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The Time When a Motion for Judgement May be Heard in West Virginia

L. C.
West Virginia University College of Law

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THE TIME WHEN A MOTION FOR JUDGMENT MAY BE HEARD IN WEST VIRGINIA.—The proceeding for obtaining judgment by motion, in lieu of an action at law, adopted in chapter 121 of the West Virginia Code from the Code of Virginia, is recognized as a plain instance of code pleading, although prevailing in essentially common-law states.[1] In the Virginia Code of 1849, the provisions of which received construction in the leading case of *Hale* v. *Chamberlain*,[2] the statute provided that the defendant should have sixty days' notice of the time when the motion would be made. The statute further provided that the notice should be returned to the clerk's office forty days before the motion should be heard.[3] In *Hale* v. *Chamberlain* the court emphasizes the fact that the primary object of the statute was "to simplify and shorten pleadings and other proceedings," but not necessarily to shorten the time within which a case might go on the docket for a hearing. In fact, it is said that "the legislature, from analogy to the time usually required to get an action on the docket, fixed the time of the notice at sixty days,

[1] Burks, Pleading and Practice, 159.
[2] 18 Grat. 658 (Va. 1857).
[3] Va. Code, 1849, c, 167, § 5.

to be filed forty days before the motion is heard", for the express purpose of making the proceeding by motion conform to the common-law procedure as to approximate time for maturing a case.[4] Chapter 177, section 1, of the Virginia Code of 1849, which corresponds to chapter 131, section 1, of the West Virginia Code, provided, among other things, that before every term of court the clerk should make out a docket of "motions and actions" pending. This statute was construed to mean that a motion or action could not be heard at any particular term of court unless it had been placed on the docket by the clerk prior to the beginning of such term. In addition to the requirements of the analogy recognized as stated above and the supposed requirements of the statute, the opinion in *Hale* v. *Chamberlain* further states certain practical reasons why it would not be expedient to hear a motion which had not been placed on the docket before the beginning of the term. It is said that

> "A certain time is allowed before the term to get the case on the docket that the defendant may prepare for a trial; and it is set to a certain day on the docket, that he may know when to summon his witnesses. But if a case may be matured during the term, there is no provision for placing it on the docket; and there would be no propriety in hearing it on the day named, so as to interrupt the regular calling of the docket, and so to give preference over cases entitled from their place on the docket to a priority. The case would have to be called on the day named, and continued to some day at the end of the days set, or the defendant would be required with his witnesses to be constantly in court to be ready whenever at some leisure interval the case should be called up for trial."[5]

Since the decision of *Hale* v. *Chamberlain,* the Virginia statute has undergone various changes, all intended to broaden and liberalize a remedy which seems to have been steadily gaining in popularity over the common-law actions.[6] The time of the notice has been reduced from sixty to fifteen days.[7] Although at a time subsequent to the decision of *Hale v. Chamberlain* the statute expressly required the notice to be returned to the clerk's office ten days before the *term of court* at which the motion was to be heard,[8] this requirement has long since been eliminated. On the contrary, the Code of 1904 provides that judgment may be obtained "after

[4] Hale *v.* Chamberlain, note 2 *supra,* p. 661.
[5] *Idem,* p. 662.
[6] Under the present statute there may be a recovery for unliquidated damages for breach of a contract and even for a tort. Va. Code, 1919, § 6046.
[7] *Idem.*
[8] Burks, Pleading and Practice, 164.

fifteen days' notice, which notice shall be returned to the clerk's office of such court within five days after service of the same, *and after such fifteen days' notice the motion shall be docketed.*"[9] The statute as thus worded has been understood as dispensing with the necessity of returning the notice to the clerk's office before the beginning of a term of court in order to have the motion heard at such term.[10] The code of 1919 is more emphatic to the effect that the proceeding may be docketed and heard after the beginning of the term. It provides for not less than fifteen days' notice, and that the notice "shall be returned to the clerk's office of such court within five days after service of the same, and when so returned shall be *forthwith docketed.*"[11] The requirement that the notice shall be returned to the clerk's office within five days after service obviously is not in order to get the proceeding on the trial docket before the beginning of the term, but in order that the proceeding shall have an official status as soon as practicable after service of the notice, and perhaps too where practicable to permit the clerk to docket regularly such notices as can be reasonably returned before the beginning of the term. The result is that in Virginia a notice may now be served, returned, docketed and the case tried, all after the beginning of the term.[12]

The original West Virginia statute followed the provisions of the Virginia Code in requiring sixty days notice to the defendant and that the notice be returned to the clerk's office forty days before the hearing.[13] By acts of 1882[14] the time of notice was reduced to thirty days and the notice was required to be returned to the clerk's office twenty days before the hearing. The statute remained thus until 1915, when the time of notice was reduced to twenty days and the notice was required to be returned to the clerk's office fifteen days before the hearing.[15] The West Virginia statute has never contained any express provision, as in the earlier Virginia Code, to the effect that the notice must be returned to the clerk's office before the beginning of the term at which it is to be heard. On the other hand, it has never contained any provision, as in the Virginia Codes of 1904 and 1919, which may be construed as requiring or permitting the notice to be docketed and the case tried after the beginning of the term. However, the West Virginia court has always followed the earlier Virginia de-

[9] Va. Code, 1904, §3211. Italics ours.
[10] Burks, Pleading and Practice, 164-165.
[11] Va. Code, 1919, § 6046. Italics ours.
[12] Burks, Pleading and Practice, 164-165.
[13] W. Va. Code, 1868, c. 121, § 6.
[14] c. 74, § 6.
[15] Acts 1915, c. 78; W. Va. Code, 1916, c. 121, §6.

cisions, and in particular *Hale* v. *Chamberlain,* to the effect that the case can not be tried unless the notice has been returned to the clerk's office before the beginning of the term and the proceeding docketed in accordance with the provisions of section 1 of chapter 131 of the West Virginia Code. Is such a requirement logical and desirable?

The West Virginia court has adopted *Hale* v. *Chamberlain* and other Virginia decisions under the earlier Virginia statutes as precedents.[16] Hence it definitely recognizes section 1 of chapter 131 of the West Virginia Code, providing that the clerk shall before each term of court docket "motions and actions" pending, as forbidding any motion to be heard at a particular term of court unless the notice has been returned and the proceeding docketed before the beginning of the term.[17] Likewise it may be understood as sanctioning all the practical reasons for such a requirement and the analogy heretofore noted as asserted in *Hale* v. *Chamberlain.* Furthermore, the West Virginia court has recently placed emphasis on certain language of the statute as constituting an additional reason why the notice must come to the clerk's office in vacation and be there docketed and can not be docketed for a hearing during the term. The fact that the notice is rerequired to be returned to the *clerk's office* is urged as indicating that it must undergo the process of docketing under section 1 of chapter 131 prior to the beginning of the term before it can be heard.[18] Notwithstanding all these reasons and the fact that the West Virginia cases are plainly warranted by judicial precedent, the modern Virginia practice having resulted from amendment of the statutes, it is believed that the rule to which the West Virginia court adheres is not in accord with the modern spirit and purpose of the statute, even as it exists in West Virginia, and that no great violence would be done to precedent if the rule were changed by judicial decision, although no doubt it would be better to accomplish such a result by amendment of the statute.

It is believed that the analogy mentioned in *Hale* v. *Chamberlain,* if it was ever contemplated by the Virginia assembly, no longer applies. While it may have been true at the time when the latter case was decided that the object of the statute providing for judgment upon motion was not to save time in maturing the cause, the fact that the time of notice has since been gradually re-

[16] Knox *v.* Horner, 58 W. Va. 136, 51 S. E. 979 (1905); Citizens National Bank *v.* Dixon, 117 S. E. 685 (W. Va. 1923).
[17] *Idem.*
[18] Superior *v.* Peters, 118 S. E. 540 (W. Va. 1923).

duced from sixty to twenty days in the West Virginia statute indicates that the saving of time in maturing the case is a very important—perhaps the primary—consideration in the modern statute. Perhaps the need for the statutory remedy is recognized as most urgent and indispensable in those instances where the plaintiff does not have sufficient time in which to mature a regular common-law action. The mere fact that the statute provides for return of the notice to the clerk's office is argumentative, but not controlling, to the effect that the proceeding must be docketed in the clerk's office in vacation before it can be heard in court. The Virginia statute still has this provision that the notice shall be returned to the clerk's office, and yet it has the further provision that the proceeding shall be forthwith docketed, although the notice may have been served and returned after the beginning of the term. Reasons have already been noted why the statute may require the notice to be returned to the clerk's office without the implication that it may not be docketed and tried in court if returned after the beginning of the term. The statute does not say that the notice must be returned to the clerk's office before the beginning of the term, nor does it say that the proceeding must remain in the clerk's office any definite time whether returned before or after the beginning of the term. Section 1 of chapter 131 makes it the duty of the clerk to docket all "motions and actions" pending at the beginning of the term, but it does not say that the court may not docket motions pending after the beginning of the term. Neither the clerk nor the court could properly docket a common-law action which had not run its due course at rules before the beginning of the term,[19] because, by positive terms of the statute, such an action would not be matured for trial until it had properly run its course at rules. But a proceeding by motion does not need to be matured at rules. One of the very objects of making the notice returnable to a day in court would seem to be to escape the delay of pleading at rules. While a common-law action could not mature for trial after the beginning of a particular term of court so as to be tried at that term, a proceeding for judgment on motion may be matured after the term. In other words, there is no reason why the provisions of section 1 of chapter 131 as applying to common-law actions should be applied by analogy with the same strictness to the proceeding by motion. If the provisions of the statute do not expressly or by necessary implication prohibit

[19] Bennett *v.* Farmers' Mutual Fire Association, 78 W. Va. 654, 90 S. E. 169 (1916).

the hearing of a motion when the notice has been returned after the beginning of the term, then it remains to inquire whether procedural circumstances would render such a practice impracticable, as urged in *Hale* v. *Chamberlain.*

It is urged in *Hale* v. *Chamberlain,* as hereinbefore quoted, that, unless the case should be set for trial regularly on the trial docket along with common-law actions matured for trial, the defendant would not know on what day to appear in court with his witnesses, unless the case should be tried on the day indicated in the notice. On the other hand, if the case should be tried on that day, it is suggested that the trial would likely interfere with the trial of other cases regularly set on the docket for the same day. It is said that the only way out of the difficulty would be to call the motion on the day specified in the notice and set the case for trial at a future day in the term. In the first place, it is believed that these objections are overemphasized; and in the second place, it is believed that they apply largely to any proceeding for judgment by motion, although the notice has been returned and the proceeding docketed before the beginning of the term. Confined as the proceeding is in West Virginia to instances where the plaintiff is entitled to recover money on contract, it is believed that in a comparatively large number of cases the plaintiff will take judgment by default on his affidavit and no witnesses nor trial in the ordinary sense will be necessary. The few minutes necessary to call the defendant and enter a default judgment on the day appointed in the notice will not interfere with the trial of cases set on the docket. On the other hand, if the defendant interposes a defense, it is believed to be the regular practice, even in those cases where the proceeding has been docketed prior to the beginning of the term, for the defendant to appear and plead on the day appointed in the notice (the first day of the term, for instance) and to set a future day for trial of the case that will not interfere with the regular docket. Or if necessary, under the law of continuances, the trial may be continued to a subsequent term of court. The fact that, in a proceeding by motion, the defendant has such a comparatively short time in which to plead and the issues to be tried are defined such a brief time before the trial will always render chances for a trial at the term appointed in the notice more or less precarious, if the defendant has any real defense to assert, whatever the time and place of docketing the proceeding. Yet why give the defendant an opportunity to postpone a recovery to a future term of court, merely because the notice has not been

docketed prior to the beginning of the term, without the necessity of asserting even that he contemplates any defense? Experience would seem to indicate in Virginia that the objections urged in *Hale* v. *Chamberlain* either have not carried much weight in practice or have been counterbalanced by other considerations. The evolution of the statute in Virginia is evidenced by numerous, gradual and studied changes. The statutory proceeding has been made available not only to recover unliquidated damages for breach of a contract, but even for a recovery in a tort action. Yet the notice may be returned and the motion docketed and heard after the beginning of the term. A recent statement of the West Virginia court is significant. It says, referring to the defendant: "He does not have to go to the trial calendar docket to be informed that his adversary is seeking judgment against him at the next term of court and on a day certain."[20]

This discussion has been prompted by the fact that the West Virginia Supreme Court has recently decided that process may issue in an unlawful entry and detainer action during a term of court returnable to such term and that the case may be docketed and tried on the return day.[21] Although it must be conceded that there are statutory provisions in chapter 89 of the Code which to a certain extent will differentiate an action of unlawful entry and detainer from the proceeding to obtain judgment by motion in respect to the matters under discussion, still it is believed that this decision goes a long way toward indicating that the same rule ought to prevail in both instances. —L. C.

[20] Citizens National Bank *v.* Dixon, note 16 *supra.*
[21] Superior *v.* Peters, note 18 *supra.*