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Amendment of Attachment Affidavits and Orders

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BENCH AND BAR

AMENDMENT OF ATTACHMENT AFFIDAVITS AND ORDERS

An admonishing forefinger — warning that attachment is a harsh and arbitrary remedy, derogatory of the common law, to be strictly construed; and a helping hand — permitting liberal amendment, has been the West Virginia approach in cases raising questions of formal errors in attachment proceedings. By decision and by statute, the West Virginia Supreme Court of Appeals and the Legislature have together plotted a course which had its beginning in the second decision of the court's first term, held in January, 1864, and its ending almost three-quarters of a century later with the enactment of the present statute.

The first case to raise the question of a formal defect in an attachment proceeding was *Pendleton v. Smith*,[1] in which it was contended that the attachment order was void because it was signed "'*S. G. Naylor, Dep't Clerk*,' and not . . . . *Joseph R. Naylor, Clerk*, or *Jos. R. Naylor*, by *S. G. Naylor*, Dep'y Clerk."[2]

The court, Judge Brown dissenting, held that the attachment was totally defective for want of the name of the clerk of the court, signed by himself or for him by his deputy:

> "Writs, summons' and other process, which are required to be issued by the clerk of a court, must be attested by the clerk in his own proper name: or it may be done by his deputy placing the name of his principal to the process: that the attestation of writs required by the constitution, means the subscribing the name of the clerk to the process . . ."[3]

Judge Brown, in his dissent, wrote the first of a series of opinions which *sub silentio* eventually overruled the majority in this case. The subscription to the attachment order was valid, he declared, since

> "The writ was issued by the deputy clerk, who was authorized by law to issue it; and was signed by him in his official character as deputy clerk."[4]

This strict construction placed on attachment proceedings and

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[1] 1 W. Va. 16 (1864). For a general discussion of this problem, see Note (1921) 10 A. L. R. 1495.
[2] *Id.* at 19.
[3] *Id.* at 24.
[4] *Ibid.*

the rigid adherence to technicality was not lost on the bar, and six years later the court had before it the ". . . question . . . as to the validity of an attachment based on an affidavit without a *jurat,* signed by the officer who administered the oath."[5]

Judge Brown, speaking for the court, used this opportunity to cut into the strict doctrine laid down in the *Pendleton* case and to develop further the views set forth in his dissent there. The error was one of "inadvertence or oversight," he said, an "accidental omission" which was corrected by evidence showing that the affidavit had in fact been properly prepared and attested.

With *Pendleton v. Smith* and *Bank v. Gettinger* contending as authority, the entire question was again raised in *Anderson v. Kanawha Coal Company.*[6] Recognizing the uncertainty which confronted the bar, as evidenced by the painstaking and careful exceptions and assignments of error, the court again attempted to settle the matter.

The first assignment of error, complaining of the permission accorded the clerk to amend his certificate to the attachment affidavit to show its true date, was dismissed, this being "a mere clerical errror" the correction of which lay within the court's inherent power to allow amendment.[7] The second assignment of error, complaining of the permission accorded the clerk to endorse his approval of the attachment bond subsequent to issuance but before trial, was held groundless since "no possible prejudice to the defendant could have resulted from the court's permitting these facts to be endorsed."[8]

The argument, based on *Pendleton v. Smith,* that the certificates of the affidavit and of the acknowledgment and approval of the attachment bond were insufficient in that they were signed " 'Wm. M. Kline, deputy for W. E. G. Gillison, clerk of said circuit court of Kanawha county,' "[9] a subscription in precisely the same form as that to the attachment order which was declared void in *Pendleton v. Smith,* likewise met with disapproval.

"That case," said Judge Green, "decides that writs or process must be signed by or in the name of the clerk . . ." which distinguished it from the case at bar, he inferred, reasoning that the

[5] Farmer's Bank of Virginia v. Gettinger, 4 W. Va. 305, 309 (1870).
[6] 12 W. Va. 526 (1878).
[7] *Id.* at 534.
[8] *Id.* at 535.
[9] *Id.* at 528.

law did not require such formal certificates of the attachment affidavit and approval of the attachment bond, and that even if the law could be so construed, the questioned signature was merely a "clerical error" which the court could permit to be amended "at any time" on motion.[10] It is significant that no motion to amend this subscription was made, although two such motions were made with reference to other defects, the granting of which was unsuccessfully assigned as error.

The bar, however, continued to cite *Pendleton v. Smith.* Just one year later it was again before Judge Green in the case of *Ambler v. Leach,* where this question was raised:

> "Was the judgment of the circuit court . . . null and void, because the summons . . . was blank as to its date . . . and because it was not signed by the clerk or his deputy?"[11]

In deciding that it was not, the court curiously enough acknowledged that *Pendleton v. Smith* had been correctly decided, but attempted to end its authority as a precedent by declaring that it was decided in accordance with a Virginia constitutional provision which required expressly that writs should be "attested by the clerks of the several courts," a provision which was no longer present in the constitution of West Virginia. Thus, within one year and at the hands of one judge, *Pendleton v. Smith* had first been confined to its facts and then declared overruled by a constitutional amendment.

Nevertheless, a decade later in the case of *Davis v. Living,*[12] it was assigned as error that the court had refused to admit a deed in evidence on the ground that "a deputy recorder has no authority to make a deed for land sold for taxes." Again *Pendleton v. Smith* was cited and again discredited, the court approving Judge Brown's dissent as expressing the view it wished to take.

Meanwhile, in 1882, the legislature helped settle the problem by providing for a supplemental affidavit of attachment.[13] By judicial construction, however, it was confined to the allegation of additional facts to support the grounds for attachment already alleged in the original affidavit and could not be used to introduce

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[10] *Id.* at 529.
[11] 15 W. Va. 677, 681 (1879). *Accord*: Laidley's Adm'rs v. Bright's Adm'r, 17 W. Va. 779, 791 (1881).
[12] 32 W. Va. 174, 9 S. E. 84 (1889).
[13] W. Va. Acts 1882, c. 106; W. VA. CODE (1887) c. 106, § 1, par. 8.

new grounds of attachment.[14] In short, the supplemental affidavit could not be used to cure errors of substance but left untouched the court's inherent power to allow amendment of errors of form.

In light of these cases and this statute, it is patent that the court, paying little heed to logical symmetry, was seeking to avoid the strict construction rule of *Pendleton v. Smith.* A rereading of the decisions at this point will disclose that without exception in cases following *Pendleton v. Smith* the court was ruling on questions of formal errors in and amendments to proceedings other than attachment orders.

It remained for Judge Brannon to articulate this distinction in the *Zeigler* cases, in which he characteristically set the decisions in the order of reason. In *Bohn v. Zeigler* he pointed out that,

> "In this case arises the question of the deficiency and the amendableness of the affidavit for attachment, while in the case of *Miller v. Zeigler,* (at this term) . . . the question of the same character related to the order of attachment . . ."[15]

It was assigned as error in the *Bohn* case that the court below had refused to permit an original and supplemental affidavit, taken before a notary in Ohio, to be amended by supplying an omitted authentication of the genuineness of the notary's signature. Overruling the court below, Judge Brannon clearly distinguished errors of form and substance and held that the court should have permitted the amendment.

Turning to the second problem "the question of the deficiency and amendableness" of the order of attachment, Judge Brannon held that an attachment order was not void for want of the clerk's signature, terming its omission "a mere technicality arising from inadvertence of public officers" which "the court ought to have given leave to amend."[16] Studying the construction and language of this opinion, it is obvious that Judge Brannon believed that he was dealing with a question of first impression. Otherwise, it is

[14] In Fayette Liquor Co. v. Jones, 75 W. Va. 119, 122, 83 S. E. 726 (1914), the court said: "By the very language of the statute the new affidavit can only be supplemental, not corrective. It can only contain new facts, discovered subsequent to the filing of the original affidavit. The statute does not authorize the patching up of the original; it only authorizes the supplementing of the same by additional facts, not known when the former affidavit was made."

[15] Bohn v. Zeigler, 44 W. Va. 402, 403, 29 S. E. 983 (1898). *Accord*: Burgunder v. Zeigler, 44 W. Va. 413, 29 S. E. 1034 (1898); State v. Hamrick, 74 W. Va. 145, 81 S. E. 703 (1914); Fisher, Sons & Co. v. Crowley, 57 W. Va. 312, 327, 50 S. E. 422 (1905).

[16] Miller v. Zeigler, 44 W. Va. 484, 486, 29 S. E. 981 (1898).

submitted, it would seem that where an attachment order was void when signed by the deputy clerk, *a fortiori* it would be void when the clerk's signature was omitted entirely.

The force of this opinion is somewhat blunted by Judge Brannon's reliance on the fact that the clerk properly signed a memorandum summoning a garnishee, written on the same sheet as the unsigned attachment order. "That is a recognition by the clerk of the authenticity of the order of attachment."[17] Thus, it may be that by implication Judge Brannon held this a properly signed order of attachment.

With the question of formal errors in attachment affidavits and their amendment thus settled, it remained only for the legislature to build on what the court had already begun. In the code revision of 1931, provision for the supplemental affidavit was omitted and there was enacted in its stead the present statute which permits the original affidavit to be

> " . . . amended at any time before trial by the substitution of a new affidavit . . . containing allegations of facts existing at the time of making the former affidavit; and the new affidavit shall stand in lieu of the old one for all purposes."[18]

It will be noted that this like the former statute relates only to the amendment of attachment affidavits and is silent as to the amendment of attachment orders. It is believed, therefore, that the latter question is still controlled by *Martin v. Zeigler.*

The changes made by the 1931 enactment are noteworthy. Of particular importance is the provision which permits the amending affidavit to state matters of fact "existing at the time of making the former affidavit". This radically changed the former provision which only permitted allegation of facts "which may have come to his [affiant's] knowledge since the filing of the original affidavit."[19] Further, until the 1931 statute the old affidavit remained in the case, whereas under the present provision, "the new affidavit shall stand in lieu of the old one for all purposes."

The effect of these changes offers an interesting field of speculation. While the court has not yet been called upon to decide any cases under the 1931 statute, the history of this litigation warrants

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[17] *Id.* at 487.

[18] W. VA. REV. CODE (1931) c. 38, art. 7, § 6. For a similar provision relating to attachment affidavits in justices' courts, see *id.* c. 50, art. 9, § 3.

[19] W. VA. CODE (Barnes, 1923) c. 106, § 1.

the conclusion that both formal and substantial errors in attachment affidavits may now be amended. This conclusion finds support both in the court's rulings on amendatory matter sought to be introduced by supplemental affidavit under the old statute, and in the powers of amendment judicially declared inherent in courts of original jurisdiction.[20]

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ANNOUNCEMENT

The annual meeting of the West Virginia Bar Association will be held at White Sulphur Springs, on September 16, 17 and 18. The first meeting will be held on the afternoon of Thursday, September 16, and there will be an evening session at which there will be a prominent speaker. The meeting will conclude on Saturday, September 18, at noon.

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[20] Following the introduction of the supplemental affidavit in 1882, the court, while continuing to allow amendments to correct errors of form, still insisted that correction of other errors await the enactment of an amendatory statute. Crim v. Harmon, 38 W. Va. 596, 18 S. E. 753 (1894); Sommers v. Allen, 44 W. Va. 120, 28 S. E. 787 (1896); Fayette Liquor Co. v. Jones, 75 W. Va. 119, 83 S. E. 726 (1914). It may be argued that the amended affidavit now permitted by statute relates to amendments presenting new facts in support of a ground already alleged and does not allow the allegation of new grounds of attachment. It is believed, however, that the legislative intent was to permit comprehensive amendment, safeguarding the defendant against surprise by reliance on the court's inherent power to grant a continuance whenever substantial justice so requires. The defendant is further protected by his right of recourse to the plaintiff's attachment bond. The plaintiff is likewise protected against having his attachment quashed and the surety on his bond held liable because of a misconception of the ground of attachment, particularly when the grounds for attachment are frequently within the peculiar knowledge of the defendant.