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THE ABOLITION OF THE FORMS OF ACTION IN VIRGINIA

*W. Hamilton Bryson**

The common law procedure for initiating actions at law in the English courts required a plaintiff to obtain a writ invoking the jurisdiction of the court and to file a declaration setting forth the facts that justified instigation of the suit and established the cause of the action. This clumsy and archaic system of litigation was abolished by a single chop of the legislative guillotine in New York in 1848. England followed suit in 1875, and the United States federal courts in 1938. Writs and declarations were replaced by simple forms which were copied from the practice of the equity courts. By contrast, Virginia painlessly and imperceptibly reformed the common law pleading over a two hundred year period. This article chronicles the stages of this development in the law of Virginia.

The forms of action as a system of litigation originated in the royal courts of England in the eleventh or twelfth century, when the courts of general jurisdiction were the county courts, and the king's courts heard cases only in special cases as a matter of the king's special favor to a particular plaintiff. Instead of going to the local court, an aggrieved party, for a fee, could obtain an original writ issued by the king's chancery directing the royal court of common law to hear the case. The original writ gave the common law court jurisdiction over the case.

Until the middle of the thirteenth century, the chancery clerks were free to draft new writs to authorize new types of litigation or forms of action. This, however, allowed too much discretion to repose in the lesser bureaucrats since the power to issue new types of writs was the power to expand substantive rights, which was legislative action. In the mid-thirteenth century, this discretion was removed from the chancery clerks who were forbidden to issue new types of writs or to invent new forms of action. Henceforth, no new types of problems were to be solved by the royal courts.

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By the middle of the thirteenth century the local courts had declined drastically in usefulness and the royal courts of common law had become the principal courts of England, perhaps the only courts from a practical point of view. A plaintiff, in order to have an effective remedy in the common law courts, was required to fit his problem into or within one of the fixed, established original writs or forms of actions. The generalizations or categories of litigation were called forms of action because each type of original writ dictated the type of process, the content of the declaration (the first pleading), the method of proof, and the type of remedy. The substance of the law itself was considerably influenced, if not determined, by the system of the forms of action.

The plaintiff's initial choice of the correct form of action was crucial to successful litigation. The law of actions continued to develop after the thirteenth century, although no new forms of action were invented. As the old forms were used for new problems, the law developed countless historical distinctions, subtleties, and "traps for the unwary." During the nineteenth century, the forms of action were abolished in many Anglo-American jurisdictions.¹

Litigation by means of the common law forms of action survived so long for two reasons. First, the changing needs of society were met by the action of trespass upon the case, a general and expandable form of action. Second, the separate legal system of the equity courts sufficiently handled the major problems of law reform until the nineteenth century.

By the end of the fifteenth century, the internal logic of the common law forms of action had developed the idea that all of the common law should be included within one or another form of action. A problem was remedied by a single form of action and no other; there was no overlapping. It was a single logical system of remedies which did not permit a plaintiff any choice of forms of action. In practice, however, this strict theory came to be modified in a few narrow situations.

Although ownership of real property could be protected in practice by writs of right or novel disseisin or ejectment, in theory each of these was quite different, because they were grounded on differ-

1. See generally J. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 49-61 (2d ed. 1979); F. MAITLAND, THE FORMS OF ACTION AT COMMON LAW (1962); 2 F. POLLOCK & F. MAITLAND, HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 558-73 (S. Milsom ed. 1968).

ent substantive interests. In 1602, however, it was decided in the court of king's bench, that a promisory obligation for a sum certain could be enforced either by a writ of debt or a writ of assumpsit.²

In 1849, Virginia enacted a statute that provided "[i]n any case in which an action of trespass will lie, there may be maintained an action of trespass on the case."³ This statute eliminated the problem of having to decide whether a tort had been committed directly or indirectly. Note, however, that the General Assembly removed one subtlety from the use of the forms of action and introduced a new one. A skilled pleader would avoid the danger by always suing in case, but inasmuch as the legislature did not make the two actions simply interchangeable, the unwary or ill-trained lawyer might sue in trespass and be met with a demurrer on the grounds that the tort alleged was an indirect one and that case was therefore the correct form of action.⁴ Subsequently, an 1897 enactment directed that whenever an action of covenant would lie, the plaintiff might sue in assumpsit as an alternative.⁵

These blurrings of the boundaries between the forms of action demonstrate that the practicing bar found the ancient forms of action as categories to be inconvenient. Although a lawyer who was professionally competent could handle the forms of action and even manipulate them to his client's advantage, these forms were a product of an age of relative political and administrative impotence.

General forms of action, though in use in the equity and ecclesiastical courts during the fifteenth century, appeared much later in the common law courts. In 1705, Virginia passed an act which allowed public creditors to obtain judgment against sheriffs or other collectors of public levies upon a simple "complaint" to the court;

2. *Slade v. Morley*, 4 Co. Rep. 92, 76 Eng. Rep. 1074 (K.B. 1602); Baker, *New Light on Slade's Case*, 29 CAMBRIDGE L.J. 51, 51-67, 213-36 (1971); J. BAKER, *supra* note 1, at 282-90 (1979).

3. VA. CODE ch. 148 § 7 at 589 (1849); VA. CODE § 2901 (1887); VA. CODE § 6086 (1919); VA. CODE ANN. § 8-866 (1950) (This section finally was deleted from the Code in 1977.). See, e.g., *New York, Phila. & Norfolk R.R. Co. v. Kellam*, 83 Va. 851, 854, 3 S.E. 703, 704 (1887).

4. W. J. Robertson, *Address*, 2 VA. ST. B.A. REP. 85, 86-87 (1889). Judge Robertson was correct, but in 1916 it was ruled that in an action of trespass, which should have been case, the statute of *jeofails* cured the failure to sue in the proper form of action, because the declaration alleged sufficient facts for the court to proceed upon the merits. *Stonegap Colliery Co. v. Hamilton*, 119 Va. 271, 279-80, 89 S.E. 305, 307 (1916).

5. 1897-98 Va. Acts, ch. 96, at 103; VA. CODE § 6088 (1919); VA. CODE ANN. § 8-508 (1950), repealed by 1954 Va. Acts, ch. 593, at 765. Note, 3 VA. L. REG. 829 (1898).

the purpose of the act was to protect the creditor from delay and "a tedious law suit."⁶

In 1732, a new act was passed that provided for various fees payable to the secretary of the colony and the county clerks to be collected by the county sheriffs. This act further provided that if a sheriff did not submit the fees collected, the secretary or the clerk could go into court and "upon a motion . . . demand judgment" for the sum due.⁷ This appears to be the origin of the present day common law motion for judgment in Virginia. A similar remedy was given to the treasurer of the colony in 1756⁸ and to high sheriffs against their deputies in 1762.⁹ Note that common law pleading by motion for judgment originated as a remedy for public officials against other public officers in relatively simple legal situations. Not only was the pleading in summary form, but so also was the trial, since there were no trials by jury.

The remedy of motion for judgment also became useful in quasi official situations during the eighteenth century. In 1748, private persons were first permitted to sue by motion on forthcoming bonds,¹⁰ and in 1753, the general public was permitted to recoup a statutory fine for the sheriff's failure to return a writ of execution.¹¹ It is interesting to note that this last mentioned statute of

6. Act of Oct., 1705, ch. 9, §§ 8-9, 3 HENING'S STATUTES 266.

7. Act of May, 1732, ch. 10, § 8, 4 HENING'S STATUTES 352 (continued in force by Act of Aug., 1734, ch. 10, § 9, 4 HENING'S STATUTES 421, 422); Act of Aug., 1736, ch. 10, § 9, 4 HENING'S STATUTES 506, 507; Act of Nov., 1738, ch. 10, § 11, 5 HENING'S STATUTES 53; Act of Feb., 1745, ch. 6, § 12, 5 HENING'S STATUTES 344; VA. REV. CODE ch. 115, §§ 13-14 (1792); 1 VA. REV. CODE ch. 85, §§ 22-25 (1819); cf. VA. CODE ch. 184, § 22 (1849); VA. CODE § 3519 (1887); VA. CODE § 3499 (1919); VA. CODE § 14-172 (1950); VA. CODE ANN. § 14.1-175 (Repl. Vol. 1978); see generally Millar, *Three American Ventures in Summary Civil Procedure*, 38 YALE L.J. 193, 215-21 (1928).

8. Act of Mar., 1756, ch. 1, § 5, 7 HENING'S STATUTES 12; see also Act of Feb., 1759, ch. 1, § 19, 7 HENING'S STATUTES 263; Act of Mar., 1761, ch. 7, § 4, 7 HENING'S STATUTES 396; Act of Nov., 1769, ch. 12, § 4, 8 HENING'S STATUTES 346; Act of July, 1775, ch. 5, 9 HENING'S STATUTES 67; Act of Oct., 1776, ch. 25, 9 HENING'S STATUTES 222; VA. REV. CODE ch. 84, § 7 (1792).

9. Act of Nov., 1762, ch. 5, § 11, 7 HENING'S STATUTES 543; VA. REV. CODE ch. 80, § 27, ch. 161, §§ 1-2 (1792); 1 VA. REV. CODE ch. 78, §§ 32-34 (1819); VA. CODE ch. 49, §§ 40-41 (1849); VA. CODE §§ 909-912 (1887); VA. CODE §§ 2835-2838 (1919); VA. CODE ANN. §§ 15-520 to -523 (1950); VA. CODE ANN. §§ 15.1-86 to -88 (Repl. Vol. 1981); 1 C. ROBINSON, PRACTICE IN THE COURTS OF LAW AND EQUITY IN VIRGINIA 616-19 (1832).

10. Act of Oct., 1748, ch. 12, § 14, 5 HENING'S STATUTES 534; Act of Nov., 1769, ch. 3, § 3, 8 HENING'S STATUTES 327; VA. REV. CODE ch. 151, § 13 (1792) (apparently changed by 1 VA. REV. CODE ch. 134, § 16 (1819)). See generally 1 C. ROBINSON, *supra* note 9, at 591-602 (1832).

11. Act of Nov., 1753, ch. 1, § 35, 6 HENING'S STATUTES 344; Act of Oct., 1791, ch. 3, § 5, 13 HENING'S STATUTES 246; VA. REV. CODE ch. 151, § 50, ch. 176, § 8 (1792); 1 VA. REV. CODE

1753 was the first explicitly to call the pleading a "motion for judgment." An appearance bail—or the sheriff where there was no bail—could have summary proceedings against a defendant for default of the defendant's appearance.¹² Not long after Independence, if an attorney received monies on behalf of his client, he could be sued for them by motion in a manner similar to sheriffs who had received public monies.¹³

In 1710, this procedure was extended to purely private litigation for small debts. A private person could sue another by motion for judgment where the sum demanded was less than twenty shillings or two hundred pounds of tobacco.¹⁴ Summary procedure for the litigation of small claims has been allowed in Virginia ever since.¹⁵ In 1786, motion pleading was allowed to sureties against their principal obligors for exoneration and against their co-sureties for contribution.¹⁶

At the turn of the nineteenth century, Judge St. George Tucker, a professor of law at the College of William and Mary, took a dim view of motion pleading, because it defeated the right to a jury trial at common law.¹⁷ But the trend toward simpler pleading continued, and by 1832, when Conway Robinson published the first volume of his *Practice in the Courts of Law and Equity in Virginia*, the list of types of cases pleadable by motion for judgment was considerably expanded. It included, in addition to those al-

ch. 134, § 47 (1819); VA. CODE ch. 49, § 29 (1849); VA. CODE § 901 (1887); VA. CODE § 2826 (1919); VA. CODE ANN. § 15-516 (1950); VA. CODE ANN. § 15.1-81 (Repl. Vol. 1981); 1 C. ROBINSON, *supra* note 9, at 610-13 (1832).

12. Act of Nov., 1753, ch. 1, § 19, 6 HENING'S STATUTES 332; Act of Oct., 1777, ch. 17, § 17, 9 HENING'S STATUTES 406; Act of Oct., 1788, ch. 67, § 29, 12 HENING'S STATUTES 742; VA. REV. CODE ch. 66, § 29, ch. 145, § 4 (1792); 1 VA. REV. CODE ch. 116, §§ 4-5 (1819); VA. CODE ch. 146, § 6 (1849); VA. CODE § 2893 (1887); VA. CODE § 5777 (1919); VA. CODE ANN. § 49-27 (Repl. Vol. 1980).

13. Act of Oct., 1787, ch. 10, § 3, 12 HENING'S STATUTES 473; VA. REV. CODE ch. 71, § 7 (1792); 1 VA. REV. CODE ch. 76, § 9 (1819); VA. CODE ch. 164, § 10 (1849); VA. CODE § 3200 (1887); VA. CODE § 3427 (1919); VA. CODE ANN. § 54-46 (Repl. Vol. 1978).

14. Act of Oct., 1710, ch. 11, § 7, 3 HENING'S STATUTES 508; 4 BLACKSTONE'S COMMENTARIES, Appendix, note E, 57-58 (S. Tucker ed. 1803).

15. Act of Oct., 1748, ch. 7, § 5, 5 HENING'S STATUTES 491; VA. REV. CODE ch. 67, §§ 5-6 (1792); 1 VA. REV. CODE ch. 71, § 20 (1819); VA. CODE ch. 150, §§ 1-4 (1849); VA. CODE §§ 2939-2942 (1887); VA. CODE §§ 6015, 6020, 6022 (1919); VA. CODE ANN. §§ 16.1-77, -79, -81, -93 (Repl. Vol. 1975).

16. Act of Oct., 1786, ch. 15, 12 HENING'S STATUTES 268-70; VA. REV. CODE ch. 145, §§ 1-2, ch. 175 (1792); 1 VA. REV. CODE ch. 116, §§ 1-2 (1819); VA. CODE ch. 146, §§ 6, 8 (1849); VA. CODE § 2893 (1887); VA. CODE § 5777 (1919); VA. CODE ANN. § 49-27 (Repl. Vol. 1980); 1 C. ROBINSON, *supra* note 9, at 604-07.

17. 4 BLACKSTONE'S COMMENTARIES, Appendix, note E, 56-63 (S. Tucker ed. 1803).

ready mentioned, suits by a turnpike company against a delinquent shareholder, by the officers of the literary fund against treasurers of school commissioners, and by jailors and creditors for jail fees, etc.¹⁸

The next major step in the development of motion pleading occurred in 1849. One of the many procedural reforms inaugurated by John M. Patton and Conway Robinson, the revisors of the 1849 Code, permitted motion pleading for all actions to recover money on any contract.¹⁹ This allowed motions for judgment as an alternative to writs and declarations in debt, covenant, and assumpsit. The primary significance of this step was that it was the first provision directing the use of motion pleading for general problems. Patton and Robinson recommended this statutory change to the General Assembly, because the earlier use of motions for judgment had been so successful in the heretofore limited situations. The revisors predicted that the use of motions would gradually take the place of the traditional modes of pleading.²⁰ Along with the general use of motions for judgment for money based on contractual obligations, the 1849 Code provided that such actions could be tried by a jury if either party so desired.²¹

The lengthy sixty-day notice requirement retarded the popularity of motion pleading for contract actions. In 1887, this was changed, and the statute was amended to require only fifteen days notice.²² The remedy became quite popular once this delay was removed.²³

Procedural reform permeated the air during the last fifteen years of the nineteenth century in Virginia. At their second annual meeting in 1889, the Virginia State Bar Association addressed the codification question. William J. Robertson delivered the first Presidential Address on the subject. Robertson had been a judge of the

18. 1 C. ROBINSON, *supra* note 9, at 589-622 and statutes and cases cited therein; 4 J. MINOR, *INSTITUTES OF COMMON AND STATUTE LAW 1317-24* (1893); *see also* 2 H. TUCKER, *COMMENTARIES ON THE LAWS OF VIRGINIA* 242 (2d ed. 1837) (where motion pleading is given only a brief paragraph).

19. VA. CODE ch. 167, § 5 (1849); VA. CODE § 3211 (1887); Millar, *Three American Ventures in Summary Civil Procedure*, 38 *YALE L.J.* 193, 216-19 (1928); *see generally* 2 R. BARTON, *PRACTICE IN THE COURTS OF LAW IN CIVIL CASES* 1037-99 (2d ed. 1891).

20. J. PATTON & C. ROBINSON, *REPORT OF THE REVISORS OF THE CODE OF VIRGINIA* 832-33 (1849), *quoted in* *Wilson v. Dawson*, 96 Va. 687, 691, 32 S.E. 461, 465 (1899).

21. VA. CODE ch. 167, § 7 (1849); VA. CODE § 3213 (1887).

22. VA. CODE § 3211 (1887).

23. 2 R. BARTON, *supra* note 19, at 1392-93.

Virginia Supreme Court of Appeals, serving there with distinction during the war until he was removed for political reasons by the Reconstruction government. He then practiced law with great success in Charlottesville and subsequently was honored by his election as the first president of the bar association.²⁴ In his address, Robertson advocated Virginia's adoption of a code of pleading and practice similar to the Field Code of New York; Robertson specifically urged the abolition of the forms of action and the merger of law and equity procedure.²⁵

This address was clearly part of an organized discussion of the codification movement. The Annual Address at the same meeting was delivered by James C. Carter of New York, a nationally known scholar who opposed the idea of general codification. Carter argued against the general codification of private law and criticized in passing the New York Code of Civil Procedure.²⁶ At the same meeting the members of the Virginia State Bar Association debated whether Virginia should adopt the Field Code of New York.²⁷

This marked the beginning of a lively debate throughout the state on the subject of law reform.²⁸ The idea of a wholesale adoption of the Field Code quickly was vetoed, and discussion focused on two related proposals: the abolition of the forms of action and the merger of law and equity procedure. In 1891, a special committee of the Virginia bar association recommended that both proposals be adopted.²⁹ In 1892, the bar association approved the recommendations of the committee;³⁰ however, when the committee

24. A. Gordon, *Judge William Joseph Robertson*, in 7 GREAT AMERICAN LAWYERS 129-59 (W. Lewis ed. 1907-09).

25. W. Robertson, *Presidential Address*, 2 VA. B.A. REP. 85, 90 (1889).

26. J. Carter, *The Provinces of the Written and Unwritten Law*, 2 VA. B.A. REP. 95, 128, 132 (1889).

27. *General Minutes*, 2 VA. B.A. REP. 32-39 (1889). The abolition of the forms of action had been advocated two years earlier. *Suggested Changes in Civil Procedure in Virginia*, 11 VA. L.J. 69 (1887); *The Code Revision and Law Reform*, 11 VA. L.J. 124 (1887).

28. See Patteson, *Law Reform*, 13 VA. L.J. 677 (1889); Patteson, *Law Reform*, 13 VA. L.J. 475 (1889); Patteson, *Law Reform*, 13 VA. L.J. 461 (1889); Graham, *Sacking the Temple*, 13 VA. L.J. 809 (1889); McGuire, *Remarks on Pleadings in Virginia*, 14 VA. L.J. 21 (1890); Patteson, *Law Reform—A Rejoinder*, 14 VA. L.J. 65 (1890); *Remarks of S.S.P. Patteson*, 4 VA. B.A. REP. 26 (1891); Pettit, *Law Reform—A Rejoinder*, 15 VA. L.J. 681 (1891); Patteson, *Law-Reform—A Sur-Rejoinder*, 15 VA. L.J. 745 (1891); Pettit, *Law Reform—Reply to Sur-Rejoinder*, 16 VA. L.J. 1 (1892); J. Tucker, *Presidential Address*, 5 VA. B.A. REP. 85 (1892).

29. *General Minutes*, 4 VA. B.A. REP. 26 (1891); *Report of the Special Committee on Law Reform*, 4 VA. B.A. REP. 44 (1891).

30. *General Minutes*, 5 VA. B.A. REP. 22-36 (1892).

presented its proposed draft bills to the bar association the following year, the general code of pleading, which included the abolition of the forms of action and the separation of common law and equity procedure, and several miscellaneous proposals were defeated.³¹

Although these efforts towards procedural reforms were not immediately successful, the slow, careful, and deliberate pace of amendment and improvement continued. By 1912, any cause of action sounding in tort could be prosecuted by motion for judgment.³² This remedy was expanded further to include the right "to recover money . . . on any contract, or to recover damages founded upon any contract, or for the breach thereof, or to recover any statutory penalty."³³ Four years later, suits for specific personal property or damages in lieu thereof and suits "to recover damages in any action at law" could be prosecuted by motion for judgment.³⁴

From 1916 until the next revision of the Code three years later, the only major subject of litigation where pleading by motion for judgment remained unavailable was the recovery of possession of real property. The use of the action of ejectment remained obligatory even though it was a form of action that had been radically altered by statute in 1849. The more bizarre aspects had been removed, the fictitious parties of record were replaced by the real parties in interest, and a judgment in ejectment was declared to be *res judicata*. The revised action of ejectment replaced all of the traditional real actions.³⁵

With the revision of the Code in 1919, motion pleading became an alternative to the ancient forms of action; and thereafter, any civil common law cause of action could be brought by a motion for judgment.³⁶ Note that motion pleading does not affect the substance of the law or anyone's rights or obligations; it merely simplifies the procedure or method of presenting the issues to the court.

31. *General Minutes*, 6 VA. B.A. REP. 14-62 (1893); *Report of the Special Committee on Law Reform*, 6 VA. B.A. REP. 72-104 (1893).

32. 1912 Va. Acts, ch. 11, at 15. This act was superseded and repealed as no longer needed in 1914. 1914 Va. Acts, ch. 18, at 28; ch. 123, at 203.

33. 1912 Va. Acts, ch. 323, at 651.

34. 1916 Va. Acts, ch. 443, at 760-62 (amending and re-enacting VA. CODE § 3211 (1887)).

35. VA. CODE ch. 135 (1849); VA. CODE §§ 2722-2759 (1887); VA. CODE §§ 5451-5489 (1919); VA. CODE ANN. §§ 8-796 to -835 (1950); VA. CODE ANN. §§ 8.01-131 to -165 (Repl. Vol. 1977).

36. VA. CODE § 6046 & *Revisors' Note* (1919); VA. CODE ANN. § 8-717 (1950), *repealed by* 1954 Va. Acts, ch. 593, at 765.

The motion for judgment must still set out sufficient matter to state a cause of action.³⁷

Motion pleading was judicially encouraged from as early as the turn of the nineteenth century. Judge Spencer Roane pointed out in 1797 that such notices should be viewed with indulgence since they were acts of the parties, not acts of the lawyers.³⁸ Although as the century progressed lawyers themselves used motions for judgment more and more, the policy of looking favorably upon motion pleading continued.³⁹ The Virginia Supreme Court of Appeals grounded this policy on the more rational basis of preferring matters of substance to matters of form.⁴⁰ Still, the old but useful myth—or legal fiction—survived.⁴¹

In view of its relative simplicity and with encouragement from the judiciary, motion pleading quickly supplanted the traditional practice. Three years after the enactment of the general provisions of the Code of 1919, one commentator stated that “[t]he remedy by motion . . . is supplanting the regular forms of action, slowly in some localities and rapidly in others.”⁴²

In 1929, the Committee on Judicial Administration of the State of West Virginia published the results of an extensive survey of the use of motion pleading in Virginia.⁴³ Their report noted that

[t]he motion for judgment procedure has practically supplanted the common law actions in all classes of actions, both in tort and in contract. The only exceptions are where there is a special statutory form provided, such as ejectment, and in cases of extraordinary remedy such as mandamus, prohibition, etc. There is a practically unan-

37. *E.g.*, *Felvey v. Shaffer*, 186 Va. 419, 424, 42 S.E.2d 860, 862 (1947); *Security Loan and Trust Co. v. Fields*, 110 Va. 827, 829-30, 67 S.E. 342, 345-46 (1910); M. BURKS, *COMMON LAW PLEADING AND PRACTICE* 290, 295 (4th ed. 1952); 13A MICH. JUR. *MOTIONS FOR JUDGMENT*, §§ 8-17.

38. *Drew v. Anderson*, 5 Va. (1 Call) 51, 53 (1797); see generally Millar, *Three American Ventures in Summary Civil Procedure*, 28 YALE L.J. 193, 219-20 (1928).

39. *E.g.*, *Chesapeake & Western R.R. v. Washington, Cincinnati & St. Louis Ry.*, 99 Va. 715, 721, 40 S.E. 20, 21 (1901); *Supervisors of Washington County v. Dunn*, 68 Va. (27 Gratt.) 608, 612 (1876). See also Fowler, *Virginia Notice of Motion Procedure*, 24 VA. L. REV. 711 (1938).

40. *Mankin v. Aldridge*, 127 Va. 761, 767, 105 S.E. 459, 461 (1920).

41. *Ransone v. Pankey*, 189 Va. 200, 207, 52 S.E.2d 97, 100 (1949); *Curtis v. Peebles*, 161 Va. 780, 783, 172 S.E. 257, 258 (1934).

42. C. Morrissett, *Legislation of 1922 of Special Interest to Lawyers*, 8 VA. L. REG. n.s. 81, 97 (1922).

43. T. Arnold, J. Simonton, H. Havighurst, *Report of the Committee on Judicial Administration*, 36 W. VA. L.Q. 1, 67-68 (1929).

imous approval of this method of procedure among both bench and bar.⁴⁴

Not surprisingly, motion pleading further spread to the federal district courts in Virginia,⁴⁵ and by 1944, common law declarations had become practically obsolete.⁴⁶ In retrospect, prudence and caution regarding one's clients' interests would dictate the immediate embracing of motion pleading wherever possible. Although some of the older members of the bar, thoroughly familiar and competent with the old system, were slow to change, the younger generation readily adopted motion pleading. Totally superseded in practice, the forms of action lay dormant for two decades before being abolished in law. Although the writ of replevin formally was extinguished in 1823,⁴⁷ and the writs of right, entry, and formedon in 1849,⁴⁸ it was not until 1950 that the other common law writs were removed as possible alternatives to motions for judgment.

Pursuant to statutory authority of long standing,⁴⁹ the Virginia Supreme Court promulgated a new set of rules in 1950 that require suit be instituted by motion for judgment where recovery of money is sought in *in personam* actions.⁵⁰ The rule was amended almost immediately to include actions to establish boundaries, for ejectment, unlawful detainer, detinue, and common law declaratory judgments.⁵¹ In order to assure the validity of the rules of court and, *inter alia*, to make explicit the abolition of the old writs and declarations of the forms of action, an additional act provided that, if a rule of court should be in conflict with a statute, the rule should prevail.⁵² Four years later, the now superfluous statute allowing motion pleading in lieu of the forms of action was repealed

44. *Id.* 70-71. See also S. Patteson, *Judgment by Notice of Motion in Virginia*, 13 J. AM. JUD. SOC. 167 (1930).

45. *Chisholm v. Gilmer*, 299 U.S. 99, 101-02 (1936) (Cardozo, J.); *Eley v. Gamble*, 75 F.2d 171, 173 (4th Cir. 1935).

46. *Shearin v. VEPCO*, 182 Va. 573, 578, 29 S.E.2d 841, 843 (1944).

47. 1822-23 Va. Acts, ch. 29, § 9, at 31.

48. VA. CODE ch. 135, § 38 (1849).

49. VA. CODE ANN. § 8-1.1 (1950); VA. CODE § 5960 (1919); VA. CODE ch. 161, § 4 (1849). From 1916 to 1919 the statute actually required the Supreme Court of Appeals to prepare a system of pleading, but no such action was taken at that time. 1916 Va. Acts, ch. 521, at 939. See generally Bowles, *The Course of Law Reform in Virginia*, 38 VA. L. REV. 689-98 (1952).

50. VA. SUP. CT. R. 3:1, 3:3(a) (1950).

51. VA. SUP. CT. R. 3:1 (1952).

52. 1950 Va. Acts, ch. 1, at 3; VA. CODE ANN. § 8-1.2 (Repl. Vol. 1957). With the recodification of the civil procedure statutes, the former rule was restored by VA. CODE ANN. § 8.01-3(D) (Cum. Supp. 1981).

and the ejectment statute was amended to substitute the words "motion for judgment" for "declaration" throughout.⁵³ The current statutes mandate that pleading be done according to the rules of the Virginia Supreme Court.⁵⁴

Thus were the procedural common law forms of action abolished in Virginia practice and replaced by the more simple motion for judgment. The success of this reform was due to its gradual introduction and to its availability as only an alternative at first. So smooth and painless was this transition that when the forms of action finally were abolished in 1950, few were aware that an eight hundred year old institution finally had been laid to rest. Of course, statutory actions of ejectment⁵⁵ and detinue⁵⁶ remain effective, and a statute still is needed to deal with the effects of judgments in trover.⁵⁷

Problems in pleading, however, have not disappeared. In stating the facts of a case, the Virginia Supreme Court, in 1958, characterized the substance of the plaintiff's pleading in terms of the forms of action. The court stated that

[h]is motion for judgment was in assumpsit for the use and occupation of his land. His counsel stated in the argument on the defendant's motion to strike that he was suing in assumpsit on the ground that the defendant "had no right to pass over the land to haul the coal and [plaintiff] was not suing for the damages as a result of the failure of defendant to properly [sic] maintain the road."⁵⁸

In this case the plaintiff's motion for judgment was in substance an action of assumpsit when it should have been an action of trespass upon the case.

In 1965, the Virginia Supreme Court held that "the right to recoupment must be shown by a plea in the general issue, or *nil debet*, or *non assumpsit*; it cannot be used against a sealed instrument."⁵⁹ The references to *nil debet* and *non assumpsit* lead us to the rules of defensive pleading in the old actions of debt and as-

53. 1954 Va. Acts, ch. 593, at 765-66, ch. 333, at 424-25.

54. VA. CODE ANN. §§ 8.01-3(A), -271 (Repl. Vol. 1977); VA. CODE ANN. § 17-116.4 (Cum. Supp. 1981).

55. *Id.* § 8.01-131 (Repl. Vol. 1977).

56. *Id.* § 8.01-114 (Repl. Vol. 1977).

57. *Id.* § 8.01-219 (Repl. Vol. 1977).

58. *Wagoner v. Jack's Creek Coal Corp.*, 199 Va. 741, 742, 101 S.E.2d 627, 628 (1958).

59. *City of Richmond v. C. & P. Tel. Co.*, 205 Va. 919, 925, 140 S.E.2d 683, 687 (1965).

sumpsit respectively.

It required legislative action in 1977 to overcome the rule of common law pleading that actions in tort could not be joined with actions in contract in the same motion for judgment.⁶⁰ "The forms of action we have buried, but they still rule us from their graves."⁶¹

60. VA. CODE ANN. § 8.01-272 (Cum. Supp. 1981).

61. F. MAITLAND, *supra* note 1, at 2.