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Venue in Equity as Depending upon the Situs of the Land

L. C.
West Virginia University College of Law

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in military service. This is also true of a very large proportion of those who expected to enter as first year students. Several of those who returned had been rejected for military service. Students in the College of Law have no peculiar grounds for exemption, are on the average of greater maturity than the students in any other college of the University, and from their record are unexcelled for patriotic devotion. A member of last year’s second year class who is now a first lieutenant in the National Army correctly expressed College-of-Law sentiment in saying “I would be ashamed of the school if it didn’t have a large reduction in attendance at such a time.”

The faculty remains unchanged except for the resignation of Associate Professor D. C. Howard who has entered practice in Charleston. It is with much regret that the College of Law loses his efficient services as a teacher and as editor of the Note Department in THE BAR.

Considerable additions have been made to the law library during the summer and fall, so that it now contains the reports of all the states. The acquisition of about ninety volumes of briefs and records from the library of the late Judge T. C. Green of Charles Town, covering cases decided from 1876 to 1887, has added much to the value of that collection. Valuable gifts have been received from the library of the late Henry M. Russell of Wheeling and from the library of Price, Smith, Spilman & Clay of Charleston. Last spring a large portion of the library of the late Col. Robert White of Wheeling, former Attorney General, was purchased, thereby adding much to the library’s rare and valuable collection of Virginia Acts, Codes and early practice books. The total number of volumes in the law library now exceeds eleven thousand. A printed catalog of the library for distribution to members of the bar is in course of preparation.

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VENUE IN EQUITY AS DEPENDING UPON THE SITUS OF THE LAND.
—A recent West Virginia case, Wirgman v. Provident Life & Trust Company;¹ by allusion, seems to cast doubt upon a former ruling of the same court in Rader v. Adamson² touching upon a question of venue. In Rader v. Adamson, the court decided that,

¹ 92 S. E. 415 (W. Va. 1917).
² 87 W. Va. 582, 595.
in a suit to subject land to a vendor's lien, the venue may be based upon the residence of one of the defendants, regardless of the *situs* of the land. A decision of this question involves construction of the West Virginia statute relating to venue. This statute, in so far as it relates specifically to the above question of venue, has been sparsely construed, and most frequently with the eyes of the court diverted upon common-law principles. In order to grasp a definite understanding of the problem involved in construing the statute, it should be noted that the statute expressly excludes ejectment and unlawful detainer from its operation, as far as venue based on residence of a defendant is concerned, merely affirning the common-law rule based upon the local nature of these actions and confining the venue to the *situs* of the land. Hence, the problem is one peculiarly involving venue in equity.

Independently of statute, a decision of the question of venue in equity depends upon whether the proceeding is *in personam* or *in rem*; in other words, whether it affects the land only indirectly by acting upon the person, as by rescission of a contract of sale, or whether it acts directly upon the land, as by sale under a decree of court or delivery of possession under such a decree. Following the analogy of the law, equity considers all proceedings *in personam* transitory in nature, and in such cases venue follows the person; but proceedings *in rem* are looked upon as local, and venue therein is localized by the *situs* of the land involved in the litigation. Hence, since a suit to enforce a lien against land is from its very nature included within the classification of proceedings *in rem*, the venue in such a case is exclusively controlled by the *situs* of the land.

Assuming that the above rules are based on the weight of authority, it necessarily follows that in West Virginia the venue of a suit to recover land or to subject it to a debt must be based on the

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3 W. Va. Code, c. 123, § 1, (1) and (3): "Any action at law or suit in equity, except where it is otherwise specially provided, may hereafter be brought in the circuit court of any county: (1) Wherein any of the defendants may reside, except that an action of ejectment or unlawful detainer must be brought in the county wherein the land sought to be recovered or some part thereof is; ... or (3) if it be to recover land or subject it to a debt wherein such land or any part thereof may be."

4 *Idem*, cl. (1).

5 Lawrence v. DuBols, 16 W. Va. 448, 455-6, and cases cited.

situs of the land, or some part thereof, unless the West Virginia statute has changed the law in this respect. Venue in West Virginia is comprehensively regulated by statute. But it should be noted that common-law principles pertaining thereto are not expressly abolished, nor are they annulled by implication, except where the statute specifically prescribes a contrary rule.

The particular question of statutory construction involved, for purposes of this discussion, is whether clauses (1) and (3), § 1, ch. 123, of the West Virginia Code, are coordinate in effect and optionally available where the two independent grounds of venue exist in the same case, or whether clause (3) is an exception qualifying clause (1). In other words, where the suit is to recover land or to subject it to a debt, must the venue correspond with the situs of the land, or may it be based upon the residence of one of the defendants, regardless of the situs of the land?

In Rader v. Adamson, without citing any authority except the statute, the court held that the suit was properly brought in the county where one of the defendants resided, although no part of the land was situated therein. Rader v. Adamson is not entirely without authority for such a rule, either in Virginia or in West Virginia. Furthermore, a literal acceptance of the language of

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7 Vinal v. Core, 18 W. Va. 1, 21-22.
8 The defendant upon whose residence venue was based had no interest in the subject of the suit except as custodian of notes secured by the lien, with power to collect, and was made a defendant only for purposes of securing a discovery and accounting.
9 Construing a statute practically similar to the West Virginia statute, it was held in Harrison v. Wissler, 98 Va. 597, 36 S. E. 982, that the word "may" (at the beginning of § 1, c. 123, W. Va. Code) does not mean "must". The same case also holds that clauses (1) and (7) (the latter relating to causes in which a circuit judge is interested) are optionally available and that clause (7) does not qualify or limit clause (1). By analogy, the same reasoning may be applied to clauses (1) and (3). In Clayton v. Henley, 32 Gratt. 65, a suit to subject land to a lien, venue was in the county where one parcel of the land involved in the litigation was situated. Held, that there were two grounds of venue, situs of the land and residence of a defendant, but that the latter ground alone would have been sufficient. BURKE, PLEADING AND PRACTICE, 233-4, citing a note by Professor Lile in 6 Va. Law Reg. 476, says that a suit to subject land to a debt may be brought in any county where the land is or "where any one of the defendants resides".
10 In Lawrence v. DuBois, supra, a suit to declare a deed absolute on its face a mortgage, the land was situated in Boone County and the suit was in Kanawha County, the county in which the defendant grantee resided. Held, that the suit was properly brought in Kanawha County. It should be noted, however, that the court says that the venue would have been proper although the land had been outside of the state. Hence, although the court refers to the statute, the question seems to have been decided independently of the statute, on the distinction between proceedings in rem and in personam, the court holding that this was a proceeding in personam, and, hence, seemingly, not within the provisions of clause (3), § 1, c. 123, Code, regardless of the meaning of that clause. The latter case seems to have
the statute may be taken to justify the holding of Rader v. Adamson. Also, it should be noted that clause (1), § 1, of the statute expressly excludes ejectment and unlawful detainer from its operation, thereby making venue in such actions, in accord with the common law, depend upon the situs of the land. Upon the principle of expressio unius est exclusio alterius, this express exception may be taken as an implied exclusion of any other exception, e.g., equitable proceedings in rem.

On the other hand, in West Virginia at least, the doctrine of Rader v. Adamson does not stand unchallenged. In Tennant’s Heirs v. Fretts et al.,11 the court uses the following language: “The land is situated in Monongalia County, and this gave the court of that county jurisdiction. Cooley v. Scarlet, 38 Ill. 316. The suit could not have been brought in any other court.” It is local in its nature, like the abating of a nuisance, Miss. & Mo. R. Co. v. Ward, 2 Black (U. S.) 485; or the enjoining of an act which affects real estate, Northern Ind. R. R. Co. v. Michigan Cent. R. R. Co., 15 How. 233.”

The above suit was a proceeding to remove cloud from title. A suit to subject land to a debt would seem to be more a proceeding in rem than is a suit to remove cloud from title. If the local nature of the proceeding confines the venue in the one case to the situs of the land, regardless of clause (1) of the statute referring to the residence of a defendant, then it is difficult to see why the same restriction should not prevail in the other case. Tennant v. Fretts, at least by way of dictum, overrules Rader v. Adamson.

In Laidley v. Reynolds,12 Judge Brannon says (referring to argument of counsel), “This is rested on chapter 123, § 1, Code, saying that a suit to subject land to a debt must [the italics are ours] be brought in the county where the land is,” seeming to construe the word “may” in the statute as meaning “must.”

Finally, we have the principal case, a suit against non-residents

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12 The latter sentence may be dictum, but it is unequivocal. It will be noted that the court here entirely ignores the statute, basing its reasoning on common-law principles alone.
13 58 W. Va. 418, 422, 52 S. E. 405. The remark of Judge Brannon is dictum, and may have been inadvertent, as far as use of the word “must” is concerned; but it clearly shows his mental attitude toward the statute.
for the purpose of cancelling fraudulent conveyances. The defendants being non-residents, venue could not be based on clause (1), § 1, ch. 123. The court did not have jurisdiction of the parties. And, since the suit was not brought in the county where the land was situated, the bill was dismissed for lack of jurisdiction to proceed in rem. Obviously, since neither ground of venue provided by the statute existed in the principal case, the question of right to elect between the two different grounds did not enter essentially into a decision of the case. At any rate, the court expresses its understanding of the statute: "Any suit or proceeding brought primarily to affect the title to land must be instituted in the county in which the land or some part of it is situated. Tennant v. Fretts, 67 W. Va. 569, 68 S. E. 387, 29 L. R. A. (N. S.) 625, 140 Am. St. Rep. 979; Code, c. 123, § 1, cl. 3 (§ 4734). Rader v. Adamson, 37 W. Va. 582, 16 S. E. 808, recognizes an exception to this rule. Whether it is well founded, it is not now necessary to say." This language may be taken as a very broad hint that the court has doubts as to the correctness of the doctrine in Rader v. Adamson. It should be noted that the principal case not only, by citing Tennant v. Fretts, bases its reasoning on the common-law distinction between local and transitory proceedings, but also relies upon the statute itself as confining the venue to the situs of the land.

There are reasons and arguments in addition to court rulings why the situs of the land should control the venue, at least in proceedings in rem. Such a rule is analogous to the statutory rule for venue in actions at law, and the statutory rule in such respect is identical with the common-law rule. It is expedient, almost essential, to keep the record of proceedings affecting the title to real property, where possible at all, in the county where the property is situated. The full doctrine of Rader v. Adamson (and it would seem that to attempt to recognize exceptions to it would destroy the doctrine in its entirety, since it is based solely on the very letter of the statute, if it has any foundation at all) might

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14 Because neither of the defendants was resident in the state, nor was the suit brought in the county where the land was situated, and hence there was no question as to election between the two grounds of venue.

15 Statutes in derogation of the common law are strictly construed. Unless the intention expressly so appears, it will be presumed that the common law has not been changed. Railway Co. v. Conley and Avis, 67 W. Va. 129, 67 S. E. 813; State ex rel. Keller v. Grymes, 65 W. Va. 461, 64 S. E. 728; Webb v. Ritter, 60 W. Va. 193, 54 S. E. 494.
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work unwarranted hardships on defendants. The fact that there are different degrees of parties in equity lends opportunity for mischief in the application of such a doctrine. Venue based on the residence of a party having only a slight interest in the subject of the suit, or having only a collateral interest in respect to the main issues, might compel a defendant landowner to defend in a court distant from the situs of his land, which usually is the place of his residence or in close proximity thereto, and might at the same time subject numerous lien creditors to the same inconvenience, for the majority of one's creditors are usually resident in his community. It is difficult to imagine a proceeding more local in all its phases than a creditors' suit. And all the expediency requiring the venue in ejectment and unlawful detainer to be confined to the situs of the land would seem to require the same restriction as to venue in creditors' suits and other equitable proceedings in rem.\textsuperscript{16} The statute, although reasonably clear in its separate provisions, requires construction as a whole. It is not exhaustive in its scope nor exclusive of the common law. In at least one case,\textsuperscript{17} it was necessary to call in the principles of the common law to aid a situation not covered by it. And since it is remedial in its purpose, and hence could not have been intended to introduce hardships not incidental to the common law, it might not be considered doing violence to its terms to restrict its operation, even at the expense of literal interpretation, so as to make it serve the purpose for which the legislature may reasonably be presumed to have intended it. Indeed, a literal interpretation of the statute might take clause (3), § 1, of the statute as one of the instances coming within the provision, "Except where it is otherwise specially provided," at the beginning of the section. Clause (3) may be considered as more "special" than clause (1); and there is no reason why clause (3), just as any other provision in the Code, may not come within this exception.\textsuperscript{18}

—L. C.

\textsuperscript{16}A statute will be so construed as to avoid private injustice or public inconvenience. Old Dominion Bldg. etc. Ass'n v. Sohn, 54 W. Va. 101, 112, 48 S. E. 222; Hasson v. City of Chester, 67 W. Va. 273, 282, 67 S. E. 231; State v. B. & O. R. R. Co., 61 W. Va. 367, 56 S. E. 513.

\textsuperscript{17}Vinal v. Core, supra.

\textsuperscript{18}In construing a statute, the intent is paramount to the letter. Bank v. County Court, 36 W. Va. 341, 346, 15 S. E. 78; Gas Company v. City of Wheeling, 8 W. Va. 320.