

William & Mary Law Review

Volume 1 (1957-1958)
Issue 1

Article 7

October 1957

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Repository Citation

Norman A. Crandell, *Costs in Virginia*, 1 Wm. & Mary L. Rev. 79 (1957),
<https://scholarship.law.wm.edu/wmlr/vol1/iss1/7>

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COSTS IN VIRGINIA

NORMAN A. CRANDELL

The term 'costs' has the legal meaning of: "those expenses incurred by parties in prosecuting or defending a suit, action, or other proceeding at law or in equity, recognized and allowed by law, and taxed against the losing party."¹

Upon initial appraisal of the subject of costs in Virginia, the budding and even the practicing lawyer may well be not only astonished, but possibly overwhelmed by the wealth of materials to be found in the Virginia Code. The Index to the Code² lists under the general subject heading of costs six pages of applicable notations to statutes. The citations referenced in these six pages are to be found spread out over eight of the nine volumes comprising the statutory law,³ in thirty-one (31) of the sixty-five (65) titles of the Code, and in more than two hundred separate sections. Matter pertinent to costs literally covers the gamut from A (Annexation)⁴ to Z (Zoning).⁵

The basic material pertaining to costs is found in Title 14, Chapter 3, Sections 174 through 197.⁶ These provisions deal with the general statutory enactments relating to costs.

Costs Generally

All costs are of a statutory authorization, the common law allowing none in any case, and, as such, are construed as remedial in nature and not penal, to be liberally and beneficially expounded for the sake of the remedy which they administer.⁷

¹ *Morgan v. Haley*, 107 Va. 331, 58 S.E. 564 (1907).

² Vol. 10, Code of Virginia (1950), pp. 352-357. And see 1956 Cumulative Supplement, p. 99; 1956 Additional Supplement, p. 106 (Dec. 1, 1956).

³ Volumes 2, 3, 4, 5, 6, 7, 8 and 9, Code of Virginia (1950).

⁴ Va. Code §§15-132, 15-137 (1950).

⁵ Va. Code §§15-838, 15-877 (1950).

⁶ Vol. 3, Code of Va. (1950), pp. 273-280. And see 1956 Replacement Volume, pp. 315-323.

⁷ *Comm. v. McCue*, 109 Va. 302, 63 S.E. 1066 (1909).

Costs in Trial Court

At law, costs are awarded in the trial court to that party for whom final judgment is given.⁸ It is specifically provided that notwithstanding this general rule, there shall be certain exceptions. Thus, in any personal action, not on contract, if a verdict be found for the plaintiff for less damage than ten dollars, he shall not recover costs in respect to such verdict unless the court enter of record that the object of the action is to try a right, beside the mere right to recover damages in respect to the trespass or other grievance on which the the action is based, or that the trespass or other grievance is wilful or malicious.⁹ In any suit in the name of one person for the benefit of another, if there be a judgment for the defendant, it shall be against such other.¹⁰ If a person, on account of poverty, is unable to pay fees and costs, he may even be allowed by the court to sue or defend a suit without payment of either the fees or costs.¹¹ Counsel may be provided in addition, and it is discretionary in the judge to provide for the payment of the appointed attorney for the indigent plaintiff.²¹

In equity, the matter of award and apportionment of costs is in the lower court's discretion;¹³ save that the party substantially prevailing in the Supreme Court of Appeals will recover costs.¹⁴

Costs on Appeal Generally

Costs in the Circuit Courts of Virginia are in the discretion of the court;¹⁵ while in the Supreme Court of Appeals of Virginia, costs are rendered in favor of the party substantially prevailing.¹⁶ The party substantially prevailing, within the meaning of the above

⁸ Va. Code §14-175 (1950).

⁹ Va. Code §14-176 (1950).

¹⁰ Va. Code §14-177 (1950). And see *Ashly v. Justus*, 183 Va. 555, 32 S.E.2d 709 (1945).

¹¹ Va. Code §14-180 (1950). And see *Tyler v. Garrison*, 120 Va. 697, 91 S.E. 749 (1917); *Miller v. Norfolk, etc., Ry. Co.*, 47 F. 264 (1891).

¹² Va. Code §14-181 (1950). And see *Stonebreaker v. Smith*, 187 Va. 250, 46 S.E.2d 406 (1948). But see Sections 19-214.1 and 19-167 for requirements as to appointment of counsel in felony cases.

¹³ Va. Code §14-174 (1950).

¹⁴ Va. Code §14-178 (1950).

¹⁵ Va. Code, §15-137 (1950).

¹⁶ *Ibid.* And see Va. Code §14-178 (1950).

quoted rule, is the party in whose favor the decision or verdict in the case is or should be given and judgment entered; and in determining this question, the result in general should be considered and inquiry made as to who has, in the view of the law, succeeded in the action.¹⁷ If a final judgment on appeal is rendered in favor of the appellant, he is entitled to recover his costs in the trial court and in the appellate court since there has been no final judgment against him in the trial court and he is the party substantially prevailing in the appellate court.¹⁸ And where a judgment of the lower court in favor of appellee is affirmed so far as it affects the appellant, although the appellate court reverses so much of the judgment as affects a third party who has not appealed, costs will be given to the appellee as the substantially prevailing party.¹⁹

Where an error is not merely clerical but prejudicial to the defendant, upon correction by the appellate court on an appeal by the defendant, costs of the appeal will be awarded to the defendant-appellant²⁰ save where such appellant has invited the error.²¹ A reversal in part, favorable to the appellant, allows for recovery of costs by the appellant,²² but a contrary result is reached where that portion of the lower court judgment favorable to appellant is reversed on appeal.²³ And if the plaintiff, appealing from a judgment in favor of the defendant, sets up lack of jurisdiction on the part of a trial court and succeeds in the appellate court, the costs in the appellate court upon dismissal will not be granted to him but will be taxed against him.²⁴

Costs on Appeal—Special Provisions

The costs of the record on appeal are ordinarily paid by the appellant before printing and must be paid within thirty (30) days

¹⁷ Richmond v. County of Henrico, 185 Va. 859, 41 S.E.2d 487 (1947).
And see Safway Steel Scaffolds of Va., Inc. v. Coulter, 198 Va. 469, 94 S.E.2d 541 (1956).

¹⁸ *Ibid.*

¹⁹ Richmond v. County of Henrico, 185 Va. 859, 41 S.E.2d 487 (1947).
And see Harmon v. Odell, 6 Gratt. (47 Va.) 207 (1849).

²⁰ Big Vein Pocohontas Co. v. Browning, 137 Va. 34, 120 S.E. 247 (1923).

²¹ Notz v. Rowe, 117 Va. 752, 86 S.E. 155, L.R.A. 1916B, 799 (1915).

²² Douglas Land Co. v. Thayer, 113 Va. 239, 24 S.E. 215 (1912).

²³ Pendleton v. Vandevier, 1 Wash. (1 Va.) 381 (1794).

²⁴ Starring v. Kemp, 167 Va. 429, 188 S.E. 174, 190 S.E. 163 (1936).

following notice by the clerk.²⁵ If the proceeding is in *forma pauperis*, that is, appellant is financially unable to defray the cost of printing, it is allowed that ten (10) typewritten copies of the record be substituted.²⁶ However, the cost of printing extraneous and unnecessary matter is not recoverable by the prevailing party.²⁷

Review of Decree of Costs

Review of the correctness of a decree of costs will not be undertaken by the appellate court unless the appeal can be supported on other grounds.²⁸ However, where there can be shown that a clear abuse of discretion exists, the appellate court can exercise jurisdiction for purposes of review and correcting error.²⁹

Enforcement of Cost Decree

The enforcement of the payment of costs may be by rule,³⁰ by execution,³¹ by requiring payment as a condition,³² and by attachment.³³ As a general rule, no interest is allowed on costs.³⁴ Special provisions govern the disposition of the costs collected.³⁵

Where Costs Indexed

The costs taxed in a suit or action are entered on the judgment

²⁵ Va. Code §8-482 (1950).

²⁶ Va. Code §8-481 (1950). And see *Beale v. Norfolk So. Ry. Co.*, 148 Va. 20, 138 S.E. 502 (1927); *Broady v. So. Ry. Co.*, 169 Va. 765, 194 S.E. 679 (1938).

²⁷ Va. Code §8-472 (1950). And see *McCready v. Ryan*, 167 Va. 107, 187 S.E. 442 (1936).

²⁸ Va. Code §14-174 (1950). And see *Margarity v. Shipman*, 82 Va. 784, 1 S.E. 109 (1887).

²⁹ *Goodloe v. Woods*, 115 Va. 540, 80 S.E. 108 (1913).

³⁰ See *Johnston v. Mann*, 21 W. Va. 15 (1882).

³¹ *Ibid.* And see *Anglea v. Comm.*, 10 Gratt. (51 Va.) 696 (1853).

³² Va. Code §§8-119 (Amended Pleadings), 8-159 (Costs on Removal Proceedings), 8-317 (Costs of Perpetuating Testimony), 8-530 (Issuance of Additional Attachments), 8-532 (Costs of Amendment in Attachment), 13.1-417 (Issuance of Replacement Stock under Uniform Stock Transfer Act), 14-185 (Payment of Costs where New Trial Granted), and 64-111 (Costs of Letters of Probate), (1950).

³³ *Howard v. Rawson*, 2 Leigh (29 Va.) 733 (1830).

³⁴ *Scott v. Daughy*, 130 Va. 523, 107 S.E. 729 (1921). *Cf.* *Shipman v. Fletcher*, 95 Va. 585, 29 S.E. 325 (1898).

³⁵ Va. Code §§14-40, 14-54, 14-196 (1950).

docket³⁶ and in the margin of the judgment itself.³⁷ Bonds for costs are indexed in the bond book kept by the clerk of the court.³⁸

Cost Bonds

In Virginia, statutes require non-residents, and others in enumerated instances, to post bond as security for costs and damages, in suits or actions in the trial court upon suggestion of the plaintiff or otherwise³⁹ If such bond is not forthcoming within sixty days, the suit or action will be dismissed;⁴⁰ a non-suit will not be given.⁴¹ However, if security is offered even though sixty days have passed, the suit will not be dismissed.⁴² The requirement of such cost bond may be waived by the defendant even after his initial request if the case is allowed to proceed to trial and the defendant does not demand dismissal.⁴³

Composition of Costs

The fees of clerks of court, sheriffs, and other officers of the court are properly taxable as costs as well as fees charged for the preparation of papers and processes.⁴⁴ In addition, the attorney fee provided for by statute,⁴⁵ the expenses of witnesses⁴⁶ whose number do not exceed the statutory maximum allowable,⁴⁷ and the expenses of blood tests in criminal cases⁴⁸ are taxable as costs. Special provision is made for the fees taxable by the clerks of the Circuit Court⁴⁹ and the Supreme Court of Appeals.⁵⁰

³⁶ Va. Code §§8-377 (1950).

³⁷ Va. Code §14-110 (1950).

³⁸ Va. Code §17-63 (1950).

³⁹ Va. Code §14-182 (1950). And see Va. Code §§26-6, 12-64, 8-597, 8-623, 8-863 (1950).

⁴⁰ Va. Code §14-172 (1950). And see *Outlaw v. Pearce*, 176 Va. 458, 11 S.E.2d 600 (1940).

⁴¹ *Pinner v. Edwards*, 6 Rand. (27 Va.) 675 (1828).

⁴² *Goodtitle v. See*, 1 Va. Cas. (3 Va.) 123. And see *Vance v. Bird*, 4 Mun. (18 Va.) 364 (1815).

⁴³ *Outlaw v. Pearce*, 176 Va. 458, 11 S.E.2d 600 (1940).

⁴⁴ Va. Code §14-195 (1950).

⁴⁵ Va. Code §§14-193, 194; and Va. Code 54-69 (1950).

⁴⁶ Va. Code §§14-186 to 14-191 (1950).

⁴⁷ Va. Code §14-192 (1950).

⁴⁸ Va. Code §18-75.1 (1950).

⁴⁹ Va. Code §14-129 (1950).

⁵⁰ Va. Code §14-123 (1950).

Costs in Particular Actions or Proceedings

Specific provision is made in the Virginia statutes in reference to the subject of costs as it pertains to particular actions or proceedings.⁵¹ These statutory provisions can be classified into six main categories:

1. Discretion in Courts to Affix Costs.
2. No Liability or Liability by Court or Other Official Bodies.
3. Costs Adjudged against the Defendant.
4. Costs Adjudged against the Plaintiff.
5. Costs Adjudged against Party Petitioning.
6. Costs Adjudged against Party Not Prevailing.

Discretion in Court to Affix Costs

By statute, in particular actions, the court has power to affix fair and just costs on either party in the court's discretion, and, if it chooses, to refrain from imposing costs on either party, with reference to the specific fact situation which develops.

The imposition of the costs upon removal of a cause of action to another court;⁵² the cost of amendment of pleading required by the development of a variance between the evidence and pleadings;⁵³ the costs of a contract action where the judgment is for less than twenty dollars;⁵⁴ the costs of inquiry by other creditors regarding the plaintiff-creditors right of attachment;⁵⁵ the costs of a declaratory judgment,⁵⁶ of a Habeus Corpus proceeding,⁵⁷ and those of a mandamus proceeding;⁵⁸ the costs in annexation proceedings by towns and cities;⁵⁹ the costs of incorporation suits of

⁵¹ There are approximately one hundred and seventy-five such provisions.

⁵² Va. Code §8-159 (1950).

⁵³ Va. Code §8-217 (1950).

⁵⁴ Va. Code §8-511.1 (1950).

⁵⁵ Va. Code §8-560 (1950).

⁵⁶ Va. Code §8-584 (1950).

⁵⁷ Va. Code §8-603 (1950).

⁵⁸ Va. Code §§8-706 and 8-709 (1950).

⁵⁹ Va. Code §§15-132, 15-137, and 15-161 through 163 (1950).

towns and cities;⁶⁰ the costs not of record;⁶¹ the costs in divorce proceedings;⁶² the costs of suits over \$3,000.00 in courts of record;⁶³ the costs of enforcement of forfeitures in respect to fish and game laws;⁶⁴ the costs of suits before the Industrial Commission;⁶⁵ and the costs on certain motions and interlocutory orders⁶⁶ is discretionary in the court.

No Liability or Liability by Court or Other Official Bodies

In certain instances, it is provided for by statute that there is either no liability for costs or that the court or some official administrative body or individual is to be liable for costs.

By statutory enactment a guardian *ad litem*,⁶⁷ a county zoning board,⁶⁸ the state in appeals against the Tax Commissioner's decisions,⁶⁹ and a fiduciary⁷⁰ or a personal representative⁷¹ will not be liable for costs in any action or suit where their actions have been prudent, and not unreasonable.

The general provision⁷² relating to exemption from judgment for costs in favor of the Commonwealth has a number of exceptions. In criminal rape cases, the costs of depositions are taxed to the Commonwealth.⁷³ The allowances made to prisoners (convict labor) of seventy-five cents per working day and twenty-five cents per non-working day for the payment of fines and costs⁷⁴ and the costs and expenses of the administration of the fish and game laws⁷⁵ are additional exceptions to the general rule.

⁶⁰ Va. Code §§15-70 and 15-71 (1950).

⁶¹ Va. Code §16.1-43 (1950).

⁶² Va. Code §20-99 (1950).

⁶³ Va. Code §17-30.1 (1950).

⁶⁴ Va. Code §§29-227, 29-228, and 29-229 (1950).

⁶⁵ Va. Code §65-97 (1950).

⁶⁶ Va. Code §14-144 (1950).

⁶⁷ Va. Code §8-88 (1950).

⁶⁸ Va. Code §§15-838 and 15-877 (1950).

⁶⁹ Va. Code §§58-188, 58-238 and 58-1134 (1950).

⁷⁰ Va. Code §26-4 (1950).

⁷¹ Va. Code §26-6 (1950).

⁷² Va. Code §14-197 (1950).

⁷³ Va. Code §18-56 (1950).

⁷⁴ Va. Code §53-221 (1950).

⁷⁵ Va. Code §28-9 (1950).

By statute it is expressly provided that commissioners in chancery in correcting their own errors,⁷⁶ the printers of the record for appeal,⁷⁷ a principal or surety on supersedeas bond,⁷⁸ the land in 'in rem' proceedings,⁷⁹ the town or city in specific situations,⁸⁰ and fiduciaries failing to file⁸¹ are liable for costs.

Costs Adjudged against the Defendant

In Virginia, the defendant may be liable for costs irrespective of whether he is the prevailing or non-prevailing party.

Where the defendant delays the filing of his pleadings, he will be liable for the plaintiff's costs until time of filing,⁸² and where there is a partial set-off, he will be liable for the costs on the uncontraverted portion.⁸³ If the defendant desires to reopen a *quo warranto* proceeding, the cost of bond must be paid by him.⁸⁴ When the defendant requests a rehearing in an action where not originally present, he must pay the costs of the first action.⁸⁵ If damage results from the refusal of the defendant in an action of trespass to make an estimate of the damage, he will be liable for costs.⁸⁶ Where a defendant corporation fails to appoint a statutory agent as required by law, it will be liable for costs and attorneys' fees.⁸⁷ And the cost of service of process by the Commissioner of Motor Vehicles on a non-resident defendant is payable by such defendant.⁸⁸

In addition, the costs of a release of a judgment,⁸⁹ the costs of a writ of *feri facias*,⁹⁰ the costs of garnishment proceedings,⁹¹ the

⁷⁶ Va. Code §§8-256 (1950).

⁷⁷ Va. Code §§8-484 (1950).

⁷⁸ Va. Code §§8-498 (1950).

⁷⁹ Va. Code §§8-657 and 8-1092 (1950).

⁸⁰ Va. Code §§15-238, 15-877, 22-55.1, and 57-37.28 (1950).

⁸¹ Va. Code §§26-23 (1950).

⁸² Va. Code §§8-121 (1950).

⁸³ Va. Code §§8-243 (1950).

⁸⁴ Va. Code §§8-863 and 8-865 (1950).

⁸⁵ Va. Code §§8-562 (1950).

⁸⁶ Va. Code §§8-909 (1950).

⁸⁷ Va. Code §13.1-147 (1950).

⁸⁸ Va. Code §§46-125 (1950).

⁸⁹ Va. Code §§8-382, 8-384 (1950).

⁹⁰ Va. Code §§8-402 (1950).

⁹¹ Va. Code §§8-444, 8-447, and 8-449 (1950).

costs of the clerks fee on a forthcoming bond,⁹² the costs in the dismissal of an injunction bond,⁹³ the costs in a suit before the Corporation Commission,⁹⁴ the cost of recordation of a general contractor's lien,⁹⁵ and the costs incident to the judicial sale of a house of prostitution⁹⁶ are all taxable to the defendant.

Costs Adjudged against the Plaintiff

The plaintiff will be liable for costs in certain enumerated cases regardless of whether the judgment is in his favor or not.

Thus, the costs if the plaintiff requests additional executions on a judgment⁹⁷ or additional attachments;⁹⁸ requests amendment of an attachment;⁹⁹ or if an attachment is quashed¹⁰⁰ or in an action of detinue, the plaintiff keeps property illegally;¹⁰¹ if, under the Uniform Stock Transfer Act, the plaintiff requests new stock to replace lost or destroyed certificates;¹⁰² in an annexation suit by a town or city to affix boundary changes;¹⁰³ and, in courts not of record, the fee for filing and indexing the papers of the case as part of the costs¹⁰⁴ will be adjudged against the plaintiff.

Costs Adjudged against Party Petitioning

Where a party to an action or suit specifically demands or requests unusual or special action by the court, the costs of such demand or request will normally be taxed to him regardless of who is adjudged the substantially prevailing party of the suit or action.

The costs in instances where a party requests leave to amend

⁹² Va. Code §8-460 (1950).

⁹³ Va. Code §§8-625 and 8-626 (1950).

⁹⁴ Va. Code §§12-14, 12-59, and 12-64 (1950).

⁹⁵ Va. Code §43-4 (1950).

⁹⁶ Va. Code §48-13 (1950).

⁹⁷ Va. Code §8-407 (1950).

⁹⁸ Va. Code §8-530 (1950).

⁹⁹ Va. Code §8-532 (1950).

¹⁰⁰ Va. Code §§8-556, 8-557 (1950).

¹⁰¹ Va. Code §8-594 (1950).

¹⁰² Va. Code §13.1-417 (1950).

¹⁰³ Va. Code §15-132 (1950).

¹⁰⁴ Va. Code §16.1-115 (1950).

his pleadings,¹⁰⁵ where a party requests the jury view the scene,¹⁰⁶ where a party requests perpetuation of testimony,¹⁰⁷ where a co-defendant in a garnishment proceeding is requested to fully disclose a debt owing,¹⁰⁸ a request for a rehearing,¹⁰⁹ a request for habeas corpus,¹¹⁰ a request for an injunction bond,¹¹¹ a request for writ of mandamus,¹¹² a petition for fixing boundaries,¹¹³ a request for service of process,¹¹⁴ a request for conservation where expense would exceed benefit derived,¹¹⁵ a request for appointment of a commissioner in eminent domain proceeding,¹¹⁶ criminal complaints leading to criminal prosecution for public nuisances and houses of prostitution where the defendant is found not guilty,¹¹⁷ institution of unreasonable suits before the Industrial Commission,¹¹⁸ a request for letters of probate,¹¹⁹ a request for a new trial,¹²⁰ a request for joinder of parties subsequently found to have no connection with the case,¹²¹ and the costs of printing the record on appeal¹²² and the cost of binding the record on appeal¹²³ are all taxed against the party petitioning.

Costs Adjudged against the Party Not Prevailing

Special statutes in certain actions or proceedings give effect to the general rule of costs by taxing the costs against the party not prevailing.

¹⁰⁵ Va. Code §8-119 (1950).

¹⁰⁶ Va. Code §8-216 (1950).

¹⁰⁷ Va. Code §8-317 (1950).

¹⁰⁸ Va. Code §8-553 (1950).

¹⁰⁹ Va. Code §8-562 (1950).

¹¹⁰ Va. Code §8-597 (1950).

¹¹¹ Va. Code §8-623 (1950).

¹¹² Va. Code §8-706 (1950).

¹¹³ Va. Code §8-899 (1950).

¹¹⁴ Va. Code §17-52 (1950).

¹¹⁵ Va. Code §21-341 (1950).

¹¹⁶ Va. Code §§25-24 and 33-65 (1950).

¹¹⁷ Va. Code §§48-5, 9, and 13 (1950).

¹¹⁸ Va. Code §65-97 (1950).

¹¹⁹ Va. Code §64-111 (1950).

¹²⁰ Va. Code §14-185 (1950).

¹²¹ Va. Code §8-369 (1950).

¹²² Va. Code §§8-481 and 482 (1950).

¹²³ Va. Code §8-501 (1950).

Thus, in suits to determine contested elections,¹²⁴ in monopoly actions where there are injured parties as a result of the monopoly,¹²⁵ in suits regarding breaches of tobacco marketing contracts,¹²⁶ and in criminal cases,¹²⁷ it is provided that costs of the suit or action shall be taxed against the non-prevailing party.

Conclusions and Recommendations

In general, the statutory material relevant to costs though extremely voluminous is fairly manageable. The general provisions relevant to costs (Sections 14-174 to 14-197) clearly and simply state the general rules and pertinent guides to be used in the imposition of costs.

Two minor recommendations alone are envisaged by this writer affecting form rather than substance. One deals with the exclusion from the index of citations which are irrelevant to considerations of the general subject of costs. The other embodies an indexing or general cross-referencing of costs in particular actions or proceedings to the general provisions relating to costs presently found in the Code.

First, certain of the citations appearing in the Index to Costs have no justifiable place therein.¹²⁸ They should be eliminated, thus reducing the six pages in some small degree and decreasing the apparent magnitude of the subject.

Second, by recognizing some categorization,¹²⁹ if not that advocated by the writer, in relation to costs in particular actions or proceedings in the general provisions,¹³⁰ it is believed that it will be easier to collate the general rules with what are necessarily the exceptions to them. This could be accomplished in one of two ways: either the annotated material could be extended in the general provisions to cross reference by a mere numerical statutory

¹²⁴ Va. Code §24-437 (1950).

¹²⁵ Va. Code §59-26 (1950).

¹²⁶ Va. Code §§13.1-278 and 279 (1950).

¹²⁷ Va. Code §14-132 (1950). And see Va. Code §§19-8, 13, 64, 148, 233, 262, 283-297, 308, 319, 322, 326, and 333 (1950).

¹²⁸ Va. Code §§8-56, 8-794, 8-878, 15-677, 21-331, 21-344, 32-132, and 56-366 to 368 (1950).

¹²⁹ *Supra*.

¹³⁰ Va. Code §§14-174 through 14-197 (1950).

designation the special actions and proceedings and the modified rules which apply, or a general statute for each category adopted could be enacted with the annotations thereto acting as a cross-reference to the specific statutes.