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Appeal and Error--Decree "Adjudicating the Principles of the Cause"--Decree Dismissing a Suit in Equity With Leave to Transfer to Law

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RECENT CASE COMMENTS

APPEAL AND ERROR — DECREE "ADJUDICATING THE PRINCIPLES OF THE CAUSE" — DECREE DISMISSING A SUIT IN EQUITY WITH LEAVE TO TRANSFER TO LAW. — Plaintiff instituted a suit in equity to subject certain property to a contractual indebtedness. On demurrer, the chancellor was of opinion that the plaintiff had shown no ground for equity jurisdiction, and dismissed the bill without prejudice to the right of plaintiff to have the cause transferred to the law side of the court under the statute.[1] On appeal, it was contended that this decree was not final, because the statute enabled the plaintiff to have the cause transferred to law and tried there, so that the decree was not appealable. *Held*: The decree was final as to the equitable jurisdiction of the trial court, and was appealable as a decree "adjudicating the principles of the cause".[2] *Murray v. Price.*[3]

The purpose of allowing the transfer of causes from one forum to the other is not to do away with the distinction between law and equity.[4] The court is not under a duty to transfer a cause on its own motion,[5] nor to recast the pleadings after such a transfer.[6] Nor is it authorized to hear law and chancery causes together.[7] The purpose of the statute authorizing such a transfer was to test the practicability of code pleading in a modified form.[8] In equity, its use has been confined to cases where this is the most

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[1] W. VA. REV. CODE (1931) c. 56, art. 4, § 11, "No case shall be dismissed simply because it was brought on the wrong side of the court, but whenever it shall appear that a plaintiff has proceeded at law when he should have proceeded in equity, or in equity when he should have proceeded at law, the court shall direct a transfer to the proper forum, and shall order such change in, or amendment of, the pleadings as may be necessary to conform them to the proper practice; and without such direction, any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit or action was not brought on the right side of the court." This statute was copied from VA. CODE (1919) § 6084.

[2] W. VA. REV. CODE (1931) c. 58, art. 5, § 1(g), authorizes an appeal "in any case in chancery wherein there is a decree or order . . . . adjudicating the principles of the cause". This statute was taken from VA. CODE (1860) c. 182, § 2.

[3] 172 S. E. 541 (W. Va. 1933).

[4] Conway v. American Nat. Bank of Danville, 146 Va. 357, 131 S. E. 803 (1926).

[5] Conway v. American Nat. Bank of Danville, *supra* n. 4.

[6] French *et al.* v. Stange Mining Co. *et al.*, 133 Va. 602, 114 S. E. 121 (1922).

[7] Conway v. American Nat. Bank of Danville, *supra* n. 4.

[8] Burks, *"The Code of 1919"*, 5 VA. L. REG. (n. s.) 97, 120 (1919).

practical method of remanding the plaintiff to the law court; and it will not be applied when the result would be a misjoinder of causes[9] of of parties[10] in the action at law. A transfer to the law side of the court will not be given when the interests of the parties have been protected by an issue out of chancery with the same result as a trial by jury at law, even though there should have been a transfer.[11] Since the statute is primarily for the benefit of the plaintiff rather than the defendant, the plaintiff can waive his right to transfer the cause,[12] or suffer a dismissal rather than to proceed at law.[13] In an action at law, the plaintiff can prevent a transfer to equity when the only purpose is to allow the defendant to assert a defense available only in equity.[14]

The purpose of authorizing an appeal from a decree adjudicating the principles of the cause is to enable a party to have an appellate review of the case without waiting for the final decree, but the statute does not extend the classification of appealable decrees indefinitely.[15] To be appealable the decree must adjudicate all of the principles of the cause raised by the pleadings or otherwise, in the sense of settling every right[16] of each party to the suit.[17] It is sufficient that the decree impliedly settle these

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[9] Brame v. Guarantee Finance Co., 139 Va. 394, 124 S. E. 477 (1924).

[10] French *et al.* v. Stange Mining Co. *et al., supra* n. 6.

[11] Sacks *et al.* v. Theodore, 136 Va. 466, 118 S. E. 105 (1923) (The trial court committed the error of setting the verdict aside, so the case was dismissed on appeal, which forced the plaintiff to go to law, after all).

[12] French *et al.* v. Stange Mining Co. *et al., supra* n. 6; Thomas Andrews & Co. v. Robinson *et al.*, 155 Va. 362, 154 S. E. 154 (1930). (The plaintiff waived his right to a transfer by not seeking it until after the appeal from the trial court); Nash v. Harmon, *et ux.*, 148 Va. 610, 139 S. E. 273 (1927) (In a proper case, the statute is mandatory until the right is waived).

[13] French *et al.* v. Stange Mining Co. *et al., supra* n. 6. (The plaintiff stood on his bill, and waiver of right to a transfer was an alternate ground for the decision).

[14] Dexter-Portland Cement Co. v. Acme Supply Co. Inc., 147 Va. 758, 133 S. E. 788 (1926).

[15] Shirey v. Musgrave, 29 W. Va. 131, 144, 11 S. E. 914 (1886).

[16] Shirey v. Musgrave, *supra* n. 15, (The decree left unsettled the amount and existence of part of the liens sought to be enforced, and awaited the joining additional parties before settling these claims); Hill v. Als *et als.*, 27 W. Va. 215 (1885) (Suit to subject property to a judgment and determine priority of liens, and held not appealable decree, for it left open the priority of the liens); Shinn v. Shinn, 105 W. Va. 246, 249, 142 S. E. 63 (1928) (Decree held not appealable for it only ordered partition of certain lands, and did not dissolve the partnership, which was one purpose of the suit); Kinkead v. Securo, 112 W. Va. 671, 166 S. E. 382 (1932) (Decree merely ordering a reference to ascertain facts is not appealable).

[17] Laidley v. Kline's Adm'r *et al.*, 21 W. Va. 21 (1882); Shirey v. Musgrave, *supra* n. 16; Blackshere v. Blackshere, 111 W. Va. 213, 215, 161 S. E. 27, 28, ("Finality of decree, in the sense that all issues must be decided, is required before an appeal can be obtained in those instances which involve

rights,[18] but the mere opinion of the chancellor with no decree adjudicating them is not enough.[19] For an appeal it is not necessary that there be an actual enforcement of the relief sought,[20] or that the principles adjudicated be applied to the facts of the case.[21] But there must be a decree putting these principles into effcet, for otherwise the appellant has suffered no prejudice.[22]

Both of the statutes in question were taken from the Code of Virginia, but they were not there construed together until after West Virginia had adopted the statute authorizing the transfer of causes from one forum to the other. In Virginia it has been held that a decree dismissing a suit in equity, with leave to transfer the cause to the law court, is not final, but it is appealable as a decree adjudicating the principles of the cause.[23] Since the effect of such a decree is to deny to the plaintiff all of the relief sought in his bill, the case seems to be correct in the light of both precedent and principle.

—PAUL D. FARR.

INSURANCE — FORFEITURE OF POLICY — INSANITY NOT AN EXCUSE FOR FAILURE TO NOTIFY INSURER AS TO TOTAL DISABILITY. — An insurance policy provided that, upon the insured's giving notice of total disability before default in payment of premiums, further payment thereof would be excused during the disability. The insured was adjudged insane previous to the due date of a premium. While so incapacitated, the period of grace expired,

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that portion of subsection 1, which allows an appeal to any decree or order 'adjudicating the principles of the cause' '').

[18] Reed v. Cline's Heirs, 9 Gratt. 136 (1852) (Bill to enforce a title bond for sale of land, and after statute of limitations pleaded, court directed an issue to try whether the bond had been executed and lost. Held, that this impliedly adjudicates the plaintiff's right, as not barred by the statute of limitations).

[19] Armstrong v. Ross, 56 W. Va. 16, 48 S. E. 475 (1904).

[20] Richmond v. Richmond, 62 W. Va. 206, 57 S. E. 736 (1907) (The decree ordered partition of certain lands, but the actual partition had not been made).

[21] Wood *et al.* v. Harmison *et al.*, 41 W. Va. 376, 23 S. E. 560 (1895).

[22] Garrett v. Garrett *et als.*, 91 W. Va. 243, 112 S. E. 494 (1922) (The decree sustained a demurrer to an affirmative answer, but did not dismiss the answer or give any relief sought in the bill); Watson v. Wigginton, 28 W. Va. 533, 552 (1886) (The trial court may correct the errors committed, or commit others, before enforcing the decree); Steenrod v. Railroad Co., 25 W. Va. 133 (1884).

[23] Colvin *et al.* v. Butler, 150 Va. 672, 143 S. E. 333 (1928); Hodges & De Jarnette v. Thornton *et al.*, 138 Va. 112, 120 S. E. 865 (1924).