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VIRGINIA LAW REGISTER.

EDITED BY W. M. LILE.

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A GOOD deal of space is devoted in our present issue to the Virginia Statute of Married Women. The question to which most attention is devoted, is that of the wife's powers of contract, where she possesses no separate estate.

We have no means of knowing what views on this subject prevail generally among the lawyers of the State. But the few who have given public expression to their opinions, agree, with singular unanimity, in dissenting from the opinion several times editorially expressed in the REGISTER. While entertaining respect for the learning and excellent judgment of these brethren, the REGISTER's convictions remain unshaken. But we confess that isolation at times grows monotonous, and that we long for company.

As an experiment, in order to ascertain the consensus of professional opinion in the State, we ask that each of our Virginia subscribers, who has read the discussions, *pro* and *con*, which have heretofore appeared in these columns, and which appear elsewhere in this number, and who has no interest in advocating either side, will send us, within the next twenty days, a brief expression of his opinion. One line will answer—but no limit is prescribed. Whether we shall use any or all of such communications, must be left to our discretion. We shall feel at liberty to publish names, unless otherwise directed. The result of this experiment may leave us more isolated than ever, but we promise not to suppress the returns.

The point is: *Must a married woman, who is not engaged in trade or business, possess separate estate, acquired as contemplated by chapter 103 of the Virginia Code, in order to make a valid endorsement of her husband's note, for his accommodation? If yea, may she, if possessed of $1,000 of such estate, endorse to the extent of $1,000,000?*

See 3 Va. Law Reg. 635, 797; *ante*, pp. 413 and 460.

WE published in our October number an extract from an article contributed to an English newspaper, by a Mr. Bird, purporting to

give the experiences of an Englishman in a Virginia court. The author's description of the conduct of judge, jury, counsel and witnesses was so improbable on its face, and so contrary to our own experience in the Virginia courts, that we declared the piece a libel upon our courts.

We have since been informed by a number of gentlemen, themselves members of the bar, of the highest standing, that the narrative of Mr. Bird is in substance an accurate account of the proceedings on the trial of the case mentioned, and even in many of its ridiculous details absolutely true. Elsewhere in this number will be found a letter from one of these gentlemen, vouching for the substantial accuracy of the story.

Howsoever painful further publicity to procedure of such unusual character may be to the eminent judge of the court in question, and to Virginians generally, it is due to Mr. Bird that we should thus publicly confess the injustice of our comments on his article.

We do not propose to lecture the venerable and distinguished judge upon the conduct of his court. No man in the State stands higher than he for character and ability, or possesses more fully the respect and esteem of the bar and people. Indeed, the informalities which have thus furnished a theme for ridicule in a foreign newspaper are doubtless to be attributed to his kindly nature and his indulgent disposition, rather than to an indifference to the traditional proprieties of the court-room. But surely it is a matter of regret, whenever any court sanctions a departure from that dignity and decorum which are the marked characteristics of judicial procedure among the people of the Anglo-Saxon race.

IN Virginia, by Act of March 5, 1894, amended by Act of March 3, 1898 (Acts 1897–8, p. 753), husband and wife are made competent witnesses for and against each other in civil cases, with certain exceptions. The Act also provides that in criminal cases they "shall be *allowed* to testify in *behalf* of each other, but neither shall be *compelled* to testify *against* the other." It is further provided that if either be examined on behalf of the other, such consort so testifying shall be deemed competent to testify against as well as in behalf of the accused consort.

Our attention has been called to a recent ruling of one of the trial courts, excluding, as incompetent, a wife who, by her own consent,

was offered as a witness for the Commonwealth, against her husband, in a case not involving any offense against her person.

The ruling seems to be right. The statute makes the wife competent to testify in behalf of the husband in any criminal case; but competent to testify *against* him only when she has first been examined as a witness in his behalf.

The common law excluded either consort as a witness for or against the other, for two reasons—the temptation to commit perjury when testifying in behalf of each other, and the matrimonial discord which would result from testifying against each other. The statute has now relaxed the rule in the one case, by permitting one to testify in *behalf* of the other, but the prohibition to testify one *against* the other remains in full force, save upon cross-examination, after testimony in chief in behalf of the accused consort.

THE famous case of *Lumley* v. *Wagner*, 5 DeG. & S. 485, 1 D. M. & G. 604, in which the defendant, who had engaged to sing at plaintiff's theatre and not to sing elsewhere, was restrained by injunction from singing at a rival theatre, is distinguished in the recent English case of *Ehrman* v. *Bartholomew* (1898), 1 Ch. 671. In the latter case the defendant had contracted to serve the plaintiffs as a traveller for the term of ten years, to devote his entire time to their service, and not to engage, during that period, in the service of any other person. So that the negative stipulation was as clearly present as in *Lumley* v. *Wagner*. But the defendant having quit the employment of the plaintiffs before the expiration of the term of service, and engaged in the service of a rival concern, the court refused an injunction to restrain him from continuing in the latter service. The court distinguishes the case from *Lumley* v. *Wagner*, on the ground that in that case the negative stipulation contemplated only a special service, while in the later case it covered every kind of service, and was therefore in unreasonable restraint of trade.

It would seem that the case might also have been distinguished on the ground that an engagement to sing or act is service of a peculiar and personal nature, rendering it difficult or impossible to secure a substitute, and for the breach of which it would be difficult to assess the damages. While, on the other hand, the services of a traveller (which we take to be what we Americans term a "drummer") are not peculiar, and could be performed equally well by others, and for the non-performance of which damages could be as readily assessed

as for the breach of any other contract for ordinary services. In short, there are many "travellers," while the world contains but one Patti.

In this connection, see *William Rogers Mfg. Co.* v. *Rogers,* 58 Conn. 356 (18 Am. St. Rep. 278), in which the court lays down the rule, thus: "Where a contract stipulates for special, unique or extraordinary personal services or acts, or where the services to be rendered are purely intellectual, or are peculiar and individual in their character, the court will grant an injunction in aid of their specific performance. But where the services are material or mechanical, or are not peculiar or individual, the party will be left to his action for damages."

IN our October number we noted, with apparent approval, a recent opinion of the Supreme Court of Alabama (*Louisville, etc. R. Co.* v. *Nash,* 23 South. 825), in which it was held that the situs of a debt, for purposes of garnishment, is in the State of the creditor's and not of the debtor's residence. Subsequent reflection has led us to the opposite conclusion.

Certainly if the original creditor himself attempts to collect the debt, its situs is at the domicil of the debtor, unless the latter has estate or is himself found elsewhere. So long as the debtor remains in his own State, and has no property beyond it, the creditor must seek him there. The debtor cannot be compelled by any process of the creditor's State to appear in its courts. If this be true, and the situs of the debt is in the debtor's State when action is brought by the original creditor, it is difficult to understand why the same result must not follow when the creditors of the original creditor undertake, by garnishment proceedings, to intercept the debt and subject it to their claims.

These creditors stand in the shoes of their debtor by a sort of legal subrogation. Indeed, the garnishment proceeding is in substance merely the subrogation, in a court of law instead of in equity, of the creditor to the rights of his debtor against a debtor of the latter.

Again, an intangible thing like a debt can have no real situs anywhere. But, for purposes of administering justice between man and man, the law must, by a fiction, since it cannot in fact, give it a situs. In determining whether, for purposes of garnishment, this shall be in the State of the creditor or of the debtor (when they reside in different States), regard ought to be had primarily to the pur-

pose in view in giving it a situs—and that purpose is that the debt may be subjected to the claims of creditors.

If this be the purpose in view, which State ought the law to regard as the situs of the debt, and what courts ought to have jurisdiction to subject it by garnishment? The natural answer is, that jurisdiction should rest in those courts which can most conveniently and most effectually do justice among the several parties. But it is perfectly clear that the courts of the original creditor's State cannot give complete relief—if indeed they can afford any relief at all. The end in view in a garnishment proceeding is to obtain a judgment against, not the plaintiff's debtor but the defendant's debtor—the non-resident garnishee. If he has no property in the principal defendant's State and himself is not found there, no judgment whatever can be obtained against him. Before the garnishing creditor can reap any benefit from his garnishment, he must seek the garnishee in the latter's own State.

It follows that the practical result of the view adopted by the Alabama court, fixing the situs of the debt due by a non-resident, in the State of the creditor's residence, and denying to the courts of the debtor's State any jurisdiction to subject the debt by garnishment, is to deny creditors all benefit of garnishment. If they cannot proceed in the State where the person owing the debt sought to be garnished resides, they certainly cannot in the State of the creditor whom he owes, since the courts of that State cannot enter judgment against the non-resident—the person of whom it is sought to compel payment. And even if judgment were possible, the *res* being beyond the jurisdiction of the court, the judgment would be impossible of enforcement.

The garnishing creditor is in justice entitled to a judgment against the debtor of his debtor. This judgment, save under exceptional circumstances, can only be had where the latter debtor (the garnishee) resides. The *res* (if there can be said to be a *res*) is there. In the nature of things it cannot be elsewhere. No other court can preserve it, or affect it by its judgment.

It may be a hardship on an Alabama creditor of a resident of Virginia to have the debt garnished and condemned by an alleged creditor, in a proceeding of which he has had no actual notice, and no opportunity to defend, but the same hardship obtains where his tangible property is attached or garnished here; and yet it is universally conceded, under the doctrine of *Pennoyer* v. *Neff* (95 U. S. 714), and the long line of cases approving it, that a summons by publication is due process of law, where the proceeding is *in rem*, whether the defendant have actual notice of the proceeding or not.