Record No. 2094

In The Supreme Court Of Appeals Of Virginia At Richmond

Talbot W. Jenkins

v.

Philip O. Faulkner

FROM THE CIRCUIT COURT OF FREDERICK COUNTY

"The briefs shall be printed in type not less in size than small pica, and shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed records along with which they are to be bound, in accordance with Act of Assembly, approved March 1, 1903; and the clerks of this court are directed not to receive or file a brief not conforming in all respects to the aforementioned requirements."

The foregoing is printed in small pica type for the information of counsel.

M. B. WATTS, Clerk.

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IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

TALBOT W. JENKINS ..... *Plaintiff in error*

v.

PHILIP O. FAULKNER, J. OLIN FAULKNER AND LUCILLE CHANNING... *Defendants in error*

Your petitioner, Talbot W. Jenkins, represents that on the 24th day of May, 1938, an attachment order was issued out of the office of the Clerk of the Circuit Court of Frederick County, Virginia, against certain property owned by your petitioner, and that said attachment order was executed by A. J. Wigginton, Deputy Sheriff of Frederick County, Virginia, on the 24th day of May, 1938. Whereupon, such proceedings were had that a judgment in said cause was rendered against your petitioner in the said Circuit Court on the 13th day of June, 1938; that before the adjournment of the term of court at which said judgment was entered, petitioner applied to the Judge of the said Circuit Court for a rehearing, which was granted. Whereupon, the court entered an order confirming the judgment rendered on the 13th day of June, 1938, and overruled a motion of your petitioner that said judgment be annulled and vacated.

A transcript of such portion of the record in this cause as will enable the Supreme Court of Virginia, or a Judge thereof in vacation, to whom this petition for a writ of error is to be presented, properly to decide on such petition, and, to enable said court, if the petition be granted, properly to decide the questions that may arise before it, is herewith exhibited as follows, to-wit: final judgment entered on June 13, 1938; order entered in this cause on June
2* 26, 1938, together with a written opinion of the *Judge of the trial court filed in this cause on June 26, 1938; the notice given by your petitioner to counsel for the plaintiffs of his intention to apply for a transcript of the record in this cause; and the Clerk's certificate. It appears from said record that the Supreme Court of

Appeals has jurisdiction. Your petitioner is advised and represents to the court that the said final judgment, entered on June 13, 1938, and the order entered in this cause on June 26, 1938, are erroneous and that petitioner is aggrieved thereby in the following particulars:

Assignments of Error.

1. The court erred in entering a judgment against Talbot W. Jenkins on June 13, 1938, in the attachment proceeding brought by the plaintiffs, as the trial court should have dismissed the attachment as the writ tax, as required by law, had not been paid by the plaintiffs before the beginning of the trial.

2. The court erred in not sustaining the motion made by the defendant, Talbot W. Jenkins, that the attachment proceeding be dismissed for failure of the plaintiffs to pay the writ tax, as required by law, before the beginning of the trial.

3. The court erred in entering the order of June 26, 1938, overruling the motion of the defendant, Talbot W. Jenkins, to vacate the judgment entered on June 13, 1938, and to dismiss the attachment on the ground that the writ tax had not been paid before the trial, as required by Section 6387 of the Code of Virginia.

I. Statement of Facts.

On May 24, 1938, the plaintiffs, Philip O. Faulkner, J. Olin Faulkner and Lucille Channing, filed a petition for an attachment in the Clerk's office of the Circuit Court of Frederick County,
3* Virginia, in which the proper grounds for an attachment *were stated and the petition was duly verified. On the same day an attachment order was issued by the Clerk of said court, commanding the Sheriff of Frederick County, Virginia, to attach and levy upon the property of the defendant, Talbot W. Jenkins, enumerated and described in the petition, and to serve the same upon the defendant, which order was returnable and the defendant commanded to appear to answer the same on the 6th day of June, 1938. This order of attachment was executed by the Deputy Sheriff levying on the designated property on May 24, 1938, and a due and proper return was made. The defendant posted a forthcoming bond and took the prop-

erty, and filed in this cause a motion to quash the attachment and an answer duly verified as required by law.

On the 6th day of June, 1938, the defendant appeared and asked that the court set a later date to hear the motion to quash the attachment and for the trial of said attachment. Thereupon, the motion to quash said attachment and the date of trial on said attachment was set down for June 13, 1938. On June 13, 1938, the plaintiffs appeared in open court, with counsel, and counsel for defendant appeared and moved that the trial of the attachment be continued upon the ground that defendant entertained a misunderstanding as to the necessity for him to be present at the trial. The defendant at that time was in New Jersey and it was impossible for him to be present. The court declined to grant a further continuance on the ground that no legal ground for continuance had been assigned. Thereupon, the court heard argument of counsel on the motion to quash, which motion was promptly overruled. The court then directed the parties to proceed to the trial of the case. Counsel for plaintiffs arose and addressed the court by making a full and lengthy opening statement, giving full particulars of the plaintiffs' case. Counsel for defendant declined to make an opening statement and the first witness for the plaintiffs was sworn and took the stand. Thereupon, counsel
4* for *defendant inquired of the Clerk whether the writ tax had been paid and the Clerk answered that it had not been paid up to that time. A motion was made by counsel for the defendant to dismiss the proceeding on the ground that the writ tax had not been paid before the trial, as required by Section 6387 of the Code of Virginia, and the court heard argument on this motion by counsel for the defendant. Plaintiffs' counsel then stated that he would pay the writ tax and did so by paying to the Clerk the sum of one dollar. The court then refused to dismiss the attachment suit, and proceeded to hear the evidence and entered the judgment complained of in this petition. No evidence was taken on behalf of the defendant and no argument was made on behalf of the defendant.

A few days after the entering of the judgment on June 13, 1938, but before the adjournment of the term, the defendant, Talbot W. Jenkins, asked the court to rehear his motion to dismiss the attachment, and to hear a new motion to vacate the judgment entered on June 13, 1938. The court granted this motion and counsel for defendant and the plaintiffs filed written argument with the court. On

June 26, 1938, the court entered an order overruling the defendant's motion to vacate the judgment of June 13, 1938, and to dismiss the attachment and filed therewith, and made a part of the record, a written opinion overruling said motion.

Argument.

The court is called upon to construe section 6387 of the Virginia Code of 1936, insofar as it relates to the time of payment of the writ tax in attachment cases. This section of the Code provides:

> "When any attachment is so returned the plaintiff therein, shall within thirty days from the date upon which said return is actually made, or if a trial be sooner had, then *before such trial,* pay to the clerk of the court to which the return is made the proper writ tax as fixed by law, if not already paid, and, in the event of his failure to do so, *the attachment shall stand dismissed ipso facto at the cost of the plaintiff, and no further proceedings shall be had thereon."* (Emphasis ours).

5* *It will be noted that this statute requires the writ tax in an attachment suit to be paid within thirty days from he return date, or if a trial be sooner had, "before such trial." The facts certified to the court in the opinion made a part of the record by order of June 26, 1938, shows that on the return date of the attachment order, that is, June 6, 1938, both parties appeared in open court and the defendant asked for a continuance. Thereupon, the court entered an order fixing June 13, 1938, as the date for trial. On the date set for trial counsel appeared, and after the court overruled the motion of defendant for a further continuance, the court heard argument on a motion to quash the attachment, which was overruled. The court then directed that the parties proceed with the trial of the case, and counsel for plaintiff made a lengthy and elaborate opening statement. Counsel for defendant made no opening statement, and thereupon the first witness for plaintiff was duly sworn and took the witness stand. Up to this point no writ tax had been paid. Counsel for defendant inquired of the Clerk whether a writ tax had been paid and upon the

statement of the Clerk that it had not, a motion was made, as appears by an order entered by the court, to dismiss the attachment.

It seems to be clear that the writ tax must be paid and it becomes necessary to determine when that writ tax must be paid. Obviously, if the Legislature had intended that the writ tax may be paid at any time there would have been no provision in the statute fixing the time when the tax must be paid. The Legislature having fixed that time, it is evident that the Legislature meant what it said. The statute provides that the writ tax must be paid "before such trial." We contend that this means before the trial begins, otherwise, the word "before" is meaningless. The lower court construed "before such trial" to mean "before the ending of the trial."

It would seem that the trial, contemplated by the statute, actually began when counsel appeared on the day set for trial and

6* *proceeded to argue the motion to quash the attachment.

Responsible and convincing authorities hold that argument on motions preliminary to the trial on the merits must be held to be part of the trial.

Ferguson v. *Ingle* (Or.), 62 Pac. 760. It was held in this case that the demurrer to a counter claim presented an issue of law, which, when considered by the court, was a trial within the meaning of the statute under construction. If a motion to quash the attachment could not be considered a part of the trial, plaintiff could be held to have the right to bring an attachment suit and test the validity thereof before paying the writ tax. In other words, he would have the advantage of securing a ruling by the court on his right to an attachment, and if he lost he might never pay the writ tax. The motion to quash may raise a great many questions on the right of the plaintiff to sustain the attachment, and there may be no further hearing in an attachment proceeding after a ruling on the motion to quash. The obvious purpose of the statute is to secure the payment of the writ tax before any further proceeding on the attachment. If this were not true the Legislature would not have fixed the thirty day limit as a limitation upon the right to pay the writ tax. The Legislature intended that an attachment should be carried on the docket of the court for no longer than thirty days preceding the payment of the writ tax, and that in no event should any issue raised by the attachment proceedings be tried before the payment of the writ tax. So we contend that the trial began upon the argument of the motion to quash.

If this position be not sustained it certainly must be held that the trial began with the opening statement of counsel and the swearing of witnesses.

Certainly the opening statement is always considered to be a part of the trial, as well as the swearing of witnesses. If counsel may make an opening statement and witnesses be sworn and it may be held that the trial is not begun, then we ask, at what stage does a trial begin?

7* *This court, in the case of *Senter* v. *Lively*, 160 Va. 417, has held that Section 6387 of the Code, requiring the dismissal of an attachment for failure to pay the writ tax, has the effect of a non-suit. The dismissal for failure to pay the writ tax does not defeat the cause of action, but merely requires the plaintiff to proceed with a new suit. In other words, his failure and his delay in paying the writ tax must be held an act on the part of the plaintiff calling for a non-suit. The language used by Judge Hudgins in this case must of necessity lead to the conclusion that the statute means what it says, and even the act of the parties cannot waive the effect and purpose of this statute. The writ tax is not paid to the defendant, and he in no wise obtains any benefit from the payment thereof, so it is obvious that even if he consented the court would be powerless to proceed with the hearing in the matter. The mere fact that the plaintiff paid the writ tax after the trial began will not preserve the right of the plaintiff in this suit, for the reason that the statute specifically says that the writ tax shall be paid *before such trial.* Hudgins, J., in delivering the opinion of the court, said:

> "The language of the statute admits no other construction. It states that "the attachment shall stand dismissed * * * and no further proceedings shall be had thereon." The word "thereon" can only refer to the attachment, not to the right of action. The latter remains as if no proceedings of any kind had been instituted."

Floody v. *Great Northern Railway Co.* (Minn), 116 N. W. 107, 108. In this case the court referred to a statute limiting the time in which a non-suit might be taken by the plaintiff and held that according to the statute such a non-suit, as a matter of right, might not be taken after the commencement of the trial. While the case under

consideration was not one governed by the statute, the court clearly recognized in this case that when a statute provides that a non-suit may be taken before the beginning of a trial, it cannot be construed to have a more liberal meaning, because the court is of the
8* opinion that the language of the statute is technical, and *that there is no good reason for construing it in its strict sense. Brown, J., in speaking for the court, said:

> "Our statutes (section 4195, Rev. Laws 1905) undertake to regulate and control the subject of the dismissal of actions, and provide when and how in the instances there specifically mentioned an action may be dismissed without a determination of its merits; but a case presenting facts like those at bar is not provided for. Under the statute referred to, plaintiff may dismiss as a matter of right in all cases where no provisional remedy has been granted, or counterclaim interposed, or affirmative relief demanded by defendant, where he elects to do so before the commencement of the trial. After the trial begins he cannot in any case dismiss without the consent of defendant or permission of the court."

Hutchings v. *Royal Bakery & Confectionery Co.* (Or.), 118 Pac. 185, 187. The court in this case had occasion to pass upon the statute fixing the time at which a plaintiff may take non-suit, and held that a plaintiff was not entitled as a *matter of right* to a non-suit after the trial commenced. In this case the Oregon statute provided that "before trial" a plaintiff was entitled as a matter of right to take a non-suit, and the court so construed its language, but did hold that the statute did not intend to preclude the court from exercising its discretion in allowing a non-suit after the trial had commenced. (Of course, in construing section 6387 of the Virginia Code, the court is not given the discretion of permitting plaintiff to pay the writ tax at such time as the court may think proper; in the Oregon case the common law gave a plaintiff, *in the discretion of the court,* the right to take a non-suit after a trial had commenced, and the statute merely gave the plaintiff an additional right, but that right had to be exercised before the trial began.) In delivering the opinion of the court, Bean, J., said:

"L. O. L. S. 182, provides that a judgment of nonsuit may be given against the plaintiff (1) on motion of plaintiff, at any time before trial, unless a counterclaim has been pleaded as a defense;"

9* *"The provisions of the statutes of Arkansas and Minnesota are more like those of our own statute than any others which come to our notice. The statute of Minnesota, in addition to its provisions for a nonsuit, similar to those contained in subdivisions 1, 2, and 3, S 182, L. O. L. provides that "all other modes of dismissing an action by nonsuit or otherwise, are abolished." See Gen. St. Minn. 1878, c. 66, S 262. In *Bettis* v. *Schreiber,* 31 Minn. 329, 17 N. W. 863, it was held that the plaintiff in an action was not entitled to dismiss as a matter of right, under that statute, after the trial had actually commenced."

"After the commencement of the trial before the jury, the motion of plaintiff for a nonsuit was too late for the plaintiff to obtain leave therefor as an absolute right. *Alley* v. *Nott,* 111 U. S. 472, 4 Supm. Ct. 495, 28 L. Ed. 491; *Northern Pac. Ry. Co.* v. *Spencer,* 108 Pac. 180. The question is whether or not, after the time at which plaintiff may take a nonsuit as a matter of right has expired, the court has power in its discretion to allow the same."

Scofield v. *Scofield* (Colo.), 3 P. (2) 794, 796. Adams, C. J., in delivering the opinion of the court, said:

"The following events in the trial court preceded the judgment: The pleadings were settled; the court arranged its calendar and set aside two days to try the case. On the day set for trial the parties appeared, but when the case was called counsel for plaintiff moved for a continuance on the ground of the unavoidable absence of a material witness. The motion was supported by affidavit, but defendant's counsel conceded that if the witness were present, she would testify as stated in the affidavit, whereupon the court denied the motion for a continuance. The court then di-

rected plaintiff to proceed with the testimony she had, and intimated that if it got to a point where plaintiff had nothing further to offer, the cause might stand over for further testimony if necessary in the interests of justice. This ended the effort for a continuance, plaintiff did not ask to have the case stand over, and assigns no error for failure to grant a continuance."

"After the above ruling, plaintiff moved for a dismissal without prejudice, which motion was denied. Exception was saved and error assigned. The cause then took its natural course, the trial proceeded, and plaintiff's counsel cross-examined defendant at length under the statute."

"In consequence, we confine our examination of the record to two assignments of error: First, on the ground that the trial court refused to permit plaintiff to dismiss her complaint without prejudice;"

10* *"Plaintiff claims that she had an absolute right of dismissal without prejudice under section 184 of the 1921 Code, which reads in part as follows: "Sec. 1. An action may be dismissed or a judgment of non-suit entered, in the following cases: First—By the plaintiff himself, at any time before trial, upon the payment of costs, if a counterclaim has not been made. * * *" *But the above words, "before trial," mean before the commencement of the trial and thereafter plaintiff was not entitled to dismiss as a matter of right. Reagan* v. *Dyrenforth,* 87 Colo. 126, 135, 285 P. 775; *Empire Co.* v. *Herrick,* 22 Colo. App. 394, 398, 399, 124 P. 748. After plaintiff had invoked the jurisdiction of the court, the court disposed of preliminary motions and a demurrer, arranged its calendar, set apart two days for trial, the court convened and the parties appeared in open court, presumably for nothing but trial, and motion for continuance was denied. It cannot be said under such circumstances that the trial was not in progress. It was under way, otherwise the denial of a continuance was abortive. A similar interpretation of the words "before trial" will be

found in *Fleming* v. *Fire Association,* 76 Ga. 678. See, also, *State* v. *Johnson,* 24 S. D. 590, 601, 124 N. W. 847; *St. Anthony, etc., Co.* v. *King, etc., Co.,* 23 Minn. 186, 188, 23 Am. Rep. 682." (Emphasis ours).

The lower court, in the written opinion filed with the order entered on June 26, 1938, took the position that the purpose of the statute was to secure the payment of the writ tax, and that as the court might withhold judgment unless the writ tax were paid, it was proper that a trial should be had up to the point of rendering the judgment. If the statute be construed to mean this it would lead to obvious absurdities. The plaintiff might sue out an attachment, try the case up to the point of taking judgment, and after receiving an expression by the court that a judgment would be had against the plaintiff, all that would have to be done would be for the plaintiff to refuse to pay the writ tax and the case would stand dismissed *ipso facto.* In other words, the plaintiff could try his cause of action, determine the opinion of the court and if it were adverse he could place himself in a fovaroble position of preserving his cause of action by not paying the writ tax. If the word "before" be construed to
11* *mean "after" then it would seem that the language of the Legislature might be susceptible of any construction that the courts might choose to give, in order to make the law conform to the opinions of the courts. Can this statute be given a liberal construction because it might result in a hardship on the plaintiff in this particular case? Suppose the defendant had not directed the court's attention to the fact that the writ tax had not been paid, and the plaintiff had gone to trial and a judgment had been entered, would not this court have held that the proceedings were void and without effect for failure to pay the writ tax? Would not such a situation have created a greater injustice on the plaintiff?

We respectfully submit that the statute provides that in the event of failure to pay the writ tax by a specified time the attachment shall stand dismissed *ipso facto* and that no further proceeding shall be had thereon. What did the Legislature mean when it said, "no further proceedings shall be had thereon?" If the trial court be correct in its holding that the writ tax could be paid before judgment is entered, then we ask what "further proceedings" the Legislature could have had in mind. It would appear that actually the court had

no jurisdiction to proceed, and we seriously question the existence of a legally pending suit with which the court could proceed. It would seem that the statute operates to dismiss the suit for an attachment, and that it is not necessary that he court enter an order dismissing the proceedings. The language of the statute is mandatory and has the effect, without an order of the court, of dismissing all attachment suits when the writ tax is not paid at the time required. In other words, the statute provides that an attachment shall *stand dismissed* from the beginning, and does not provide that the court shall dismiss the suit for failure to pay the writ tax.

12* *It cannot be denied that the trial began before the writ tax was paid in this case. When the parties appear in court and say that they are ready for trial on certain defined issues, and counsel proceed to make opening statements, it is obvious that the trial has begun. The statute does not provide that the writ tax must be paid at the time the trial begins, but before the trial. To hold otherwise would require this court arbitrarily to define when a trial begins. It is not necessary to give such a definition in this case, because it has long been considered that the opening statement of counsel and hearing of witnesses before the court convened for the purpose of trying a case, is a part of a trial. In a criminal case the mere empanelling of a jury is part of a trial and it has never been contended, so far as may be determined from the authorities, that the convening of court and the opening statements of counsel did not constitute a part of the trial.

We respectfully submit that a strict construction should be given to Section 6387 of the Code of Virginia, for to do so cannot possibly affect the right of plaintiff to sue out another attachment on the same cause of action. If this attachment had been dismissed for failure to pay the writ tax plaintiff could have proceeded at once with a new attachment. Instead he elected to take a chance, and he paid the writ tax in open court while the witness was on the stand and after the court had heard a statement of the merits of plaintiff's case.

Your petitioner, therefore, prays that a writ of error may be awarded him in order that the judgment of June 13, 1938, and the judgment of June 26, 1938, for the cause of errors aforesaid, before you may be caused to come, that the whole matter in the said attachment contained may be re-heard, and that the judgment may be reversed and annulled. And your petitioner will ever pray, etc.

Respectfully submitted,
TALBOT W. JENKINS,
By Counsel.

13* *Statements.*

1. Petitioner adopts this petition as his opening brief.

2. We hereby certify that on the 11th day of October, 1938, a copy of the foregoing petition was delivered to Herbert S. Larrick, attorney for the plaintiffs in the court below.

R. GRAY WILLIAMS.
J. SLOAN KUYKENDALL.

I Herbert S. Larrick, attorney for plaintiffs in the lower court, hereby certify that I have received a copy of the foregoing petition for a writ of error, as set out in the above certificate.

HERBERT S. LARRICK

Certificate.

I, J. Sloan Kuykendall, an attorney practicing in the Supreme Court of Appeals of Virginia, do hereby certify that in my opinion it is proper that the judgment of the Circuit Court of Frederick County, Virginia, in the cause of Philip O. Faulkner, J. Olin Faulkner and Lucille Channing v. Talbot W. Jenkins, of which the record is annexed, should be reviewed by the Supreme Court of Appeals of Virginia.

Given under my hand this 11th day of October, 1938.

J. SLOAN KUYKENDALL

Received October 12, 1938.
M. B. WATTS, Clerk.

November 16, 1938. Writ of error awarded by the court. Bond $300.00.

M. B. W.

RECORD

page 1} IN THE CIRCUIT CLERK'S OFFICE OF FREDERICK COUNTY, VIRGINIA

PHILIP O. FAULKNER, J. OLIN FAULKNER AND LUCILLE CHANNING

vs.

TALBOT W. JENKINS

This day came the parties by their attorneys, and the defendant, Talbot W. Jenkins, moved to quash the attachment levied in these proceedings on certain personal property belonging to said Talbot W. Jenkins upon grounds set forth in writing. Said motion to quash having been fully argued by the plaintiffs and by the defendant, and the Court having taken the matter under advisement, is of the opinion that said motion to quash should be overruled. It is, therefore, ordered that said motion to quash be and the same hereby is overruled.

The Court having heard sundry witnesses as to the grounds upon which this attachment was issued and the validity of said attachment, and upon the validity of the claims upon which this attachment is based, is of the opinion that the grounds of attachment are fully proven, and that the levy of attachment is a binding lien upon said personal property, and that said Talbot W. Jenkins is indebted to said plaintiffs in the sum of $300.00; $50.00 of which became due and payable on the 1st day of June 1938, with interest thereon from said date until paid; $50.00 of which becomes due and payable on the 1st day of July 1938, with interest thereon from said date until paid; $50.00 of which becomes due and payable on the 1st day of August 1938, with interest thereon from said date until paid; $50.00 of which becomes due and payable on the 1st day of September 1938, with interest thereon from said date until paid; $50.00 of which becomes due and payable on the 1st day of October 1938, with
page 2} interest thereon from said date until paid; and $50.00 of which becomes due and payable on the 1st day of November 1938 until paid, with interest thereon from said date until paid; and that the said Talbot W. Jenkins has been served with a copy of this attachment ten days prior hereto, it is, therefore, considered and adjudged by the Court that the plaintiffs do recover against the said

Talbot W. Jenkins the sum of $50.00 which is now due and payable, with interest thereon from the 1st day of June 1938 until paid; $50.00 which becomes due and payable on the 1st day of July 1938, with interest thereon from said date until paid; $50.00 which becomes due and payable on the 1st day of August 1938, with interest thereon from said date until paid; $50.00 which becomes due and payable on the 1st day of September 1938, with interest thereon from said date until paid; $50.00 which becomes due and payable on the 1st day of October 1938, with interest thereon from said date until paid; and $50.00 which becomes due and payable on the 1st day of November 1938, with interest thereon from said date until paid, and costs.

And it appearing that the attachment herein issued was levied on the following personal property of the defendant, Talbot W. Jenkins, to-wit:

page 3} 1 G. E. Vacuum cleaner, No. A. V. 6-5191; G. E. Radio, No. 8-10303, cabinet model A-6-F; 1: G. E. Radio No. 6022, cabinet model, F-107; 1 G. E. Radio No. 0002069, table model FD-62; 1 old Crosley Radio; 1 old Kolster; 1 G. E. Radio No. 212203, table model E-91; 1 Standard electric stove No. 208775; 1 Westinghouse electric range No. 332321; 1 gas stove A. B. Battlecreek; 1 G. E. refrigerator No. J. B. 6-38; 1 G. E. hot water heater serial No. 150390; 1 G. E. air circulator No. E. P. 284; 1 G. E. washing machine Model A W 19 G; 3 old ice refrigerators; 3 wooden filing cabinets; 1 office chair; 1 straight chair; 1 flat top desk and contents; 1 Sunbeam cabinet heater, serial No. D. M. T.; 1 G. E. waffle iron, catalog No. 119 Y 192; 1 G. E. oil furnace and equipment, Type L. A. 3; all of the above described property being located at No 15 South Loudoun Street; also 1 Ford Pickup, 1936 model, bearing State of Virginia, license No. T 53-234 and 1 Chevrolet coach, 1935 model, bearing State of Virginia license No. 341-174; also the following household furniture located at No. 428 W. Leicester Street: 2 upholstered chairs; 1 davenport; 1 desk; 1 rug; 2 lamps; 1 table; 6 chairs; 1 sideboard; 1 rug; 1 cot; 1 table; 1 sewing machine; 1 desk; 1 lamp; 1 refrigerator; 1 range; 1 table; 1 bed and bedding; 1 chair; 1 bureau; 1 chest; 1 bed and bedding; 1 chair; 1 chest of drawers; 1 crib.

It is further ordered that the Sheriff do not proceed to sell any

of the above mentioned personal property of the said Talbot W. Jenkins, upon which levy of attachment has been made, until the further order of the Court, and it is further ordered that the lien of attachment upon said personal property shall remain in full force and virtue.

On motion the Sheriff was permitted to amend his return on the attachment served by him in these proceedings, which was accordingly done by inserting the following words:

> "All of the above being the property of the defendant, Talbot W. Jenkins."

The motion of defendant to rehear his motion to dismiss this attachment upon the ground that the writ tax had not been paid as required by section 6387 of the Code having been granted, and the rehearing having been had and been fully considered, it is ordered and adjudged, for reasons appearing in a written memorandum filed herewith and ordered to be a part of the record in this cause, that the attachment shall not be dismissed and that the judgment heretofore rendered in this cause shall remain in full force and effect. The defendant noted his objection and exception to this ruling.

page 4} Attachment proceedings were instituted and made returnable to the first day of the term of the Circuit Court of Frederick County, which was June 6, 1938. On that day the defendant requested and secured a continuance until June 13, 1938, the order fixing that date for the trial. Defendant filed a motion to quash the attachment and a statement of his grounds of defense. On the date set for trial, the defendant sought a further continuance, but this was denied because no proper ground was shown. The motion to quash was then argued and overruled. No jury being required by the parties, counsel for plaintiff made an opening statement before the court. An opening statement was waived by counsel for the defense. The first witness for the plaintiff had been sworn and had taken the stand but had not been asked any question when the counsel for the defense inquired of the clerk of the court whether the writ tax had been paid. The clerk stated that it had not. Motion was then made to dismiss the attachment proceedings for failure to comply with section 6387 of the Code requiring that the writ tax shall be paid before trial. The plaintiff then paid the writ tax to the clerk in open court. The court held that such payment complied with the statute and overruled the motion to dismiss. The trial then proceeded and resulted in the rendition of a judgment for the plaintiff. The defend-

ant has moved for a reconsideration of the motion to dismiss and to set aside the judgment and dismiss the attachment upon the ground assigned for that motion. A reconsideration has been granted and counsel for both sides have been heard, and upon further consideration, it is the opinion of the court that the judgment should stand.

One dollar is the writ tax upon this suit. Sec. 126 of
page 5 The Tax Code. The statute upon which the motion to dismiss is founded provides:

> "When any attachment is so returned the plaintiff therein, shall within thirty days from the date upon which said return is actually made, or if a trial be sooner had, then before such trial, pay to the clerk of the court to which the return is made the proper writ tax as fixed by law, is not already paid, and, in the event of his failure to do so, the attachment shall stand dismissed *ipso facto* at the cost of the plaintiff, and no further proceedings shall be had thereon."

The writ tax has been paid within the required thirty day period, so the only question is whether the payment that was made was before trial.

This provision of this statute has not been construed by the Supreme Court of Appeals upon the question here involved. That court decided in *Senter* v. *Lively,* 160 Va. 417, 168 S. E. 328, that a dismissal for failure to pay the writ tax had the effect of a non-suit, only, and did not prevent another attachment from being issued upon the same right of action. In construing a statute its purpose is to be sought. The purpose of this provision, obviously, is to insure promptly and certainly the payment of a tax; it has no relation to the right or procedure of the action. For certainty of payment it was wise to require the plaintiff to pay before judgment was rendered, for if that were adverse there would be no incentive for payment. This being the purpose, why should the construction be that the statute means before the beginning of the trial rather than before the ending of the trial? The rule of reason should be applied. Trial means a hearing and determination. Definitions of the term "trial" may be found in 64 C. J. 31, and it is there stated that when a trial commences is a difficult question. One line of cases cited hold that the term "trial" contemplates a final disposition of the controversy. Varying defini-
tions of the term and many constructions of the phrase
page 6 "before trial" may be found in 1 Words and Phrases (First

Series) 736 and in volume 1, page 419 of the second series of that work, also in 54 C. J. 309 in the title "Removal of Causes." These, however, are not very helpful upon the question under consideration because the construction of the phrase depends largely upon its context and the purpose with which it was used.

The conclusion here reached is that considering the purpose of this statute, a payment of the writ tax at the time and under the circumstances disclosed is in compliance with the statute.

June 26, 1938. PHILIP WILLIAMS, Judge.

To Herbert S. Larrick, Esq., attorney representing Philip O. Faulkner J. Olin Faulkner and Lucille Channing:

This is to notify you that on October 7, 1938, at two P. M. I will appear in the office of the Clerk of the Circuit Court of Fredeirck County, Virginia, and there apply to the Clerk of said Court for a transcript of the record in the above styled cause of action, or so much thereof as is necessary and material to enable the Supreme Court of Appeals of Virginia, or a Judge thereof in vacation, to pass upon a petition for a writ of error to the action of the trial court in overruling a motion to dismiss said cause of action for failure of plaintiff to pay a writ tax before the beginning of the trial of said cause of action.

J. SLOAN KUYKENDALL,
Counsel for Talbot Jenkins.

Received the within notice this 3rd day of October, 1938.

HERBERT S. LARRICK.

page 7} CLERK'S CERTIFICATE

STATE OF VIRGINIA,

COUNTY OF FREDERICK, To-wit:

I, C. C. Brannon, Clerk of the Circuit Court of Frederick County, in the State of Virginia, do hereby certify that the foregoing is a true transcript of so much of the record and proceedings in a certain Attachment Suit between Philip O. Faulkner, J. Olin Faulkner and Lucille Channing, Plaintiff, and Talbot W. Jenkins, Defendant, as

the same exists among the records in my office, as I was directed to copy by Counsel for Talbot W. Jenkins, pursuant to Section 6339 of the Code of Virgiina.

I further certify that notice required by Section 6339 of the Code of Virginia, of the intention of Talbot W. Jenkins to apply for such transcript for the purpose of applying for a writ of error, was duly given to Counsel for Philip O. Faulkner, J. Olin Faulkner and Lucille Channing, a copy of which notice appears in the record hereby certified.

Given under my hand and official seal this day of October, 1938.

C. C. BRANNON,
Clerk, Circuit Court of Frederiek County, Va.

A Copy,

M. B. WATTS, Clerk.

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