane* case or the adoption of a constitutional amendment.

---

[28] *Supra* n. 24. In Nuzum v. Herron, *supra* n. 26, a *quare* was raised whether attacking creditors must sue within four months after the docketing of the preferential judgment.