

January 1924

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Recommended Citation

L. C., *Can the Bar of the Statute of Limitations be Asserted on Demurrer?*, 30 W. Va. L. Rev. (1924).
Available at: <https://researchrepository.wvu.edu/wvlr/vol30/iss2/6>

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West Virginia Law Quarterly

And THE BAR

Published by the Faculty of the College of Law of West Virginia University, and issued in November, January, April and June of each academic year. Official publication of The West Virginia Bar Association.

Subscription price to individuals, not members of The West Virginia Bar Association, \$2.00 per year. To those who are members of the Association the price is \$1.50 per year and is included in their annual dues. Single copies, 50 cents.

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CAN THE BAR OF THE STATUTE OF LIMITATIONS BE ASSERTED ON DEMURRER?—In a recent West Virginia decision,¹ an action of trespass on the case for the wrongful suing out of an injunction, the defendant demurred to the declaration on the ground that it appeared on the face of the declaration that the action was barred by the statute of limitations. The trial court overruled the demurrer. The Supreme Court of Appeals, approving the action of the lower court in overruling the demurrer, makes the following statement:

“We also approve the action of the lower court in overruling the demurrer to the declaration. It is true that, where the facts sufficiently appear upon the face of the pleading, the statute of limitations may be raised by demurrer (*Crawford’s Adm’r v. Turner’s Adm’r*, 67 W. Va. 564, 68 S. E. 179), but it does not appear here except from the process that suit was delayed beyond the statutory period, and over of the process was not craved in order to its being considered on the demurrer (*Lambert v. Ensign Manufacturing Co.*, 42 W. Va. 813, 26 S. E. 431).”

¹ *Vencill v. Flynn Lumber Co.*, 119 S. E. 164 (W. Va. 1923).

This statement clearly raises the question whether one may rely upon the statute of limitations by way of demurring to a declaration in a common-law action.

It has frequently been said in West Virginia that one can not rely upon the statute of limitations unless he pleads it.² Such a statement may be taken to mean that only by plea, and not by demurrer, may the defense be asserted. That it does carry with it such a meaning in some of the texts in which it is made is beyond dispute. However, an examination of the local cases in which such statements appear will indicate that the actual point of adjudication in them is that a party can not rely upon the statute in his evidence under the general issue. In other words, the court undertakes to say that, if a party intends to rely upon the statute in his evidence at the trial, he must do so under a special plea setting up the statute of limitations as a defense, and can not do so under the general issue.³ So far as the writer has been able to determine, it has never been decided in West Virginia, except by way of dictum, whether the defense may be asserted on demurrer in an ordinary common-law action.⁴

According to the great weight of authority in states where the question has actually been decided, the objection that the action is barred by the statute of limitations can not be heard on demurrer to a declaration in a common-law action.⁵ Various reasons

² See cases cited in 9 Encyc. Dig. Va. & W. Va. Rep., 441-2.

³ There are instances where a party may have the benefit of the statute under the general issue, as in ejection and unlawful entry and detainer, where by statute the only plea allowed is "not guilty." W. Va. Code, c. 90, § 13; *Idem*, c. 89, § 2; *Martin v. Cochran*, 119 S. E. 174 (W. Va. 1923). On common-law principles, where the elapse of the statutory period confers title on the defendant and the title is in controversy, the bar of the statute may be proved under the general issue. This would of course be true in ordinary actions for the recovery of specific property, real or personal, as in ejection or detinue. *Smart v. Baugh*, 3. J. J. Marsh, 363, *Sunderland's Cases on C. L. P.* 574 (Ky. 1830); *Burks, Pleading and Practice*, 211; *Hogg, Pleading and Forms*, 184, note.

⁴ See *Lambert v. Ensign Manufacturing Co.*, 42 W. Va. 813, 26 S. E. 431 (1896).

⁵ Among the many cases and authorities available to sustain the proposition, the following may be cited as representative: *Wall v. Chesapeake & O. R. Co.*, 200 Ill. 66, 65 N. E. 632 (1902); *Gunton v. Hughes*, 181 Ill. 132, 54 N. E. 895 (1899); *Gebhart v. Adams*, 23 Ill. 345, 76 Am. Dec. 702 (1860); *Miller v. Aldrich*, 202 Mass. 109, 88 N. E. 441 (1909), and cases cited; *Forest Township v. American Bonding Co.*, 180 Mich. 90, 146 N. W. 416 (1914), and cases cited; *Barclay v. Barclay*, 206 Pa. 307, 55 Atl. 985 (1903); *Callan v. Bodine*, 81 N. J. L. 240, 79 Atl. 1057 (1911); *Wapello v. Bigham*, 10 Iowa 39, 74 Am. Dec. 370 (1859); *Huss v. Central Railroad & B. Co.*, 66 Ala. 472 (1880); *Chemung canal Bank v. Lowery*, 93 U. S. 72 (1876), and cases cited; *Smith v. Hutchinson*, 78 Va. 683, 688 (1884); *Gould v. Johnson*, 2 Ld. Raym. 838; *Puckle v. Moor*, 1 Vent. 191; *Stile v. Finch, Croke's Charles* 1, 381; *Sunderland, Cases on C. L. P.*, 195; 18 *Standard Proc.* 1045; 25 *Cyc.* 1396; 17 *R. C. L.*, *Title Limitation of Actions*, §§ 373-376; *Wood, Limitations*, 4 ed., 29; *Burks, Pleading and Practice*, 350, 406; *Kittle, Assumpsit*, 496.

Some general statements may be found in texts, as in 17 *R. C. L.* 994-5, and *Wood, Limitations*, 4 ed., 30, which would tend to indicate that generally the defense of the statute of limitations may be raised by demurrer. However, an examination of the cases cited, so far as they are in point, will indicate that they are decided under practice codes and are not ruled by common-law principles. Many of them deal with matters of purely equitable cognizance, such as injunctions, partition, or specific performance. Moreover, even under the codes, the demurrer, in order to set up the statute of limitations as a defense, must be special. 17 *R. C. L.*

are stated in support of the rule. Most of the cases emphasize the fact that the statute affects merely the remedy and not the right of action, the conclusion following that the court on demurrer ought to consider only matters which impair the right to recover and not matters which merely interfere with the remedy. The defense is looked upon as being a mere personal privilege of which the defendant may not desire to avail himself.⁶ This being true, the plaintiff has no means of knowing in advance whether the defendant will undertake to rely upon the statute. On the other hand, if the plaintiff, by way of anticipation, should undertake to set up in his declaration matters which will avoid the effect of the statute, which is the only thing that he can do when his pleading shows that the statutory period has elapsed, he not only may unnecessarily add surplusage to his pleading but may be charged with the impropriety of anticipating a defense.⁷ In equity pleading it is perfectly legitimate, and even commendable, to anticipate a defense in the bill; but such a method of procedure is contrary to the principles of common-law pleading.⁸ The West Virginia court has fairly well summed up the objections to allowing the statute to be urged as a defense on demurrer in an ordinary common-law action in the following dictum, from a case in which the court was dealing with an exception to the general rule:

“It is true that a statute of limitations, pure and simple, which bars the remedy only, and thereby and to that extent destroys the right, the defendant must set up and rely on by way of plea, before he can have the benefit of such bar. *Riddle v. McGinnis*, 22 W. Va. 253, 275; *Seborn v. Beckwith*, 30 W. Va. 774 (5 S. E. 450); 1 Bart. Law Prac. p. 84, § 30; 4 Minor, Inst. pt. 1, pp. 719, 692; 1 Wood, Lim. pp. 25, 27, § 7, notes. And this has been settled law in actions at law for more than two hundred years. See *Puckle v. Moor* (1672) Vent. 191; *Gould v. Johnson* (1702) 2 Ld. Raym. 838. And the reasons generally given are that it is personal, and may be waived, and must be pleaded, or in some way be shown to be relied on, and that it can not be reached at common law by a demurrer, because the pleader makes out his case as far as he needs at first to go, without withdrawing it from saving clauses, or setting

996, and cases cited. Some courts make a distinction where the declaration or complaint affirmatively shows not only that the statutory period has elapsed, but also that no ground or excuse avoiding the statute exists. *Low v. Ramsey*, 135 Ky. 333, 122 S. W. 167, 135 Am. St. Rep. 459 (1909); 25 Cyc. 1397-8.

⁶ See same citations.

⁷ See same citations, and in particular *Gunton v. Hughes*, and *Wall v. Chesapeake & O. R. Co.*, note 5 *supra*.

⁸ *Andrews, Stephen's Pleading*, 2 ed., § 220; 4 Minor, Institutes, pt. 2, 999.

up matters in confession and avoidance of the statutory bar. It will be time enough to do this by replication if defendant sees fit to plead the statute, which often he does not wish or intend to do.⁹

However, the West Virginia court and other courts have recognized at least one exception to the general rule stated above. In an action for death by wrongful act under Lord Campbell's Act it is held that the defendant may demur if it appears on the face of the declaration, when compared with the summons, that the statutory period within which the action may be brought has elapsed.¹⁰ This exception is based upon the proposition that the statutory limitation, in an action based upon a right at the same time created and limited as to time of enforcement purely by statute, does not merely affect the remedy, but is a qualification of the very right of action itself and in the nature of a condition precedent to the right to sue. The true nature of this exception is explained by the West Virginia court in the following language:

"But here the cause of action did not exist at common law, but is created by statute. The bringing of the suit within two years from the death of the person whose death has been caused by wrongful act is made an essential element of the right to sue, and it must be accepted in all respects as the statute gives it. And it is made absolute, without saving or qualification of any kind whatever. There is no opening for explanation or excuse. Therefore, strictly speaking, it is not a statute of limitation."¹¹

In West Virginia, and it is believed in a majority of the states, the chancery practice has always been different from that of the common law as to permitting the defense of the statute of limitations to be asserted on demurrer. Consequently, it is generally held that a bill in equity is demurrable when it appears on the face of the bill that the claim is barred by the statute of limitations.¹² Different courts have assigned two different and distinct reasons, either one of which appears logical, why the chancery practice should differ from that of the common law. Some courts have said that in those instances where equity recognizes the bar of the statute of limitations it looks upon the statute, and applies it, as being analogous to the equitable principle of laches. As laches

⁹ *Lambert v. Ensign Manufacturing Co.*, note 4 *supra*.

¹⁰ *Idem*; *Mc Rae v. New York, N. H. & H. R. Co.*, 199 Mass. 418, 85 N. E. 425 (1908); 25 Cyc. 1398, 4.

¹¹ *Lambert v. Ensign Manufacturing Co.*, *supra*.

¹² See cases cited in 9 Encyc. Dig. Va. & W. Va. Rep. 445; 18 Standard Proc. 1045; 17 R. C. L. 995. In Virginia, the strict common-law rule, subject to the exceptions hereinbefore noted, prevails universally, and even in equity the statute of limitations can be asserted only by plea or answer. *Hubble v. Poff*, 98 Va. 646 (1900).

affects the *right* to recover and not merely the remedy, so the bar of the statute is looked upon as tainting the very right, making it stale and inequitable as a basis of recovery.¹³ The other reason for the distinction may very well be stated in the language of a West Virginia decision:

“The objection of lapse of time was formerly considered a proper ground for a plea and not for a demurrer; for, it was alleged, the plaintiff should have the advantage of showing by replication exceptions which might take the case out of the operation of the statutory bar. This however, since the abolition and disuse of special replications in equity practice, cannot be considered a sufficient reason for the distinction between a plea and a demurrer, as the plaintiff, if he has any reason or exception to allege to take his case out of the bar arising from the length of time, should show it by his bill; and it is now clearly the rule in equity, that the statute of limitations, or objections in analogy to it, upon the ground of laches, may be taken advantage of by demurrer as well as by plea.”¹⁴

The dictum in the principal case, quoted at the beginning of this note, cites only one authority to sustain the proposition that a demurrer as to the statute of limitations is proper in an ordinary common-law action. This case, *Crawford's Adm'r v. Turner's Adm'r*, is an equity case, and hence is not in point. The other case cited, *Lambert v. Ensign Manufacturing Co.*, apparently is cited only to sustain the proposition that oyer of the writ is necessary in order to make the record show when the action was started. If the latter case is cited to the effect that the statute of limitations may be asserted on demurrer, it is not in point; for in the case itself, which comes under the exception adhering to actions based on Lord Campbell's Act, the court is careful to explain that the general rule is that a party can not have the benefit of the statute of limitations on a demurrer to a declaration.

It is believed to be the better rule not to permit a defendant to assert the defense of the statute of limitations on demurrer in a common-law action. It is believed that to do so would be contrary to the genius of common-law pleading and in the long run would not serve the purposes of precision and economy. Moreover, there are peculiar reasons in the local law why it is expedient to confine the defendant to use of a special plea.

“This is generally the proper and only method. The others are exceptions. If this were not true, the plaintiff would be compelled to set out his whole case in his declaration, including not

¹³ Kittle, *Assumpsit*, 496; *Riley v. Norman*, 39 Ark. 158 (1882).

¹⁴ *Jackson v. Hull*, 21 W. Va. 601, 610-611 (1883). *Accord*, *Gunton v. Hughes*, 181 Ill. 132, 54 N. E. 895 (1895).

only the grounds of his action, but also excuses for not sooner bringing it, or else he would be cut off from relying upon a new promise in writing, coverture, infancy, insanity and many other answers to the plea. It is especially necessary in those jurisdictions which, like Virginia, allow the plaintiff either to bring his action on the old promise and reply to the new, or else to bring it on the new.¹⁵

—L. C.

¹⁵ Burks, Pleading and Practice, 406. The rule alluded to by Judge Burks is statutory and prevails also in West Virginia. The West Virginia statute appears in Code, c. 104, § 8.