1968

Criminal Law and Procedure

Dudley Warner Woodbridge

William & Mary Law School

Repository Citation
http://scholarship.law.wm.edu/vabarnotes/46

Copyright © 1968 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
http://scholarship.law.wm.edu/vabarnotes
1. Facts about sources of the criminal law. (1) The common law of crimes is in force in Va., as of the date of 1607 except in so far as not adaptable to this country or changed by statute. (2) The criminal law administered by the old ecclesiastical courts is not regarded as common law, and hence such offenses as adultery and fornication are purely statutory. (3) There are no common law offenses against the Federal Government. All such offenses are purely statutory.

Classification of Crimes
2. Facts about the classification of crimes. (1) Crimes are divided into three classes: Treason, Felony, and Misdemeanor. Treason is punishable only with death, V.18-576(1). Most offenses are then either felonies or misdemeanors. Such offenses as are punishable with death or confinement in the penitentiary are felonies; all others are misdemeanors, V.18-1. (2) A crime that may be punishable either by fine, or jail sentence, or imprisonment in the penitentiary is a felony regardless of the punishment actually noted out.

3. Civil and criminal suits are separate and distinct. Thus a man might be acquitted of murder and yet held liable in a civil suit for damages. But where one is convicted of a crime (such as burning stores to defraud insurance company) his guilt is not adjudicated and a bond to a civil action. See 120 S.E. 314.

4. Most crimes are also torts, i.e., both public and private wrongs. Examples: murder, libel. Some crimes are not torts. Examples: reckless driving, blasphemy. Some private wrongs are not crimes. Examples: malicious prosecution, innocent conversion.

Consent v. Condonation as defenses
5. Facts about consent and condonation as defenses. (1) As a general rule these are not defenses for the crime has been committed against the state and not against the individual. Example: prize fighting. (2) But where lack of consent is an element in the criminal act consent is a defense even if the accused did not know it had been given.

Example: A detective hired by the owner gives the accused the key and tells him to rob the store. (3) Since society has an interest in the life and well being of each of its members consent is no defense to murder or assault. The cases are in conflict as regards assault and battery, e.g., fighting with mutual consent in anger. Some courts hold there is no better where it is consented to. Others hold that this makes two offenses against the State—one by each. The correct view seems to be that there is no assault and battery unless the fighting goes beyond the consent e.g., foul blows, but if the fighting is in a public place they are guilty of an affray, disorderly conduct, and breach of peace. (4) By statute V.18-53 the subsequent marriage of the accused with his victim is a bar to a conviction for seduction. By V.18-55 A marriage in good faith with the victim of a seduction case, aged 14 to 15 can not be an inmate of an institution for insane, deaf, dumb, blind etc. and with proof of support of the wife works a suspension of the charge until the girl becomes 16 years of age whenupon it becomes a bar. See also V.19-12.

Effect of Victim's Actions
6. In criminal cases it is inadmissible that the victim was grossly negligent, or that the victim also intended to commit a crime.

Agreements not to prosecute as defenses
7. Agreements not to prosecute or acquit if he will tell what he knows may generally not be pleaded in bar but are at best only morally binding. See 16 C.J. 94.

Necessity as defense
8. Necessity is generally a defense to any crime but murder provided the necessity is overpowering. In the case of murder, a man should forfeit his own life in preference to taking that of an innocent party.

Liability of Wife for Crimes Committed in Husband's Presence
9. Facts about the liability of a wife for a crime committed in the presence of her husband. (1) In all cases except murder, and treason, a wife is presumed to have committed the crime under the coercion of her husband if committed in his presence and she is excused. Note(a) that this creates no presumption against the husband (b) that the presumption is a rebuttable one (c) that neither married wom
an's acts have greatly lessened the force of the presumption and made rebuttal-easier though these acts do not expressly mention this common law principle. (2) The principle does not apply to keeping of disorderly houses and crimes peculiarly apt to be committed by women.

Criminal Intent

10. Facts about criminal intent (1) In general, there is no crime unless the act is accompanied with a criminal intent (mens rea). This intent differs with the crime. Thus in murder it means malice aforethought; in larceny an intent to steal; in receiving stolen goods knowledge that they were stolen; and in criminal negligence insufficient attention. (2) (a) If a person intends to commit a crime malum in se, and in doing so another crime results it is in general no excuse that he did not intend to commit the crime that he did. The intent is said to be carried over. Some writers call it constructive intent. (b) But if an act, malum prohibitum only, is intended, then the intent is generally not carried over. (3) In many statutory crimes the legislature has intended that one act at his peril. In such cases the absence of a criminal intent is immaterial. Examples: (a) In statutory rape belief in good faith that the girl is over 16 is no excuse. (b) If a person sold milk in good faith but in violation of the dairy code he would probably be guilty of a crime. (4) By criminal intent is meant an intent to do the act prohibited. It is immaterial that one has a good motive. Example: killing a child so he will go to Heaven at once, and be saved from the possibilities of going elsewhere later. (5) When intoxication (negligence) is relied upon as the mental element it is necessary to show a legal duty to act with ordinary care under the circumstances. In the absence of such duty the act wanton neglect is not criminal. Example: I see a baby on the railroad track and negligently fail to save its life. If I am a stranger to the railroad company and the baby, I am not guilty of any crime. If I were the parent of the child or the fireman of the train there would be a duty of some sort, for a duty, not to wantonly injure a trespasser, exists. (6) Mistake of the law is generally no defense, but in cases involving a specific intent it may be a defense. Example of the exceptions: Because of ignorance of the law I think that X's property is mine. If I take X's property under this sincere belief I did not intend to deprive X of his property but to take my own property and I am not guilty of larceny. (7) In all cases of specific intent the intent must be proved as charged. Example: I drew my gun with intent to kill Mayor Gaynor. Just as I fire X jumps in front of Mayor Gaynor and is injured. I cannot be convicted of an assault on X with intent to kill him, but only of a simple assault and battery as far as X is concerned. Note that had X died, I would have been guilty of murder. (8) A non-negligent mistake of fact is an excuse provided (a) the act would have been lawful had the facts been as supposed and (b) that it is not a case in which the legislature intended that one act at his peril. (9) A child under 7 years of age is conclusively presumed incapable of having a criminal intent. Over 7 and under 14, he is presumed to be incapable but this presumption may be rebutted. Over 14 he is treated as anyone else subject of course to the statutes about juvenile offenders. It is also conclusively presumed that a male under 14 is incapable of committing rape as a principal in the first degree. (10) In Virginia insanity is a defense if (a) the accused is so insane that he cannot tell right from wrong (b) he is moved by an "irresistible impulse" which it is impossible for him to resist (dictum only). This is on the theory that he is not in such cases his own master. (11) Voluntary drunkenness is never a defense. In general it makes no difference one way or another but if the crime involves a specific intent which it is impossible for a drunkard to have he can not be guilty of the crime. Moreover a person so drunk that he does not know what he is doing, and who did not plan a murder while he was sober, could not be guilty of murder in the first degree, for the drunkenness negatives express malice. (12) In general the wrongful act and the criminal intent must occur in point of time or there is no crime. Example: I borrow with your permission your book, and later decide to steal it. There is no larceny.

Sufficiency of the Criminal Act

11. Facts about the sufficiency of the criminal act. (1) Solicitations to the more serious crimes are punishable as such. Of course, if the party so solicited...
CRIMINAL LAW (continued)

3. To constitute an attempt there must be (a) an intent to commit the very crime charged; (b) an act done in pursuance of such intent which amounts to the beginning of the consummation of the crime, but yet falls short of it. Note that bare preparation is never enough. (c) Apparent ability to commit the intended crime. Example: X threw a bundle of saws to Y who was in jail on the second floor. Y caught the saws, but seeing that he was discovered dropped them. Y is not guilty of an attempt to break jail. Had he taken the saws and started to saw even a scratch with intent to break out he would have been liable criminally. (3) If the consummated act would not be a crime there can be no criminal attempt. Example: A 13 year old boy acting alone cannot be guilty of attempted rape. Note however, that if one picks an empty pocket bag is guilty of attempted larceny although it would seem both physically and legally impossible to steal nothing. (4) Attempts: How punished. Va 18-115 provides that in cases not otherwise provided for, if the offense attempted to be committed be punishable with death and the person making the attempt shall be confined two to five years, except that attempts to commit rape shall be punishable with death or 3 years to life. If the crime attempted is punishable by confinement in the penitentiary but not by death the attempt is not a felony but a misdemeanor. At common law all attempts were misdemeanors only. (5) A conspiracy to commit an illegal act makes each of the conspirators guilty of a misdemeanor at common law. (6) A justifiable act is one committed in the performance of a legal duty or in the exercise of a legal right. Examples: (a) Chastisement of children by one in loco parentis where done without violence by a proper instrument of correction used within the bounds of reason. (b) Necessary acts done in order to prevent a felony of violence or to suppress a riot, or to effect an arrest for a felony, or in self-defense when feloniously assaulted by another. In these cases the felon may even be killed if necessary. Note that in case of arrest for misdemeanor and the accused flees it is not a justifiable act to kill him to effect an arrest, nor is it justifiable to kill to protect property only. (7) An excusable act is one which is merely excused. The accused is or was at one time regarded as justifiably to blame while in the case of a justifiable act he was never to blame. Examples: Killing one by unavoidable accident, or striking in self-defense under circumstances in which the killer was partly to blame for the altercation. See further on this point the following section.

Self Defense

12. Facts about the defense of self-defense. (1) In Virginia the burden of proving that the evidence is on the accused as all murder is presumed to be murder in the second degree and the burden is on accused to mitigate it. (2) One is justified in killing another in self-defense if the killing is apparently necessary to save his life or to protect himself from great bodily harm. (3) That one can do for himself he may do for another, and thus he may kill another even in defense of a stranger if the stranger could have killed in self-defense under the circumstances. (4) But if one brings on a conflict by his own fault and then kills in self-defense he is guilty of manslaughter, and should a third party reasonably mistake the facts, it is arguable that he would occupy no better position than the person he helped. (5) But even if he brought on the conflict himself if he withdraws therefrom and gives notice of withdrawal he is excused if he kills in self-defense, but in such cases he must "retreat to the wall" before taking his opponent's life unless retreat would expose him to greater hazard, or he is in his own house. (6) If the attack was brought on solely by another, and the accused was where he had a right to be, by one view the accused can stand his ground and need not retreat. (7) While insulting words do not justify an assault nevertheless one is guilty of bringing on a conflict who uses them; and his right to resort to self-defense would be as discussed in (5) supra.

13. Facts about parties to crime. (1) The parties to a crime are all principals in treason and misdemeanors. In felonies those actually committing the crime are principals in the first degree, those present and giving aid or encouragement are principals in the second degree. Those advising or aiding, but not present are accessories before the fact. Those aiding the criminal to escape, except a wife
are accessories after the fact, at common law. An accessory cannot be convicted unless the principal has first been convicted, or has died, or been determined an outlaw at common law. All the above parties are guilty of the crime committed and must be indicted as principal, accessory before, etc. at common law. Parties merely present and nothing to prevent the crime or to aid the criminals are not guilty of the crime committed. If they fail to report it they are guilty of misprision of felony, a misdemeanor only. (2) The common law rules about parties have been changed in three important ways in Virginia. (a) V 18-5 provides that an accessory may, whether the principal felon be convicted or not, be indicted, convicted and punished in the county or corporation in which he became accessory, or in which the principal felon might be indicted. (b) V 18-3 provides that principals in the second degree and accessories before the fact shall be punished the same as a principal in the first degree, but (and this is the change) an accessory after the fact is guilty only of a misdemeanor and punished by jail sentence of not over one year, and fine not exceeding $500. (c) V 16-4 extends the exempted class and provides that no person in the relation of husband and wife, parent or grandparent, child or grandchild, sister or brother, or consanguinity or affinity, or servant to the offender shall be deemed an accessory after the fact. (3) All parties to a crime are responsible for the natural and probable results of the crime, so if one kills the victim in an attempted robbery all are guilty of murder, but should one turn aside from the purpose of the crime for a crime of his own then the others are not responsible for the latter crime.

Assault

14. Facts about an assault. (1) Definition: An assault is an attempted battery. If a battery results, we then speak of an assault and battery. (2) Words alone never constitute an assault, but used in conjunction with acts may show the state of mind. Remember that an intent is an element of an attempt and an assault is an attempt. (3) If he is arrested, an essay in the state of the defendant's mind. Example: X shakes his fist under Y's nose and says, "If you were not an old man I would knock you down." This is not an assault. But if he had said, "Take off your hat or I will knock you down," this would be an assault for X had no right to impose such a condition. (4) If X points an unloaded gun at Y the cases are in conflict whether X is guilty of an assault. It tends to a breach of the peace as a matter of policy it should be regarded as an assault. But strictly speaking there is no intent to commit a battery and the words used are not adapted to that end.

Assault and Battery

15. Facts about assault and battery. (1) A battery is the intentional touching of another unlawfully. The touch may be very slight. The clothes, cane, and the horse upon which a person is riding are regarded as part of his person. The touching must be the result of intent or recklessness. The agency used may be a bullet, a poison given internally, an automobile, etc. (2) An assault and battery with intent to maim, disfigure, disable, or kill is made an aggravated assault and battery in Va. by V 18-70. It is divided into two sorts: (a) where maliciously done with that intent it is punished by imprisonment one to ten years. (b) Where unlawfully done with that intent (but not maliciously) it is punished by imprisonment for one to five years, or jail sentence not exceeding 12 months and fine not exceeding $500.

Mayhem

16. Facts about mayhem. Mayhem prosecutions in Virginia are all to be brought under V 18-70 in 13 supra. At common law mayhem was violently depriving another of the use of his members as may render him the less able in fighting to defend himself or annoy his adversary. Note that V 18-76 is broad enough to include maiming does for example the loss of an ear.

Kidnapping

17. Kidnapping. V 18-43. If any person seize any other person with intent to extort money he shall be punished with death, or confinement in the penitentiary.

Criminal Seduction

18. Criminal Seduction. V 18-44. If any person under promise of marriage conditional or unconditional, seduce any unmarried female of previous chaste character,
17. Facts about felonious homicide in general. This is important. Learn it. (1)Feloni-
ous homicide is divided into(a) Murder in two degrees(b) Voluntary manslaughter(c) In-
voluntary manslaughter. There were no degrees of murder at common law. (2) V.18-30-
"Murder by poison, lying in wait, imprisonment, starving, or by any wilful, deliberate,
and premeditated killing, or in the commission of, or attempt to commit arson, rape,
robbery, or burglary, is murder of the first degree. All other murder is murder of the
second degree." Murder is presumed to be, in the absence of evidence aggravating it,
of the second degree. V.18-31 provides a punishment for first degree murder of from
20 years up to death. V.18-32 provides from 5 to 20 years for second degree murder. (3) 
V.18-32 punishes voluntary manslaughter from 1 to 5 years; and V.18-34 punishes in-
voluntary manslaughter from 1 to 5 years; but for this last, jury may punish by fine
alone not exceeding $1,000, or confinement in jail not exceeding one year, or both.

Murder

20. Facts about murder(1) Death must occur within a year and a day(2) Death must be the
result of the wound or hurt done by the accused. This, of course, is true in all cases
of homicide. It has been held that where victim refuses to have arm amputated or goes
to unskillful doctor the accused is nevertheless guilty of a homicide. (3) Suicide is
probably a crime in Virginia, as if one attempted to kill himself and accidentally
killed X instead he would probably be guilty of murder. (4) One cannot be convicted of
crime on his uncorroborated extra-judicial confession. That is not enough to prove
the corps delicti i.e. the criminal act, or literally, the body of the wrong. (5)
Unless the killing was done with malice aforethought it is not murder. But malice in
this case may be implied as where one in attempting to commit some other felony kills
also. It could also be implied from extreme cruelty. Aftorethought means any time in
advance of the act itself, for a man may conceive the idea of murder and then delib-
erately carry it out in the fraction of a second. (6) V.19-158 If a mortal wound be in-
flicted by a person within this State upon one outside this State, or a person hurt
dies in another State, the offender shall be amenable to prosecution in Virginia.

Manslaughter

21. Facts about manslaughter(1) If I run over and kill A with my car accidentally it is
no crime(2) If I do it very negligently it is manslaughter(3) If I do it recklessly(i.e.
with no regard for the consequences) it is murder. (4) To murder to manslaughter
there must be such a provocation that a reasonably firm man will for the moment for-
get himself and lose control over his actions. (5) If one is actuated by a reasonably
normal man to cool down has elapsed the killing will be murder and not manslaughter.
(6) The following have been held sufficient provocations as a matter of law provided
the accused has in fact not taken advantage of the opportunity as an excuse for murder.
(a) Catching one in an act of adultery with one's wife. (b) Being illegally arrested.
(7) Words alone are never a sufficient provocation. (8) No ordinary blow from a child or
a woman would amount to sufficient provocation. (9) Killing in self defense where
accused was the aggressor would be manslaughter, unless the accused had withdrawn and
retreated to the wall.

Larceny - V.18-168

22. Facts about larceny. (1) Definition Larceny is the taking and carrying away of the
personal goods of another with a felonious intent to steal the same. Note that at
common law the property taken must be tangible personal property, there must be some
carrying away, or spoliation, there must be a technical trespass at least, both the
taking and the carrying away must be with a felonious intent to deprive the owner of
his property permanently and the intent and act must occur. (2) Virginia statutes have
changed the common law. (3) Intangible personal property, such as may be stolen. At
common law so called base animals (those not fit for food) could not be the subject of
larceny. (b) V.18-168, "Things which cover of the rock, and are at the time they are
taken, part of the fœderal, whether they be of the substance or produce thereof,
or affixed thereto, shall be deemed
goods and chattels, of which larceny may be committed, although there be no interval between the seasing and taking away. (a) Stealing from the person a thing worth $5 or more, or stealing goods worth $50 or more in grand larceny, and a felony. (b) If of less value it is a petit larceny and a misdemeanor, but a third conviction for petit larceny is a felony. (c) Stealing of horse, mule, ass, cow, steer, bull, calf, sheave, lamb, hog, or goat, is a felony regardless of value, and so is the stealing of poultry over $5 in value. (d) A partner cannot be guilty of larceny of partnership property, nor for embezzlement of it as he has as much right to its possession as any of the other partners. (5) If X snatches an ear ring off Y's ear and it comes loose and then catches in Y's hair this is larceny for there was a single moment when X had it in his control and the least separation of the whole thing stolen is sufficient. (6) A servant ordinarily has mere custody of his master's goods, and not possession, and hence the stealing of the goods would be larceny, and not embezzlement. (7) But if goods are given to a servant for the master, and not put in his master's receptacle, the servant has possession, and his stealing the goods would amount to embezzlement and not larceny. (8) Since a bailee has possession and not mere custody his taking the goods would not be a trespass, and he would be guilty of embezzlement and not larceny. Likewise with a trustee. But if the bailee took the goods with intent to steal same at the very moment they were entrusted to him, his fraud in so taking them amounts to a technical trespass. Further, if a bailee "breaks bulk" that is a trespass and in each of these cases the crime would be larceny. (9) Where property is stolen in one State and brought into another State a nice problem is raised. Virginia first decided (92 Va. 789) that since the crime was committed in the other State, Virginia had no jurisdiction. 19-194 changed this decision by statute. The theory of the statute is that there is a continuing trespass and thus all the elements of larceny exist in Virginia. (10) If X finds property, and knows the owner, and decides at once to keep it, this is larceny. If he keeps it for the purpose of returning it, and later decides to keep it this is in crime for the act and intent do not occur in point of time. Larceny distinguished from obtaining by false pretenses. In larceny the owner intends to part with possession only. In obtaining by false pretenses the owner intends to part with both title and possession. Example: A falsely tells B that C has sent him to borrow a car. B lots A take the car and A steals it. This is larceny, But if A bought a car on credit by giving false representations as to identity this would be obtaining by false pretenses. (11) It is not necessary in larceny that the taking be done for the sake of gain or "Lucrative." (12) Statutes passed on matters related to larceny: (a) 19-216 makes it a special statutory crime to interfere with gas and electric meters. (b) 19-236 provides that any person who, without the consent of the owner shall take an automobile and drive it for his own use shall be deemed guilty of a misdemeanor. Note that such a statute was necessary to protect owner from "joy-riders" who did not intend to steal the car permanently. (c) 19-180 provides that any person who draws a check with intent to defraud knowing that he has not sufficient funds is guilty of larceny. Unless made good within five days after notice the act of drawing the check shall be prima facie evidence of the fraudulent intent.

Robbery

23. Facts about robbery: (1) Robbery is larceny from the person in presence of another by means of violence or intimidation. (2) Snatching a pocket book from a lady's hand would not be robbery unless there was a struggle to retain possession. (3) Robbery is means of strangulation, suffocation, beating, or presentation of deadly weapon punishable with death or imprisonment 2 years to life. Other robbery from 5 to 10 years. (4) One cannot rob a bank or a mail truck as neither the bank or the truck owns the property. But of course one can rob a corporation.

Embezzlement

24. Facts about embezzlement: (1) Embezzlement is merely a statutory crime. These statutes were passed to plug up the hole in the law of larceny which allowed embezzling agents, servants, trustees, and bailiffs, having possession of the goods in question from criminal prosecutions. 18-171 provides that if one person wrongfully and fraudulently use, conceal, or embezzle any personal property which he shall have received for another, or by virtue of his office, trust, or employment
he shall be guilty of larceny thereof, and may be indicted as for simple larceny, but proof of embezzlement shall be sufficient to sustain the charge. On the trial of an indictment for larceny, the defendant, if he demands it, shall be entitled to a statement from the Commonwealth's attorney of what statute he intends to rely upon. Note: obtaining by false pretenses, fraudulent removal of goods that have been levied upon, receiving stolen property and drawing checks with intent to defraud are also made larceny by statute, but it is still important to know the difference between larceny and these offenses as the accused is entitled to know on which of the statute he is being prosecuted.

Obtaining by False Pretenses. V# 18-180

25. Facts about obtaining by false pretenses. (1) Those statutes were passed to extend the law of common law cheats. Under the common law a cheat was not criminal unless the party cheated had been deceived by some false token or token to deceive the general public such as false weights or measures. (2) V# 18-180 provides that if any person obtain by any false pretenses or token, from any person, with intent to defraud, money or other property which may be the subject of larceny, or if he obtain by any false pretense or token, with such intent, the signature of any person to a writing, the false making wherein would be forgery, he shall be confined from 2 to 10 years. (3) In 24 Graft (65 Va.) 563 the court gave the following analysis: four things must concur (a) there must be an intent to defraud (b) there must be an actual fraud committed (c) False pretenses (as to a present or past act) must be used for the purpose of perpetrating the fraud (d) those false pretenses must in some degree have been the cause of the defendant's obtaining.

Burglary

26. Facts about burglary. (1) Burglary is the breaking and entering of the dwelling house of another in the night time with the intention of committing a felony therein. It may be punishable with death. (2) Breaking may be actual or constructive. The mere pushing open a door that is held in place by its own weight or pushing a door partly open are probably not sufficient acts to constitute a breaking. If, being inside, without breaking, any inner door is opened, this would be a sufficient breaking. Examples of constructive breaking are entry by fraud, collusion with a servant, or through the chimney. But where two persons are equally entitled to stay in a room one breaks and enters to steal the others' money, this is not burglary. (3) The least entry of any part of the body is a sufficient entry. If one uses a stick with which to unlock a door and puts the stick through an open place, no part of the body entering, this is not a sufficient entry. (4) To be a dwelling house it is only necessary that someone usually sleeps therein. Thus a store in which the owner generally slept would be a dwelling house. (5) Note that no overt act of the felony intended to be committed need be done. (6) By V# 18-160 and 18-161 if any person in the night enter without breaking or in the daytime and enter a dwelling house or an outbuilding adjoin thereto and occupied therewith or in the nighttime enter without breaking or break and enter either in the daytime or nighttime any office, shop, storehouse, warehouse, banking house, or other house, or any ship or river craft or any railroad car, or any truck or trailer if such truck or trailer is used as a dwelling (a) with intent to commit murder, rape or robbery, or (b) with intent to commit larceny or other felony shall be deemed guilty of a statutory burglary which is a felony, (a) being punishable to a greater extent that (b). (7) V# 18-162 reads, "If any person armed with a deadly weapon shall enter any banking house (day or night) with intent to commit larceny he shall be punishable with death, or life imprisonment, or for any term not less than five years.

Arson

27. Facts about arson. (1) Common law arson consists of the burning of the dwelling house of another with a felonious intent. (a) Hence, at common law it was not arson to fire one's own house for insurance. V# 18-158 makes this a felony. (b) The test of "another" is not legal title but the right to live therein at time act is committed. (4) V# 18-150 provides that no outbuilding adjoining a dwelling house, nor under the same roof (although within the curtilage thereof) shall be deemed to be a part
26. Facts about forgery. (1) Forgery is the false making with intent to defraud, of any writing which, if genuine, might apparently be of legal efficiency. (2) Examples are
material alteration on check, signing fictitious name to check, writing on returned check "payment in full", etc. (3) "Uttering" means offering forged paper with knowledge of its character. (4) Both forgery and uttering are felonies in Virginia. (5) If one
forges U.S. Money this is a crime against both the State and the U.S. Note however, that
\[\text{Equity}\] provides that if the same act be a violation of two or more statutes, or of
two or more municipal ordinances, or one or more ordinary and one or more statutes,
or a violation of both a State and Federal statute, a prosecution under one shall be
bar to another prosecution so far as Virginia is concerned.

29. Facts about Perjury. (1) \(18-237\) provides that if any person, to whom an oath is
lawfully administered on any occasion, wilfully and falsely on such occasion
swearing to any material matter, or if a person falsely make oath that any other person is
21 years of age, in order to obtain a marriage license for such other person, he
shall be deemed guilty of perjury. This is a felony.

Seduction. It is immaterial that the promise to marry is conditional.

2. Jones and Smith engage in a public prize fight in a State where prize fighting is
unlawful and a misdemeanor. In the course of fighting, Jones breaks Smith's ear off.
What offense is Jones guilty of?

This would not be common law murder, because the answer lost is not a victim who does
not disable one from fighting. And since prize fighting is not the act to which a breach of
the peace is made against only the intent to break the statute would not be
carried over to provide the intent to main. In Virginia under \(18-70\) this would be
a case of unlawful but not maliciously wounding another and a felony.

3. A decides to kill his wife. An evening approaches, he unintentionally becomes
thoroughly intoxicated, mistakes C, B's brother, for B and kills him. Of what
homicide is A guilty?

This is murder degree. Drunkenness would indicate that he did not have express malice towards the party killed.
On the other hand the murder was planned deliberately, and A was so drunk as
to not know what he was about. While the statute does not expressly say that a
killing of one while attempting to kill another is murder in the first degree some
decisions in other States with similar statutes have so held.

4. A makes an assault upon C in the public highway in the presence of B. The latter
says nothing and does nothing either by way of encouraging the assault or stopping
it. Is C guilty of any offense?

No. Here presence at the scene of a crime is not itself a crime. If A is guilty of
a felony and C does not report it he is guilty of a common law misdemeanor known as
perjury.

What constitutes the crime of charmparty in Virginia?

Charmparty is a crime of law crime. It consists of an obvious interference with the
affairs of others in which one has neither a moral nor legal interest by aiding such
others to prosecute laws suits the proceeds of such suits to be divided. It is this
division of the proceeds that distinguishes it from manslaughter. An agree-
ment by one not morally or legally interested to stand all risks of the suit in return for a portion of the recovery would be champertous, but contingent fees, where an attorney does not agree to stand costs in case of loss are not champertous per se.

Self-Defense

A. A insults B in a public place. B goes to his home, secures a cowhide, returns and attacks A with it. Thereupon A seizes a heavy iron bar and strikes B on the head killing him. Of what crime, if any, is A guilty and reason?

While it is true that A brought on the quarrel and ordinarily one who brings on a quarrel cannot escape criminal liability if he later kills his adversary in self-defense, here A withdrew from the quarrel, i.e. pressed it no further after A and B separated. In such a case the one who withdraws has the right of self-defense and A’s act was at least excusable even if not justifiable. So A is not guilty of any crime. This answer assumes(a) that B was able to inflict great bodily harm on A with a cowhide(b) that A retreated "to the wall". If either of these factors were lacking then A would be guilty of voluntary manslaughter, or, if he acted with malice aforethought and not under the sting of the lashes, of murder.

Self-Defense

C, who is on bad terms with her husband and living apart from him, but not divorced, in a fit of anger at a remark he is reported to have made derogatory to her character, deliberately sets fire to and burns a vacant house belonging to him, which is uninsured. Is she liable criminally, and reason?

C, is guilty of a statutory felony under V#18.1-80. This is not common law arson (1) because the house was vacant and hence not the dwelling house of another (2) because husband and wife were regarded as one in a case of this sort at common law. The statute creates an offense as to (1) and the emancipation of married women changes (2).

Self-Defense — defense of another

A man gets into a row with a gang of laborers, owing to insulting language used by him to them, and they attack him. His son, fifteen years old, seeing him surrounded and in imminent danger of life, picks up a gun and shoots and kills one of them. Can H (the son) be held criminally?

Yes. The son is in no better position than the father and hence is guilty of manslaughter, the crime with which his father would have been guilty had he killed in self-defense after having been partly to blame for the attack. Answer ignores juvenile court statutes.

Accessory after the fact

Jones commits murder. He flees to his daughter’s house and hides. She lends him her dress by which he deceives the officers guarding the house and escapes. What crime, if any, does she commit?

None. See 13(2)(c). At common law the daughter would have been guilty of murder as an accessory after the fact.

Adultery and Fornication

Are adultery and fornication common law or statutory offenses? Statutory since these were punished only by the Ecclesiastical courts and that portion of English Jurisprudence was never adaptable to American conditions and hence never a part of our common law.

Trespass to Realty

Is trespass to realty a crime? An ordinary trespass is not criminal at common law. By V#18.1-173 it is a misdemeanor to go upon or remain upon the lands of another after having been forbidden to do so.

Implied Malice

Upon a trial for murder it was alleged and shown that the killing resulted from an attempt to commit robbery. The attorney for the prisoner requested the court to instruct the jury that the burden was upon the Commonwealth to establish a wifflful, deliberate and premeditated design to take the life of the deceased. The court refused to so instruct; was this error? Give reason for answer.

No. As applied to the facts of the case the instruction is too narrow. It would exclude the idea of implied malice, implied from the attempt to commit the
14. Charles Jackson went upon the premises of George Ratliff for the purpose of cutting off his water supply, which he had the legal right to do. While in the performance of this lawful act, he is assaulted, without provocation, by Ratliff. What degree of force did Jackson have the right to use in repelling the assault, and state whether or not Jackson was compelled to retreat before using such force?

In 96 Va.107 the Court held it was reversible error to refuse the following correct instruction, "If you believe from the evidence that the defendant was lawfully cutting off the water of Ratliff, and that said defendant reasonably apprehended that said Ratliff would do him bodily harm, then you are instructed that the defendant had the right to repel such assault by all the force he deemed necessary, and that he was not compelled to retreat from said Ratliff but might, in his turn, become the assailant, inflicting bodily wounds until his person was out of danger." The Virginia view is that if one is where he has a right to be and was not to blame for bringing on the conflict he need not retreat when attacked but may stand his ground as above stated. Note well the distinction between justifiable self defense and excusable self defense as to where one is to blame in bringing on the conflict.

15. A thiefs pocket from the pocket of Jones a watch valued at $7.00. Of what offense is he guilty? Grand larceny, since it is $5 or over and from the person.
16. A solicits and advises B to kill C, but by mistake he kills D. Is A guilty of any crime?

Yes. The solicitation of any serious crime is in and of itself a common law misdemeanor. Whether or not A is a party to the crime is doubtful. If the mistake was one that naturally might be made A would be an accessory before the fact. The test is "Did the principal commit the felony he stood and charged with under the influence of the flagitious advice, and was the event, in the ordinary course of things a probable consequence of the felony?" 16 C.J.125, note 37(b).

17. A makes an assault on B, which is returned. In the course of the encounter B procures a large stone, and when in the act of throwing the stone at A, is shot and killed by C, a brother of A. C is indicted and endeavors to defend on the ground of his brother's peril. How far will the defense avail him, if at all?

It will reduce the homicide to manslaughter. The right of a person defending the aggressor is at least the same as that of the aggressor. If the aggressor here had killed in order to save his own life it would have been manslaughter.

18. A is indicted for selling grape wine without a license, contrary to the statute. He defends on the ground that he made the wine from grapes grown by himself, that he did not know that it was violation of law, and thought that he had the right to sell wine of his own make. Is the defense good? No. See 10(6) of summary of criminal law.

19. During treason against the U.S., and state the degree of proof necessary to convict? Article III, Section 3-1 of the U.S. Constitution, "Treason against the U.S. shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of the witnesses to the same overt act, or on confession in open court."

20. A counterfeit national bank note is knowingly put into circulation by an individual. Is the act a crime against the State or the United States?

Both. It is a crime against the law uttering and thus a crime against Virginia, and also a
21. Define manslaughter, voluntary and involuntary.
Manslaughter is unlawful homicide without malice aforethought, express or implied. It is voluntary as when done on purpose as when the aggressor in a fight slays his antagonist to save his own life, or one kills his wife or her paramour when caught in adultery. It is involuntary when not intended as where one negligently runs over a child.

22. Upon what tribunals is conferred original jurisdiction, and of what grades of crimes has each jurisdiction?
Jurisdiction over felonies is in the circuit or corporation courts of the county or city. Trial justices have only the right to grant a preliminary hearing in case of a felony, fix bail, and to determine whether or not one shall be held awaiting the action of the grand jury. Trial justices have jurisdiction over misdemeanor cases with a right of appeal to the circuit or corporation court of the county or city. See V. 16-6; 16-7; 16-8; 16-10; 16-12.

23. By whom can the writ of habeas corpus be issued; when is it returnable and for what purpose is it used?
The writ of habeas corpus can be issued by any circuit court or corporation court, or any judge of either in vacation, to any person who shall apply for the same by petition, showing by affidavit or other evidence probable cause to believe that he is detained without lawful authority. Section 38 of the State constitution also gives the Supreme Court of Appeals original jurisdiction in habeas corpus. W.5849 provides that the writ shall be directed to the person in whose custody the petitioner is detained, and made returnable as soon as may be before the court or judge ordering the same. It is used to gain one's freedom from unlawful custody.

24. What is the corpus delicti?
By corpus delicti is meant the "body of the crime." It is usually used in connection with murder cases in the sense that the dead body of deceased must be accounted for, or otherwise there is no proof of any crime having been committed.

25. Under what circumstances may a party who has engaged in a mutual combat be excused for taking the life of the other upon the ground of self-defense?
When he has withdrawn in good faith and retreated to the wall and his opponent has notice of the withdrawal and the killing is apparently necessary to save his life or to prevent great bodily harm.
"Present During the Trial"

CRIMINAL PROCEDURE

1. A is on trial for murder. During the course of the trial, and without the knowledge or consent of the court, or any one else, A manages to leave the court room for a few minutes, but later returns. After his return, the jury renders a verdict against him, and he thereupon makes a motion for a new trial on the ground that he was not present during the hole trial. Should the court sustain the motion?

Yes. VI: 21 provides "A person tried for felony shall be personally present during the trial. But for the purpose of this section, a motion for a continuance, whether made before or after arraignment, shall not be deemed to be part of the trial." This provision is mandatory and cannot be waived.

19. At what stages of the trial, if any, in felonies and misdemeanors respectively, is the presence of the accused necessary? When his presence is necessary, how must it be established?

Not necessary in misdemeanors. By the record, and that alone. (99 Va. 316).

24. A defendant to an indictment, the demurrer is sustained, and he is discharged. He is subsequently re-indicted on the same charge. Can he plead once in jeopardy?

In order to make the defense of former jeopardy with success, the party relying thereon must show that he has been put upon trial before a court which had jurisdiction, upon indictment or information which is sufficient in form and substance to sustain a conviction, and that a jury has been impaneled and sworn. Anything short of this, is insufficient to raise a bar against a new prosecution for the same offense. (91 Va. 718, 822.) If the demurrer were sustained the party has never been in jeopardy for an offense for the court decided that the indictment did not state an offense. See also 0.63, supra in common law pleading.

1. On an indictment for malicious cutting and wounding with intent to maim, disfigure, disable and kill, the jury finds defendant guilty of assault and battery. Defendant moves to set aside the verdict on the ground that he was not charged with assault and battery. Should the motion prevail, and why?

No. VI: 220 reads, "If a person indicted for felony be by the jury acquitted of part and convicted of part of the offense charged, he shall be sentenced for such part as he is so convicted of, if the same be substantially charged in the indictment, whether it be felony or misdemeanor. If the verdict be set aside and a new trial granted the accused, he shall not be tried for any higher offense than that of which he was convicted on the last trial."

62. A seriously wounds B with a pistol. He is arrested and carried before a justice of the peace, by whom he is tried, and fined for assault and battery. Thereafter he is indicted by the grand jury for assault with intent to kill. He pleads guilty, is convicted, and proves the sentence already imposed by the justice of the peace. What judgment should be entered upon this plea?

It should be ordered stricken. Since a J.P. has no jurisdiction to try a felony there has been no conviction on a charge of felony.

55. State the rule as to what should be charged in an indictment for a criminal offense. An indictment is divided into three parts: (1) the accusation which states the venue and the fact that the grand jurors have presented the indictment upon their oaths; (2) the statement which includes the name of defendant and every element of the offense; and (3) the conclusion "against the peace and dignity of the Commonwealth." The indictment must state the offense with sufficient certainty: (1) to enable the court to say that, if the facts stated are true, an offense had been committed by the defendant; (2) to enable the court to know what instructions to give the jury with respect to punishment; (3) to enable the court to confine the proof to the offense charged, so that the defendant may not be accused of one offense and convicted of another; (4) to give the defendant reasonable notice of the particular charge he will be called upon to answer, and enable him to properly prepare his defense; (5) to make it appear on the record of what particular offense the defendant was charged, for the purpose of review, case of conviction; (6) to identify the offense that an acquittal or conviction may be pleaded in bar of a subsequent prosecution for the same offense. See Clark's Criminal Procedure, 153 et seq.
CRIMINAL Procedure (cont.)

104. Is a jury obtained and empanelled for the trial of a felony case?

Va.9-171 et seq. provide that 20 names free from exception shall be drawn from a list on a panel furnished by the clerk, the drawing to take place before the judge, or commissioner and a citizen or two disinterested citizens. The jury so summoned may be used for the trial of all the cases which may be tried at that term, both felonies and misdemeanors. If one panel of 20 is not enough the judge may order additional names drawn. In every case of felony, each side shall be allowed four peremptory challenges. This is done by each side alternately striking off names until the number is reduced from 20 to 12. If not enough qualified jurors can be conveniently found in one county, additional ones can be summoned from another county. Note 1—Who liable to serve as jurors. Va.9-174. All citizens over 21 years of age, who have been residents of this state two years, and of the county, city, or town in which they reside one year. No officer, soldier, or seaman shall be considered a resident merely because stationed in Virginia. Inmates of any charitable institution, idiots and lunatics, and persons convicted of bribery, perjury, embezzlement of public funds, treason, felony, or petty larceny are disqualified. Service by a citizen over 60 years of age is optional. The list of those exempted from jury service is long. Here are a few: practicing attorneys, physicians, pharmacists, telegraph and telephone operators, pilots, those employed in the conveyance of the mails, professors, tutors, students, etc. See Va.9-178 for complete list. Note 2—Waiver of a jury trial. Va.Const.9-5. "In criminal cases—
if the accused plead not guilty, with his consent and the concurrence of the Commonwealth's attorney and of the court entered of record, he may be tried by a smaller number of jurors, or waive a jury. In case of such waiver, or pleas of guilty, the court shall try the case." 105. A is indicted for attempting rape on B. In the same indictment there is a second count charging A with an assault or battery. In the trial sexual intercourse between A and B at the time of the alleged offenses is sworn to by B and admitted by A. The jury brings in a verdict of not guilty of rape as charged in the first count of the indictment, and not guilty of an attempt to rape as charged in the second count of the indictment, but guilty of a simple assault and assesses the fine at $10.00. On motion for a new trial can this verdict stand and judgment be entered upon it?

Yes. See 6 Supra. Suppose a jury found A to be under 14 years of age. An indictment for rape includes a charge of assault.

106. The record of conviction in a criminal case disclosed the fact that the accused had no counsel representing him at the trial. State whether or not this would be sufficient grounds for reversal of the proceedings in the trial court, and to entitle the accused to a new trial?

If the accused is sui juris he may waive counsel. 15 C.J.221 A waiver will be implied where accused, being without counsel, fails to demand that counsel be assigned him. In order to constitute error, there must be a request for and a denial of counsel. The denial will not be presumed. 92 Va.794.

107. In a criminal prosecution the Commonwealth neglects to prove that the crime occurred in the county laid in the indictment. The accused is convicted and takes case to Court of Appeals on refusal of lower court to set aside as contrary to law and evidence. On what basis can this be reversed? And what will be result on appeal? Failure on the part of the Commonwealth to prove the venue by a preponderance of the evidence where the point is reasonably raised is ground for a new trial. See 106.C.J.530,767,1121. If accused goes up on appeal he waives his right to plead former jeopardy. By 19-22 the appellate court may set aside the verdict, reverses the cause, and direct a new trial.

Statutory Provisions worth Noting: 19-223 The accused may take the stand, but if he does so he may be cross-examined as any other witness. 19-263 The punishment in all criminal cases tried by a jury shall be ascertained by the jury trying the same within the limits prescribed by law. 19-31: "Every search warrant shall be directed to the sheriff, sergeant, policemen or constable of the county or corporation in which the place to be searched is, and shall name him to search the place
V/19-33 Search without warrant is a misdemeanor, except that an officer empowered to enforce the game laws may without a search warrant enter for purposes of police inspection any freight yard, or room in passenger depot, warehouse, train, boat. V/19-122 et seq. There shall be a regular grand jury at one term in each year, and special grand juries whenever ordered. The judges shall annually select from the citizens of each county 60 persons 21 years of age or over, of honesty, intelligence, and good demeanor. For each regular session of the grand jury, the sheriff shall summon not less than 5 nor more than 7. A grand jury shall consist of not less than 5 nor more than 7. V/19-132 At least 4 of a regular or special grand jury must concur in finding or making a presentment or indictment. V/19-136 Prosecution for felony must be by indictment or presentment unless waived in writing. Note that this is not a constitutional requirement. If the grand jury present of their own knowledge, it is a presentment only; but, if they act on the knowledge of others, it is an indictment. Misdemeanors may be by information. 9 M.J.646. V/19-116 No indictment or other accusation shall be quashed or deemed invalid for omitting to set forth that it is upon the oath of the jurors -- or for omitting to state, or stating imperfectly, the time at which the offense was committed, when time is not the essence of the offense; or for failure to allege the kind or value of an instrument which cause death--. Nor shall it be abated for any misnomer of the accused but the court may allow it to be amended to correct the misnomer. V/19-137 A person in jail on a criminal charge shall be discharged from imprisonment if a presentment, indictment, or information be not found against him before the end of the second term of court at which he is held to answer. V/19-165 provides that every person against whom an indictment is found charging a felony, whether he be in custody or not shall be forever discharged from prosecution for the offense if there be 3 regular terms of the circuit or 4 of the corporation courts in which the case is pending after he is so held without a trial unless the failure to try him was caused by his insanity or by the witnesses for the Commonwealth being enticed or kept away or prevented from testifying by sickness or inevitable accident, or by continuance or separate trial granted on motion of the accused, or escape, or by failure of jury to agree. V/19-168 "In any case of felony the jury shall not be kept together unless the court otherwise directs". V/19-215 Defendant may plead as many several matters, whether of law or fact, as he shall think necessary, and he may file pleas in bar at the same time with pleas in abatement, but the issues on the pleas in abatement shall be first tried. V/19-196 Provides for change of venue for good cause shown. This motion may be made in the absence of the accused. V/19-255 A writ of error lies in any case for the accused, and if the case be for the violation of law relating to the State revenue, it shall lie also for the Commonwealth. V/19-72. A copy of a warrant sworn out by an officer or individual except in case of motor vehicle traffic violations must be left with the accused. This statute does not apply to indictments. It was held in Va. 33 that while it is the duty of the arresting officer to comply with this section, his failure to do so does not constitute reversible error unless it affirmatively appears that defendant was prejudiced thereby.
C, a young man of good reputation, but with a fondness for drink, fell in with S, a known criminal, and T.

After exhausting all their money for drink, S produced a sawed-off shotgun, held up a car, ordered C and T to get in the back seat, drove the car to a bootlegger's place, took some money from the owner of the car, and all three drank the liquor obtained with the money. C did not threaten the owner. C kept still all the time. C was afraid of S. C was convicted of robbery and sentenced to 8 years.

Held: It was a jury question under the facts of this case whether C had a criminal intent, or was just present as a result of his fear of S. "A verdict will not be set aside merely because the court might, if on the jury, have rendered a different verdict."

To warrant a conviction of the offense of receiving stolen property four things must be proved. What are they?
1. That goods were previously stolen by some other person.
2. That accused bought or received them from another person, or aided in concealing them.
3. Accused at such a time knew they had been stolen.
4. Dishonest intent.

Accused was indicted for conspiring with others to rob a certain U.S. mail truck. No objection was made to the indictment in the trial court. Should the Supreme Court of Appeals of its own motion reverse the case?

Held: Yes. One judge dissenting.

There is no such thing as robbing a mail truck. One cannot rob an inanimate object. There is no such thing as statutory robbery in Virginia.

Where the indictment states no crime at all the Supreme Court of Appeals on its own motion should reverse the case, though no motion in arrest of judgment was made in the lower court.

What is the Virginia law on the matter of entrapment?
(a) If an officer, for the sake of reward, or revenge, induces a citizen to commit a crime, then the offender is absolved. (b) But where the doing of a particular act is a crime regardless of the consent of anyone, the courts are agreed that if the criminal intent originates in the mind of the accused, and the criminal offense is completed, the fact that an opportunity is furnished, or the accused is aided in the commission of the crime in order to secure the evidence necessary to prosecute him therefore, constitutes no defense. In such a case the purpose of the detective is not to solicit the commission of the offense, but to ascertain if the defendant is engaged in an unlawful business.

Trial for D for attempted robbery. D asked the court to instruct the jury "that if they believe from the evidence that the driver, Morris, parted with possession of the truck and its contents willingly and in accordance with a previous plan to which he was a party and not because of any force exercised by D, and not because he was put in fear by D, then they must find D not guilty of an attempt to commit robbery." Is this a good instruction?

Yes, for if the driver of the truck voluntarily surrendered possession one of the elements of robbery is lacking. (Definition of robbery: Robbery is the felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence or putting him in fear.)
Objection was made to the following instruction:

"The court instructs the jury that a mortal wound given with a deadly weapon in the previous possession of the slayer, without any, or very slight provocation is prima facie willful, deliberate and premeditated killing, and causes upon the prisoner the necessity of showing extenuating circumstances." What ruling—Objection overruled.

This is a stock instruction many times given and approved.

The qualifying clause at the end tells the jury clearly that this prima facie presumption might be overcome by proof of extenuating circumstances.

CRIMINAL LAW

What are the three types of infamous crimes at common law? 
Treason, felony and the crime of false.
It is the crime and not the punishment that renders a crime infamous.

CRIMINAL LAW

Three negroes were in a car. There was also a 5-gallon jug of corn liquor in the same car. Two of the negroes fled when officers ordered the car to stop. One was caught. Can he be convicted of transporting intoxicating liquors on the basis of facts stated? 
No. More presence at the scene of a crime is not a crime. The additional fact that the occupant of an automobile in which intoxicating liquor is being illegally transported, fled on the approach of officers, is not sufficient to establish the crime charged beyond a reasonable doubt.

CRIMINAL LAW

An officer charged with enforcing the AIC law reached Bedford, he asked a colored boy where a man could get a drink of whiskey in those parts. The boy obligingly took him to D's house where the officer purchased two drinks and a pint of illegal liquor. It is a misdemeanor in Virginia to buy illegal liquor.

Question: Can B be convicted? Must the officer be corroborated? 
Since the officer has no more urge D to commit a crime than any other person who might ask to purchase liquor the defense of entrapment is not available. There is no other practical way to detect such crime.

The officer in such a case is not a real accomplice but only a "feigned accomplice." Hence the rule that the evidence of an accomplice must be received with great caution has no application.

CRIMINAL LAW

X while driving while drunk ran into Y who was on the sidewalk. The impact broke Y's leg and knocked him out for a few minutes. On the next day Y seemed to be resting easily and enjoyed his breakfast and dinner. Later on the second day he had a sudden attack of acute pulmonary edema. Perfectly well people sometimes have this disease.

Q.1. Can X be convicted of manslaughter?
Q.2. What are the two elements of the corpus delicti?
X cannot be convicted because the Commonwealth has not proved the corpus delicti which consists of two components in homicide cases:
(1) Death as the result of
(2) The criminal agency of the other as the means.

CRIMINAL LAW

A's failure to testify cannot be commented 

Accused was clearly proved guilty. He offered no evidence but did not take the stand in his own behalf. The Commonwealth's attorney in his closing argument pointed to the accused and said, "The defendant has not denied what our witnesses said." Counsel for accused then asked for a mistrial, but the court refused to declare a mistrial. It did, however, immediately orally instruct the jury that defendant was
not required to take the stand nor introduce any evidence, and the Defendant's failure to take the stand could not be taken against him or held to prejudice his case. The trial then proceeded and Defendant was found guilty.

What result in Supreme Court of Appeals?

 Held: Reversed and remanded. Court should not disregard the plain mandate of Code §238 that Defendant's failure to testify cannot be commented upon. The error is prejudicial when in clear violation of his rights. The chief concern of the appellate court is not to sit as jury and determine the guilt or innocence of an accused, but its chief concern is to ascertain whether or not an accused has been accorded a fair and impartial trial according to law.

Three judges dissented on ground Defendant was clearly guilty and error was not prejudicial.

CRIMINAL LAW

An officer attempted to arrest two Negroes, A and B, who were too boisterous in the early morning hours. The Negroes were brothers. A ran. B and the officer started to fight. A heard the officer shout whereupon A decided his brother might need help; so he bravely returned to the fray, wrested the officer's gun from his hand; and threw it into a body of water nearby. A was convicted of robbery. Is the conviction valid?

Held: No. There was no specific intent to rob. His only intent was to protect his brother. Guilty of assault and battery or interfering with an officer in the performance of his duty.

CRIMINAL LAW

1. S.E. 2d 300.

Arson

An officer attempted to arrest two Negroes, A and B, who were too boisterous in the early morning hours. The Negroes were brothers. A ran. B and the officer started to fight. A heard the officer shout whereupon A decided his brother might need help; so he bravely returned to the fray, wrested the officer's gun from his hand, and threw it into a body of water nearby. A was convicted of robbery. Is the conviction valid?

Held: No. There was no specific intent to rob. His only intent was to protect his brother. Guilty of assault and battery or interfering with an officer in the performance of his duty.

CRIMINAL LAW

1 S.E.2d 323.

1. If a landlord burns his own house which is occupied by his tenant, is the landlord guilty of arson at common law? Yes, it is the possession that counts since arson is a crime against the habitation, and the rented house is the habitation of the tenant.

2. If the husband lives in his wife's house, and the husband burns it, is he guilty of arson at common law? No. If the two are living together it is the husband's habitation not because of property rights therein, but because of right of access to his wife growing out of the marital relationship.

3. Note well that by statute in Va. 1938, C154, p. 215 the common law has been changed, and it is statutory arson to burn one's own house with a fraudulent intent.

4. In the instant case the property was worth $2,500, was mortgaged to the extent of $2,200, was insured to protect mortgagee to extent of $2,500. Accused also owed $900 for a heating system he had installed. Two colored boys testified accused gave them $50 to burn the building. Held: This evidence is too incredible to believe and verdict of guilty should be set aside.

CRIMINAL LAW

5 S.E.2d 491.

Attempted Rape

D, a 22 year old man, induced a seven year old girl to accompany him into some woods several hundred feet from the highway, under promise of giving her some candy. He then suggested sexual intercourse and started to unbutton the girl's snowsuit. She said "Leave me alone." He then left the girl. D was convicted of attempted rape. Should the court set the verdict aside?

Held: Yes, at most D was guilty of assault and battery. Certainly there was no overt act which reached far enough to amount to the "commisscement of the consummation" nor did extraneous circumstances only frustrate his evil designs. (There was still a locus penitentiæ and it is to his credit that he took advantage of it).

CRIMINAL LAW

6 S.E.2d 647.

Murder

D, a deputy sheriff, shot and killed one Hamilton who had very probably shot at D and who very probably was operating a still in the mountains. E and F were with D.

A jury sentenced D to 20 years. Instruction #11 was as follows: The court instructs the jury that if they believe from the evidence beyond a reasonable doubt
that D killed Hamilton, or that if B or F killed him, and that D was present aiding, abetting, counseling and consensuring to said crime, and that such killing was willful and premeditated, you should find D guilty of murder in the first degree and fix his punishment, etc. Is this instruction correct?

 Held: No. (One judge dissenting) Objection one is that it tells the jury that D is guilty of murder even though the killing of Hamilton was warranted by law and in pursuance of D's authorized duty as a law enforcing officer. Objection two is that it fails to draw a distinction between concert of action and simultaneous action.

CRIMINAL LAW—Arson
Evidence only that a fire was incendiary, that the defendant had an opportunity to commit the crime, and that he cherished ill feelings toward the owner of the property destroyed, does not warrant a conviction.

While circumstantial evidence may be strong enough to support a conviction for arson, it must conclusively prove (1) the fact that the crime has been perpetrated, and (2) that the accused is the guilty party.

CRIMINAL LAW—Burglary
What is the argument that an unmarried man cannot be guilty of bigamy in Virginia? Is the argument valid?

Bigamy is not a common law offense but one punished by the ecclesiastical courts. Hence we must examine the statute. There is not one word in the statute that makes the competent party (the unmarried party) guilty of the crime of bigamy. If he can't be guilty of the crime of bigamy as a principal in the first degree how can he be guilty as a principal in the second degree?

Held: Argument not valid. Once the statute makes a crime a felony then common law principles about felonies apply, and at common-law one present and aiding in the commission of a felony is a principal in the second degree, and statutes are interpreted with reference to the common law.

Hence a husband can be guilty of the rape of his wife as a principal in the second degree and a 13 year-old boy can be guilty of rape as a principal in the second degree.

Exceptions to rule: (1) There statute is passed for protection of a class, a member of the class not guilty as the girl in statutory rape cases (2) Where the statute could not be enforced unless aider can testify (as in liquor purchase cases where only seller is guilty).

CRIMINAL LAW—Statute allows evidence of prior conviction
D was tried for violation of the ABC Law Code 4-31, as follows: "In any indictment—charging any person with having violated any provision of this act, it may be alleged, and evidence may thereafter be introduced at the trial of such person, to prove that such person has been previously convicted of a violation of this act."

Such evidence was admitted. D's attorney asked for the following instruction, "The fact that D has been heretofore convicted of a similar offense is not proof that he is guilty of the offense here charged and such fact should not be considered in reaching a conclusion as to his guilt or innocence on the present charge."

The Court refused to give the instruction. Was this error?

Held: Yes. Otherwise it would be like trying a man with a rope about his neck. A man may have repented and reformed and conviction in the past would be no substantive evidence that he was now guilty. In the case of reputation evidence a man's reputation may change for the better but a past conviction never changes. Therefore this is a penal statute any ambiguity should be resolved in favor of accused. So the court interpreted the statute to mean that the jury could use such evidence solely for the purpose of fixing the punishment after the accused had been found guilty on other evidence.

CRIMINAL LAW—Manslaughter
X knocked Y down three times whenupon Y drew a pistol and killed X. Y was convicted of murder in the second degree and sentenced to 15 years in the penitentiary.
CRIHil"JAL LAH

v "ore tho

C H I HINAL LAH

t !·,e Dresumption

C H IHINAL LAH

tho

t !·,e re

argwncnts

C H IHINAL

in this cas e ,
tended .

judge refl .,red

or its absence, is

is evidence that illegal liquor belonged to wife who was in reality the one who

for the pants in the family conviction of husband must be set aside.

CR1NAL LAW

Presence of liquor upon the premises of an occupant is not sufficient to overcome

of liquor upon the premises of an occupant is not sufficient to overcome

the presumption of innocence. It is merely some circumstantial evidence, and where

there is evidence that illegal liquor belonged to wife who was in reality the one who

CR1NAL LAW

Upon conflicting evidence the jury found D guilty of statutory rape. They gave him

the minimum penalty and recommended to the court that the sentence be suspended. The

judge refused to suspend sentence. Discuss.

The jury cannot convict and acquit at the same time. It is not within its province
to recommend mercy or a suspended sentence, and any such recommendation is no part
of the verdict.

Hence it is not an abuse of discretion for the judge to ignore the recommendation.

CR1NAL LAW

(1) A man may be convicted of murder without proving any motive for the crime. Motive,
or its absence, is not proof of a substantive fact, although the presumption of

CR1NAL LAW

F offered M $6 per week for "protection". M was a constable. No money was paid or

tendered. Is this a felony, a misdemeanor, or no crime at all?

If a crime, is it bribery or attempted bribery?

Held: It is the felony of bribery. Our statute (V.15-240) prohibits three specific
acts: 1. The giving of a bribe

2. The offer of a bribe

3. The promise of a bribe

Hence we have here the completed offense under our code.

CR1NAL LAW

Little Abner, aged 11, and his mother aged 40, both illiterate mountaineers were on
bad terms with their neighbor, Scraggs. While Abner and his mother were out looking
for a horse that had strayed away they saw Scraggs building a fence. They told Scraggs
to get off their land, but instead Scraggs ran after the horse and threw rocks at
her, and called her vile names. Now there were lots of snakes in the mountains so
Abner carried a shot-gun, and he shot Scraggs and killed him. After it was all over
the mother praised Abner and still later denied all knowledge of the shooting. The
jury found her guilty of 2nd degree murder.

Held: Reversed. More presence at the scene of the crime and approval of the crime
are not enough to make one an aider and abettor. There must be some overt act. If the
mother never conspired to kill Scraggs, nor told Abner to do so, she is guilty of no

CR1NAL LAW

D let T drive his car while T was drunk. She ran over A and killed him. The jury
caused D to wake up. She then ran over B and killed him, and later ran over C

2004.
and killed him. She did not stop the car until she reached her house. Then D drove the car to his house. Is D guilty of the felony of hit and run driving?

Held: Yes, as a principal in the second degree. While mere presence at the scene of the crime is not a crime, here D had control of the car and was under a duty to exercise such control and do what he could to stop the car and comply with the statute. Failure to do this was itself a violation of the hit and run law(p.36).

CRIMINAL LAW - Parties to a Crime in Misdemeanors

In misdemeanor cases and in trespass, all persons present who encourage the wrong in any way, are punishable as principals. Thus it is not necessary to draw the distinctions that are drawn in felony cases. Also persons who advise or urge the commission of a misdemeanor or trespass which is committed are liable as principals.

Thus where X and Y were on P's property as trespassers and X told Y to fire a salute and Y shot into P's door injuring him, X was held liable in an action of trespass notwithstanding the fact that X reasonably supposed Y would not be fool enough to shoot through P's door. See 33 Gafran 136.

CRIMINAL LAW - Larceny

D took Dr. G's car without his permission intending to drive it to Bluefield and there to abandon it. Is this larceny, or only the statutory misdemeanor (4480 and 46-8) of unauthorized use of a motor vehicle?

Held: Larceny for there was no intent to return it. As far as D was concerned he didn't care whether Dr. G ever got his car back.

CRIMINAL LAW - Operating picture Shows on Sunday

D kept his show open on Sunday, not proceeds to go to charity. He was arrested and convicted of violating 179 Va.264 which makes it a criminal offense to work at one's calling on Sunday or to allow one's employees to do so except in cases of necessity or charity. The Supreme Court of Appeals split 3-1-3 as follows:

The opinion adopted by the court reversed the conviction on the ground that D was engaged in a work of charity, since the net proceeds went to charity. The work done was a mere incident of the charity.

Chief Justice Campbell dissented. To be a work of charity the work itself must be charitable. Three judges concurred, but stated that this was a work of necessity, an elastic term meaning different things in different places and at different times. "Due to the complexity of our present day civilization and the strain under which we now live and work, relaxation and recreation are just as much necessities as our food and drink. The mind and body cannot be kept in condition without food. Neither can they be kept fit without relaxation and recreation."

CRIMINAL LAW - Burden of proving malice

D shot and killed his wife when he found her at a soft drink stand with another man. Is the burden of proving malice on the Commonwealth, or is the burden of proving no malice on D?

Held: In Virginia every homicide is presumed to be murder in the second degree. Malice is inferred from the killing. Hence the burden of mitigating the crime, that is, of proving that there was no malice is on the defendant.

CRIMINAL LAW - Drunkenness

D came home drunk and shot his wife through the heart. After he sobered up he said his mind was a blank and it must have been an accident. What affect, if any, has his drunkenness? It can be taken into consideration by the jury in determining whether or not it was first or second degree murder. It can never reduce murder to manslaughter, or to an "accident". Society cannot afford to let a man who voluntarily becomes drunk to stand in a much better position than a sober man. But where actual malice or some specific intent is required as an element of the crime, drunkenness may negative the existence of such element.
D was in his automobile near the C&O tracks on Garrett St. in Charlottesville after dark. Police officers thought he was acting peculiarly, and attempted to arrest him, but he got away temporarily. The officers commandeered a car and soon found D's car parked in front of his mother's house. On the front seat of the car were 20 tie-plates such as are used by railway companies.

D was prosecuted for larceny. Representatives of the C&O testified that they looked like tie-plates that workers had received from the C&O tracks. On this evidence D was sentenced to six months in jail.

 Held: Reversible error. There was no proof of the corpus delicti. No one unequivocally testified that the tie-plates were the property of the C&O, or even that the C&O had missed any tie-plates. To the argument that D did not raise any objection on this score in the trial court, the Supreme Court of Appeals simply stated that D owed no duty to the prosecution to assist in proving that a crime had been committed.

CRIMINAL LAW—Conviction of Lesser Offense 182 Va.237.

D fell in love with H's wife, W, who reciprocated his affections. So D invited H to go hunting with him and when they scared up a rabbit D shot and killed it instead of the rabbit. When tried for murder, the jury found D guilty of involuntary manslaughter. D says there was no evidence to support any such verdict and hence he should be discharged.

 Held: An indictment for murder necessarily includes a charge of manslaughter and simple assault. Finding D guilty of manslaughter was an acquittal of murder but a conviction of the lesser offense charged. To let D go scott-free because the jury were too lenient would be unthinkable in this type of case.

CRIMINAL LAW—Errors in Instructions—Murder 182 Va.216.

X cursed and abused D, whereupon D struck X a blow with his fist. When X fell from the blow he hit his head on the sidewalk and fractured his skull. D then picked X up in his taxi and rushed him to the hospital. Prior to the incident X and D had been good friends. D was tried for murder and the court gave the usual instruction that every homicide, in the absence of other evidence, is presumed to be murder of the second degree. D was convicted of involuntary manslaughter and sentenced to a three year term of imprisonment.

 Held: Error. This could not be murder as there was no express intent to kill, nor did the killing take place in the commission of a felony. The charge about murder made it appear to the jury that the case was far more serious than it actually was. The penalty might have been less but for this erroneous instruction.

CRIMINAL LAW—Venue—Judicial Notice 183 Va.182

The Commonwealth failed to offer any evidence that the crime was committed in York County although witnesses testified that it was at the "half way house". Defendants contended they should be discharged as the Commonwealth had the burden of proving venue. The trial judge answered that he would take judicial notice that the "half way house" was in York County.

 Held: A trial judge may take judicial notice of local matters of general knowledge, and that direct proof of venue was not needed.

"The law of venue may be restated—Proof is not necessary unless timely objection is made, that charged in the indictment is accepted. When timely and meritorious objection is made, the judge may, by judicial notice, dispense with proof. It may be shown by circumstances, and it may be shown by testimony, direct or indirect."

 Under Rule XXII, "Questions of venue must be raised in the trial court before verdict in cases tried by a jury or before judgment in all other cases."

CRIMINAL LAW—Marriage Statute 183 Va.432.

D's estranged wife went to live with her sister who was fifty years of age. D went there after her. The sister told him to get out. This enraged D and he said, "This is the third time you have interfered in my affairs and I'm going to finish you now." He struck her a violent blow in the face with his fist breaking her nose and
causing it to bleed. He then struck her two more violent blows before his wife was able to intervene.

D was indicted under our maiming statute (VHA 18-70) for unlawfully wounding with intent to maim, disable, and kill. Can a verdict of guilty be sustained?

Held: (1) A bruise only is not enough. There must be a cut or breach of the skin. This breach of the skin may be inside the nose, so that requirement is satisfied.

(2) Ordinarily no intent to kill can be inferred from a mere blow of the fist. But where the assailant is a husky man and the assaulted a frail woman of fifty; where he brutally strikes her again and again in her own home and without provocation; and where he states that he is going to finish her, and intent to maim, disable, and kill can be inferred. Conviction sustained.

Note: If there is a broken bone as a result of the assault but no breach of skin the indictment should read not "shoot, stab, cut or wound, etc." but that defendant caused his victim a bodily injury with intent to maim, disfigure, and kill. While these last words are stated disjunctively in the statute they must be stated conjunctively in the indictment.

**Criminal Law**

**Trial Judge has no authority to amend indictment.**

An indictment read: "The Grand Jurors--do present that D--did feloniously, under promise of marriage seduce and have carnal illicit knowledge of P, a female of the crime.

Before pleading D moved the court to quash the above indictment for seduction because it did not state that P was unmarried. The judge refused to quash the indictment but amended same by inserting after the name of P the words "an unmarried" in place of the word "a". D was convicted of the crime of seduction on overwhelming evidence. Was there any error?

Held: Yes. Case reversed and remanded. The trial judge has no authority to amend an indictment in such a way as to change the nature of the crime. As originally written the indictment only charged fornication, a misdemeanor. As amended it charged seduction, a felony. Note the language of VHA 19-150, "At any time before the defendant pleads, a defective indictment for treason or felony may be amended by the court before which the trial is had that does not change the character of the offense charged.

Notes:

(a) Seduction is a statutory crime unknown to the common law.

(b) In the above case the grand jury should have re-indicted D after itself determining that P was unmarried.

**Criminal Law**

**Not to be tried while terms after Indictment.**

X was indicted for murder. At the next term of court when the case first came up the Commonwealth asked for a continuance. The next term was the August term; the next the April term; and the next the following February. At each of these terms the Commonwealth asked for a continuance without objection on the part of X. At the next term X was tried in spite of a claim by his attorney that he should be discharged. Held: (3 judges dissenting), that mere silence on the part of the accused is not a waiver of the right given by VHA 19-165 that if three regular terms of the circuit pass without trial of a person who has been indicted he shall be forever discharged whether in custody or not unless the case is one of the nine exceptional ones provided for in the statute. Hence prisoner discharged.

Note: (1) The term at which the accused is indicted is not counted as one of the three.

(2) Unless the accused claims this right in the trial court he loses it by waiver. He cannot successfully claim it for the first time in the Supreme Court.

**Criminal Law**

**9 Exceptions to above.**

1. Insanity of accused. 2. His confinement in hospital for insane for care and observation. 3. Witnesses for Commonwealth being kept away or prevented from attending by sickness or accident. 4. Continuance granted on motion of accused. 5. Escape
from jail, or his failing to appear according to his recognizance, or Hung jury. Where there is some good reason not to try him which reason must be placed on the record. The case had been tried and was pending in the appellate court.

**Criminal Law**

Constructive larceny 184 Va. 397.

If one is charged in an indictment with burglary and larceny can he be convicted of the offense of receiving stolen property if the evidence shows that offense rather than the two offenses with which he is charged?

Held: Yes, following Stapleton v. Com. 140 Va. 475. By statute receiving stolen property is constructive larceny and is necessarily included in an indictment for larceny. A general verdict finding the accused "guilty as charged in the indictment" was responsive to the sole issue submitted to the jury.

**Criminal Law**

Receiving stolen property Element 184 Va. 223.

(1) What are the four elements of the above crime?
(2) Is exclusive possession of recently stolen property circumstances evidence of guilty knowledge?
(3) If erroneous instructions are given should the case be reversed and remanded?

As to (1) the four elements of the crime are:
(a) the property must have been previously stolen by another;
(b) the accused must have received it;
(c) with knowledge that it was stolen;
(d) with a dishonest intent.

As to (2) above it is just as much evidence of guilty knowledge of a receiver of stolen property as it is of a wrongful taking by one accused of stealing the property.

As to (3) if the errors are harmless, "There is a vast distinction between a fair trial and a perfect one--A perfect trial is one of the things hoped for but as yet an iridescent dream."

**Criminal Law**

Circus Delicti 184 Va. 381.

X, a married man with three children, fell in love with a single girl of 19 who worked for him and became very jealous of her. The girl went out with some boy and he called for the girl the next morning in his car. The girl either fell out, jumped out or was pushed out of his car. While the girl was on the running board he was seen to swerve sharply to the left and increase his speed. The girl was killed. He was convicted of involuntary manslaughter. Should the verdict be set aside because of failure to prove the corpus delicti?

Held: No. In homicide cases the corpus delicti consists of two parts, the death of deceased which must be proved beyond any doubt, as a result of the criminal act of the accused. The last can be proved by circumstantial evidence which excludes any other reasonable hypothesis. The circumstances of the case are all consistent with guilt. The fact that he swerved and increased his speed as he did at least shows wanton and reckless conduct and is sufficient to support the verdict.

**Criminal Law**

Contempt of Court Notice of Interdicta 184 Va. 397.

D had an ABC license to sell wines and beer. The judge of S County pursuant to the statutes interdicted one C, and notice thereof was published in the local paper. D did not see the notice although he regularly bought the paper. He sold some wine to C who then got drunk and murdered two people. Is D guilty of contempt of court?

Held: No. The interdictor, to be binding on D, must have been served on him. He must have had actual notice. One cannot be expected to read every word in the newspaper. The only exception to this rule is where the decree operates in rem against an illegal use of specific real property on the ground that the decree is an incumbrance which runs with the land. No such feature is involved in the present case.

**Criminal Law**

"Wounding" 184 Va. 409.

D struck W so violently with his fists that he broke two of his ribs, but there was no breach of the outer skin. Can he be convicted of wounding W with intent to disfigure, disable, and kill if such intent is proved pursuant to Code § 513-7?

Held: No Virginia Cases have a narrow definition of "wounding". There must be
A break in the skin either on the outer surface of the body or of the inner skin. Hence a sprain is not a wound although a break of the skin in the mouth would be. In the above case D should have been indicted for causing b a bodily injury with his fist with the intent to main, disfigure, disable, and kill also provided for under Code #13-7.

CRIMINAL LAW:  Liquor licenses

Case 1. D's employee sold liquor to an intoxicated man. D had a license to sell liquor but it was a criminal offense to sell it to one who was known to be intoxicated. Is D criminally liable? Held: Yes, it was his liquor. He received the money, and knowledge of the employee is imputed to D.

Case 2. A license to sell wine and beer is prohibited by law from keeping or allowing to be kept on his premises intoxicating liquor he is not licensed to sell. D's employee kept a few bottles of whiskey on the premises. Is D criminally liable? Held: No, D had no knowledge of the keeping, and received no benefit therefrom. The word "allow" connotes knowledge and intent. Unlike Case 1(supra) the employee was not hired to sell or keep the liquor in question. There are no statutory crimes by implication. The doctrine of respondeat superior has no application in case 2.

CRIMINAL LAW: Hit and Run Statute

D ran over a man lying in the road and did not stop. The man was either drunk or dead when this happened. Does it make any difference whether the man was drunk or dead? Yes, if he was drunk then D is guilty of violating the hit and run statute; but if the man was already dead when D ran over him the statute would not apply as the reason for the statute are (1) to fix liability for injury and (2) to give aid. Neither of these reasons are applicable if one runs over a corpse.

CRIMINAL LAW: Larceny Continuing Trespass

X stole T's car and drove it to X's house. He offered to sell some parts of the car to D for $15. X and D decided to take the car to a secluded spot to take off the parts. D knew the car was stolen. In order to get the stolen car started D pushed it with his own car, and then followed X who was driving the stolen car to the secluded spot. After the parts had been taken from the stolen car and put in D's car the parties were apprehended. Is D guilty of larceny of the car as a principal or as an accessory after the fact, or of only receiving stolen property of the value of $15? Held: Larceny as a principal. X's possession was a continuing trespass. It was still T's car. When D pushed the car he was guilty of taking and carrying away the personal property of another with an animus furandi. He was trespasser as to T, and intended to deprive T permanently of the car. Even though if property is stolen in A County and moved to B County the thief can be tried in either county as the larceny is a continuing one.

CRIMINAL LAW: Larceny--no Criminal Intent

L was landowner and S was sharercropper. L claimed that S had stolen his farm machinery when he left his employment. S in good faith claimed that the machinery in question was his by virtue of some oral contract he had made with L. S took away the machinery openly and when L demanded its return suggested to L that if he thought he had any claim to it that he take the matter to court. Instead L swore out a warrant for larceny, and S was convicted. Should the conviction stand? Held: No. There was no criminal intent if S acted in good faith. L's remedy is in the civil courts—an action of detinue or procedure by notice of action under Va. 717.

CRIMINAL LAW: Ownership Requirements for Larceny

(1) D stole cigars which belonged to Y. He was indicted for larceny of Z's cigars. Can he be convicted? No. Stealing Y's cigars and stealing Z's cigars are not the same crime. A man cannot be indicted for one larceny and convicted of another.

(2) Title to cigars passed to Y when the K Ry Co. accepted them from the seller as freight. D stole the cigars while in transit and was indicted for stealing cigars
which were the property of the R.Ry.Co. Can he be convicted? Yes, The R.Ry.Co. as baillee of the cigars had a special property therein. Either a general or a special property is sufficient ownership to support an allegation of ownership in an indictment for larceny.

D was on trial for murder. There was some evidence that deceased had threatened to kill everyone on the premises. D then procured a gun. At the request of the Commonwealth the court instructed the jury that the law presumed that one who killed with a deadly weapon acted maliciously and the burden of disproving malice was on the accused. It refused to give the following instruction, "When a person reasonably apprehends that another intends to attach him for the purpose of killing him then such person has a right to arm himself and in such case no inference of malice can be drawn."

Held: Reversible error to refuse the latter instruction when a jury might have found such a situation from the evidence.

CRIMINAL LAW "Hit and Run" Knowledge of Accident Essential 185 Va.2176.
Our "hit and run" statute (Va.46-130) reads in part, "The driver of any vehicle involved in an accident resulting in injuries to or death of any person—shall immediately stop at the scene of such accident—(give aid and certain information)." Is knowledge that one has been in an accident an essential element of the crime? In the instant case defendant was a driver of a heavy bus, there were dense pockets of fog, and no unusual bump or jerk was felt. Yet blood and hair on the rear tires of the bus indicated that it was the vehicle that had killed deceased.

Held: Case dismissed. Knowledge of an accident is essential. How can one be expected to give aid and information to designated persons if he has no knowledge that his car was involved?

D was on trial for murder. His defense was self defense. D asked the court to instruct the jury that the accused is entitled to be tried and judged by facts and circumstances as they reasonably appeared to him. The court refused to give the instruction as asked for, but amended it as follows, "providing they would so appear to a reasonable man placed under similar circumstances." Is it error to amend in this way?

Held: Error (2 judges dissenting). The accused was the one attacked and he is the one who had to decide. The rule is settled in Va. that how the circumstances reasonably appeared to him is the question. Holt, J., dissenting, says this is a minority rule and if it be the correct view counsel in admonition to a client need only stress to the importance of saving to the jury, "I was scared to death. I thought he was going to kill me." It makes him the sole judge in his own case.

CRIMINAL LAW Revocation of Suspension of Sentence 185 Va.357.
D was convicted of drunken driving and his driver's license was revoked for one year, He was sentenced to jail for 60 days and the sentence suspended. He was put on probation. A few months later D was arrested for driving a car. There was a conflict in the evidence as to whether he or C was driving though there could not have been an honest mistake. D was acquitted. In spite of this acquittal the trial justice revoked the suspended sentence because he thought D was driving. D contended that since he was acquitted the matter was res adjudicata. Held: Revocation of suspended sentence affirmed. Under Va. Rev. Code § 57 the suspension of sentence and the revocation thereof where it will be for the best interests of society are within the discretion of the trial judge and can be set aside only for an abuse of discretion. As there was no evidence produced to indicate such abuse, his decision is conclusive. To hold otherwise would be to substitute a jury's discretion for that of the trial judge in spite of the statute.
What fundamentals should be known about the right of the state to revoke a suspended sentence?

(1) Since revocation deprives the probationer of his liberty he is entitled to a judicial hearing.

(2) Since it is not a criminal proceeding there need by no jury trial.

(3) Nor need the evidence justifying revocation be beyond a reasonable doubt, hence the probationer could be acquitted of a second offense and the trial judge in the exercise of a reasonable and honest discretion could revoke a suspended sentence because he thought that in spite of an acquittal the probationer was guilty.

Criminal Law. Prejudice of Judge

In the case of Commonwealth v. X before Judge J., there was testimony by both D and X that X was not driving the car in question. Although X was acquitted a suspended sentence was revoked thus indicating that Judge J. was convinced that X and D were guilty of perjury. X and D were later tried for perjury before Judge J. Should he disqualify himself?

Held: The fact that the presiding judge is convinced that the accused is guilty is not ground for a change of venue. As long as the jury is trying the defendant and the judge does not tell the jury he thinks the accused is guilty the defendant is getting a fair trial.

Criminal Law. Perjury

The accused obtained his acquittal by testifying falsely in his own behalf. Can he be subsequently convicted of perjury, or is his acquittal a bar to any further prosecution as the jury must have found he was telling the truth or it would not have acquitted?

Held: While there is a conflict of authority, the better view is that the accused may be prosecuted for perjury. The acquitted may be res adjudicata of the crime for which he was being tried when he gave the false testimony but the perjury by which the acquittal was obtained is a separate crime. It would be a monstrous doctrine to hold that a person could go into a court of justice and by perjured testimony secure an acquittal, and because acquitted he could not be tried for his perjury. This would be putting a premium on perjury and allowing a second trial to take advantage of his own wrong.

Criminal Law. Presumption of 2d degree Murder

H and W were husband and wife. Each accused the other of unfaithfulness whereupon W told H she would like to shoot him. H got her a shotgun and showed her how to load it and fire it and then fired her to shoot him which she obligingly did inflicting a ghastly wound from which H died almost instantaneously. The Commonwealth's attorney took a picture of the afore-mentioned ghastly wound and showed the picture to the jury over W's objection. The jury found W guilty of murder in the second degree and sentenced her to 15 years in the penitentiary.

H said: (1) Every unlawful killing is presumed to be murder in the second degree and W failed to rebut the presumption.

(2) Both passion and sufficient provocation before time of coolness (furor brevis) must co-exist to reduce murder to manslaughter and words no matter how provocative are not sufficient provocation.

(3) A person's right to his life is inalienable. Hence H's consent or dare had no legal consequences.

(4) Since the method of inflicting death and the circumstances thereof were relevant they could be proven by photographic evidence. The argument that such evidence (where crime was admitted) was unnecessarily prejudicial and only stirred up the passions of the jury against the accused was rejected.
Defendant, a married man, was known to be such by the prosecutrix. He told her that if she would have sexual relations with him, he would divorce his wife and marry her and that he thought she was a very pretty girl and that he loved her with all his heart. Can he be convicted of seduction?

Held: Yes. Knowledge by the prosecutrix that defendant is married does not bar an action. Any promise made by a married man is sufficient whereas in the case of an unmarried man the promise must be one of marriage conditional or unconditional.

Note: If a seduction is stated to have occurred on a certain day and the proof is doubtful whether it occurred on that very day the variance is not fatal. Time is not of the essence as long as the act was committed before the two year statute of limitations has run.

**CRIMINAL LAW  Disorderly conduct as a crime** 186 Va.1.

A warrant charged D, a striker, with the offense of disorderly conduct. A Norfolk ordinance reads, "Any person who shall--be guilty of disorderly conduct—shall upon conviction thereof." D was convicted and fined §25. He urged that the phrase "disorderly conduct" is too vague, meaning whatever the particular magistrate wishes it to mean.

Held: While there is no such crime by that name at common law such conduct is everywhere denounced. It may be made a criminal offense by ordinance or statute.

One can no more under take to define comprehensively disorderly conduct than he can misdemeanors, nuisances, police power, or insulting words. Each case turns upon its facts, to be judicially determined. Conviction is affirmed.

**CRIMINAL LAW  Meaning statute** V/#15-7 186 Va.55.

V/#15-7 reads in part "If any person maliciously shoot, stab, cut or wound any person or by any means cause him bodily harm with intent to maim, disfigure, disable or kill he shall (be guilty of a felony, etc). P drove his car from a garage into a stream of traffic just in front of D who then burred his four or five times. P pulled over to the curb and asked D what he meant by his darned foolishness. D, who was a professional wrestler, got out of his car, bent P's face to a pulp, broke his nose in several places and kneed him in his genital organs. D weighed 65 pounds more than P who was a semi invalid. D contends that at best he is only guilty of a simple assault and that no intent to disable can be inferred where one uses no weapon other than those that nature gave him. He was sentenced to 3 years imprisonment.

Held: While intent to disable would not ordinarily be presumed where one only used natural weapons yet it is possible to hurt one to death or to stupor or kick one so severely that an intent to disable or kill may be found. The statute says, "by any means" and beating and kicking are such means. The attack in this case showed unmitigated brutality and the jury could find from such acts an intent to disfigure and disable.
X, a 22 year old merchant marine sailor became infatuated with defendant, an 18 year old girl. He gave her $1,000 in travellers checks payable to his order and not countersigned by him to keep for him. She ditched him and attempted to alter three of the checks but did such a poor job of it that she abandoned them. Can she be convicted of embezzlement? The checks were worthless until X countersigned them.

 Held: She is guilty of embezzlement. At common law it is not larceny to steal evidence of indebtedness. However, 1-186 makes it larceny to steal any check or paper of value. And 1-187 states that the value shall be the amount due as evidenced by such check or paper of value.

CRIMINAL LAW  Kidnapping

Under 1-13-13 it is a felony to kidnap with intent to extort money or pecuniary benefit. D, a hitchhiker, pulled a gun on W and commanded him to drive him to Washington. Is D guilty of kidnapping?

 Held: Yes, it costs money to go to Washington. Force D who attempted to get a free ride intended to extort pecuniary benefit. (Note: Kidnapping was only a misdemeanor at common law)

CRIMINAL LAW  First degree Murder in trial for involuntary manslaughter

D was tried for murder and convicted of involuntary manslaughter. The case reversed and remanded by the Supreme Court of Appeals. At the retrial is it proper for the Commonwealth to introduce evidence of first degree murder?

 Held: Yes, but jury should be instructed that he has been acquitted of first degree murder, second degree murder, and voluntary manslaughter, so that if they believe him guilty of any such crime of involuntary manslaughter they can convict only for the latter. The fact that the evidence shows a more serious offense for which he cannot be convicted is no reason why he should not be punished for a lesser offense necessarily included in the greater. Hence the court should give instructions on involuntary manslaughter even though all the evidence shows first degree murder.

CRIMINAL LAW  No guilt by suspicion

D was tried for the murder of Grace Smith's husband. He carried on a clandestine love affair with her while her husband was in the Service. He called her Grace and took her to a fortune teller on Staten Island. He had a bruise on his face the day after the tragedy. He fabricated an alibi and swore falsely on the trial. There was no credible evidence that he was at the scene of the tragedy or that he was not. He was found guilty.

 Held: Reversed and remanded. One cannot be found guilty on suspicion only. While the above circumstances are consistent with guilt they are not necessarily inconsistent with innocence. They do not exclude every other reasonable hypothesis. The deceased may have committed suicide or have been killed by another.

CRIMINAL LAW  Criminal negligence

Prior to 1947 it was not a criminal offense per se to handle poisonous snakes. D and W, his wife, were members of a snake handling sect. While D was handling a poisonous snake and singing and shouting it bit W who was putting its head and W died a few days later from the bite. D was prosecuted for manslaughter. The court instructed the jury that involuntary manslaughter is the unintentional killing of a human being while performing a lawful act in an unlawful, careless, reckless or negligent manner. D was convicted. What result or appeal arising that D exceeded the above instruction? Held: Reversed and remanded. A higher degree of negligence is required to establish criminal negligence than to establish liability in a civil action. The lawful act must have been done in a way so grossly negligent and accident as to indicate an indifference to consequences or an absence of due regard for human life. Note 1: The doing of an unlawful act (not felonious) resulting in an unintended death of another may also be involuntary manslaughter. Note 2: Since 1947 (Chapter 23, Acts Extra Session 1947, p.63) it is a misdemeanor for any person to display, exhibit,
Criminal Law

186 Va. 288.

Vt. 131 provides that if any person behaves in a disorderly manner in any street—he shall be guilty of a misdemeanor. D while on his own property thirty feet from the street used vile and abusive language towards his mother. Several persons on the street heard him. Has he violated the above statute?

Held: Yes. He constructively follows his voice to the street and is thus in the street. If he stood on his own land and threw rocks into the street he would constructively be present in the street, and in numerous venue cases (as where a bomb is sent by mail) the crime takes place where the force the accused act in motion takes effect, and it is immaterial that accused was not physically present in that county or state.

Criminal Law

Rule of Uncorroborated Evidence in Rape Cases 186 Va. 936.

D was charged with rape. Can he be convicted on the uncorroborated evidence of the female?

Yes. Two Richmond policemen were. Said the Supreme Court of Appeals, "We have repeatedly held that a conviction of rape may be sustained upon the uncorroborated testimony of the prosecutrix, if it is not incredible and contrary to human experience, and if the guilt of the accused is believed by the jury beyond a reasonable doubt."

Note: In seduction cases the rule is different. There the prosecutrix must be corroborated both as to the promise to marry and the seduction. #1567 of Lec. (2nd Ed.)

Criminal Law

"Preparing to Transport More Than a Gallon of Liquor" 187 Va. 203.

By 5/24/72, it is a crime to transport alcoholic beverages other than wine or beer in excess of one gallon except in accordance with certain regulations. D drove a truck close to an A.B.C. store which truck was locked when the police arrived. It contained 71 pints of A.B.C. liquor and D was about to place 8 more pints in the truck himself and he had several men standing in the A.B.C. line all of whom were buying 8 pints at a time. D was found guilty of violating the law. That result on appeal? Held: Reversed and dismissed. There is no proof of transportation of even a gallon. The car was not moved. There is no proof it had any whisky in it when it was brought to the A.B.C. store. It is no crime under the law to make a trip after trip to the same A.B.C. store and get a gallon each time. All that can be said is that D was preparing to transport more than a gallon. Preparation to commit a crime falling short of an attempt is not a crime.

Criminal Law

Evidence 187 Va. 913.

A police officer received an anonymous tip that a car at X's garage contained more than a gallon of liquor. He secured a search warrant and found in the trunk thereof 85 fifth gallon bottles of whiskey which had evidently been purchased in Washington D.C. The car had been left at X's garage by D, the owner thereof, to be checked and gasoline. D had another car and he frequently left one car at X's garage to be fixed while he drove the other. Sometimes the car would remain at the garage for quite a few days. The officer took the car to the police station and arrested D when he claimed the car. D was tried for illegal possession and transportation and acquitted. Confiscation proceedings were then instituted against the car under the A.B.C. law (Va. 4-55). D testified that the liquor was not his, that he had no knowledge of its presence in the car, that he gave no permission to anyone to put it there either express or implied. He was not contradicted. Under the Act D has the burden of proving his innocence in order to prevent confiscation of the car. The trial court ordered confiscation. Result on Appeal?
While D was cutting some flowers with a knife on her land, while she was engaged in a lawful act, and hence the homicide was excusable.

CRIMINAL LAW. Excusable Homicide. 187 Va.946.

D was 67 years old and weighed 85 pounds. X was 60 years old and weighed 135 pounds. While D was cutting some flowers with a knife on her land X said, "You have got to die and I have got to die." D paid no attention to this observation but continued to cut flowers. The knife had a blade about one inch long. Suddenly X said, "I have a good mind to beat you" and she at once started to strike D who attempted to ward off the blows. In the excitement she forgot she held a knife in her hand and she cut X so severely X died. D desisted as soon as X stopped striking at her. D was convicted of involuntary manslaughter. What result on appeal?

Held: Case reversed and dismissed. D was in her rights in attempting to ward off the blows. Her actions were spontaneous, instinctive, and normal. If X was killed she was inadvertently killed by D while D was engaged in a lawful act. Note that D did not claim a right to kill in self defense. Her correct contention is that she had a right to repel the assault and battery, that the killing was inadvertent and not negligent while she was engaged in a lawful act, and hence the homicide was excusable.

CRIMINAL LAW. Charge of felony includes attempt. 188 Va.553.

D was indicted for the crime of abortion only. The jury however found her guilty of an attempted abortion and sentenced her to three years. What result on writ of error?

Held: Affirmed. A charge of a consummated crime necessarily includes a charge of an attempt to commit the crime. Va.191-254 expressly authorizes conviction for an attempt to commit a felony on an indictment charging the felony.

CRIMINAL LAW. 188 Va.583.

D's car was traced by its peculiar tire markings and license number to his home in Norfolk after it had been used by him to steal 52 pieces of cured hog meat valued at $550 from X of Surry County. One piece of the meat was found in his house together with an oat sack taken from X's property. The one piece of meat so found was worth about $12. He was tried in Surry County.

Q.1. D contended that since the goods were found in Norfolk that was the venue.

Held: Venue may be proven by circumstantial evidence, and hence Surry County was proper.

Q.2. Is the unexplained possession of some of the recently stolen property evidence that D took only the amount found in his possession, or is it evidence that he stole all that was taken at the same time and place?

Held: The latter, for thieves frequently dispose of part of their loot and keep part for themselves.

Q.3. The Commonwealth's attorney in his closing argument said, "We ask you to deal to D a punishment that will be a sign-mark on every highway in Surry County indicative of the fact that thieves are not safe in this County." Objected to as prejudicial. Objection overruled.

Held: This statement is on the boundary line between proper and improper argument. At worst it is a strong rhetorical appeal to fix the punishment to warn others. There is no comment on extraneous matters. It falls within the class of remarks which rests within the sound discretion of the trial judge, and his decision will not be interfered with on appeal.

CRIMINAL LAW. Uniform Extradition Act. 188 Va.877,892.

The X Corporation of Nebraska sold certificates of membership exclusively by mail to citizens of Virginia in violation of our Blue Sky Law. Could its officers be extradited and tried criminally in Virginia?
By 2016, both Nebraska and Virginia (as well as 29 other states) have adopted the Uniform Extradition Act. Section 6 of this act (§ 15–23) expressly provides that one who commits an act in one state intentionally resulting in a crime in another state is subject to extradition even though the accused was not present in the latter state and has not fled therefrom.

In 1979, the Supreme Court of Virginia, in the case of Commonwealth v. 55 S.E.2d 289, discussed points involved. (1) The trial court erred when it refused to give instructions on involuntary manslaughter as the jury could have found that D intended to commit no felony but merely to quiet his household by a display of the pistol. (2) It also erred in admitting evidence that he fired the contents of his pistol into a tree top as that action merely indicated nervousness after the affair, rather than a malicious intent before the affair. (3) It may have erred when it gave instructions on murder but since a conviction for manslaughter is an acquittal of the charge of murder the instructions complained of are now no longer relevant to the issues that will be involved in the new trial.

Criminal Law

Officers X and Y testified that they discovered D's auto against a broken fire hydrant a few minutes after the accident, and that a few minutes after the above discovery officer O brought 0 to the scene of the accident, that D admitted that he had run into the hydrant, and that D talked with a thick tongue and was under the influence of intoxicating liquors. Officer O did not testify. Can 2 be convicted of drunken driving under the above evidence?

Note the following points. (1) No. He cannot be convicted of the above evidence because he might have gotten drunk after he struck the hydrant. The term "few minutes" is extremely indefinite indicating vastly different things to different people. The fact that Officer O was not called by the prosecution raises an inference that his testimony, if given, would have been favorable to D. Hence the prosecution has not proved its case beyond a reasonable doubt. Case reversed and remanded.

(2) It was urged that the testimony of Officers X and Y violated the opinion evidence rule. Held: the state sets that D talked with a thick tongue and was under the influence of intoxicants was a statement of facts disclosed to them by personal observation and not a mere statement of opinion. (3) In Virginia the corpus delicti may be proved by the admissions of the defendant coupled with other relevant circumstances. The rule that it must be proved by evidence independently of such admissions was rejected.

Criminal Law

Va., 55 S.E.2d 427.

§ 15–23 provides that if a person have in his possession any slate, blank, or press or other thing, with intent to use in forging any writing he shall be confined in the penitentiary etc. D purchased a check writing machine. He had in his possession at the time of such purchase 39 blank checks bearing the printed name of the Mfg. Co. and the forged signature of its president. D was convicted of violating the statute set out above. What result on appeal?
Held: (1) It is immaterial that a check writing machine was not designed to aid forgers, or that it is generally used properly. The evidence indicates that D had the machine in his possession with intent to forge. The court cited decisions to the effect that if one had a crowbar in his possession with intent to use it in the commission of a burglary he was guilty of illegally possessing burglars' tools in violation of statute. The intent of the possessor is the important thing.

(2) The court also held it was immaterial that check writing machines were unknown when the statute was passed. "It is an elementary rule of statutory construction that the language of a statute may be so broad, and its object so general, as to reach conditions not coming into existence until a long time after its enactment."

**CRIMINAL LAW**

V.18-70 (the maiming act) provides that if any person shoot, stab, cut, or wound any person, or by any means, cause him bodily injury with intent to maim, disfigure, disable, or kill, he shall be punished (one possibly more serious way if the act was done maliciously and a possibly less serious way if the act was done unlawfully—both felonies). D, a police officer while in the act of arresting P for drunkenness struck P with his club fracturing his skull and causing a partial paralysis. At his first trial the jury found as follows, "We, the jury, find the defendant, D, guilty of unlawful wounding and fix the punishment at 3 years in the State Penitentiary."

Q.1. Is this a good verdict? No. It is fatally defective as it does not state name of a person wounded, or that the wounding was done with the intent to maim etc., or that it was committed as charged in the indictment.

Q.2. May D be tried again, and if so, for what? The verdict above set forth already clearly indicates that D was acquitted of maliciously wounding with intent to maim etc. as a finding of guilt as to a lessor offense is an acquittal of a greater. But D may still be tried for the lessor offense of unlawfully committing the acts charged against him. A request for a new trial for errors committed is a waiver of the defense of former jeopardy to the extent that the defendant has not been acquitted. V.18-222 provides that if a verdict against an accused be set aside and a new trial granted "he shall not be tried for any higher offense than that of which he was convicted on the last trial."

**CRIMINAL LAW**

In the above case the court instructed the jury that a man is presumed to intend that which he does or which is the natural consequence of his act.

Held: As applied to the above situation the instruction without further amplification is misleading. It overemphasizes the consequences and underemphasizes the rights of the officer. It fails to tell the jury that it was D's duty to arrest P if he was found drunk in public. "A police officer, on duty occupies a much different position from that of an ordinary individual. Often he must act quickly and effectively. Frequently he has little time for deliberation, and must use his best judgment, under the circumstances as reasonably appears to him."
CRIMINAL LAW Escaped

Assume that D was sentenced to confinement in the penitentiary for 10 years by a court of competent jurisdiction but that D would be entitled to release if he brought habeas corpus proceedings due to serious defects in his trial such as denial of counsel. If D escaped is he guilty of a crime?

 Held: Yes. It is D's duty to submit to the imprisonment until lawfully released. He does not have the right of self-help and self-judgment. If he considers his confinement improper he is bound to take other means to test the question. Escape and attempted escape from prison involve dangerous consequences. If prison guards were made insurers of the loyalty of the commitment of prisoners in their custody they could not afford the risk of resisting an attempted escape and prison discipline would completely break down. Hence it is immaterial whether D had a fair trial when he was first sentenced to serve time so far as his guilt for the crime of escape is concerned.

CRIMINAL LAW Larceny

X was engaged in the business of dismantling airplane carriers. He maintained a dump for scrap materials. D was halted while driving his car and in the back of the car there was found $392 worth of cable. According to D's testimony X's employees told him he could have anything he found on the dump. X's employees denied having given any such permission. The following stock instruction was given, "If property be stolen, and recently thereafter be found in the exclusive possession of the prisoner, then such possession of itself affords sufficient grounds for a presumption of fact that he was the thief; and, in order to repel the presumption, makes it incumbent on him to explain on being called on for the purpose to, account for such possession consistently with his innocence. If he give a reasonable account of it, then it devolves on the Commonwealth to prove that such account is untrue. If he give an unreasonable account of it, then it devolves on the prisoner to sustain such account by other evidence". Was this a proper instruction as applied to the above facts?

 Held: No (two judges dissenting). The material question at issue in this case is whether or not permission to take the cable had been given. The above quoted instruction is not applicable to such an issue and hence had no place in the case.

CRIMINAL LAW Warrants-Entrapment

The prosecuting police officer in response to tips that a Norfolk hotel was being used for purposes of prostitution, went there, secured a room, and indicated to the bell hop that he would be receptive to a "date". Shortly thereafter defendant entered the room, expressed a willingness to have intercourse for pay, and disagreed. She was thereupon arrested, and later convicted of frequenting a house of ill fame. Defendant contends

(1) She should be released because she was not given a copy of the warrant as required by statute. Held: She knew what the charge was and at no time requested a copy of the warrant. While the officer should have complied with the statute, his failure to do so is reversible error only where it is shown that defendant's ability to properly prepare his defense was prejudiced thereby.

(2) The jury should have been instructed on the law of entrapment. Held: There was no question of entrapment where the officer did not create in her mind the criminal intent but merely gave her an opportunity to reveal her criminal purpose.

CRIMINAL LAW Murder

Accused was indicted for murder. The head of deceased had been cut off and burned in a furnace at accused's home. Bloodstains were found on a long knife and throughout one of the rooms of the house. Everything pointed to a crime of extreme atrocity and cruelty. Was it permissible for the court to refuse to grant an instruction that "All murder is presumed to be murder in the second degree, and the burden is upon the Commonwealth to elevate the offense to a higher degree"?

 Held: The defendant is entitled to such an instruction, and it is error to deny it regardless of the vicious nature of the homicide.
In an unbelievably brutal homicide case the defense was insanity. Should the jury be instructed to acquit the defendant if they have a reasonable doubt as to his sanity?

Held in 162 Va. 664, "When the corpus delicti has been established and proof adduced that the accused committed the act, it is not sufficient for the accused to raise a reasonable doubt as to his sanity; he must go one step further and prove to the satisfaction of the jury that he was insane at the time of the commission of the act."

CRIMINAL LAW

Involuntary Manslaughter

S was walking east on his left on the north shoulder of a narrow highway. X was driving a tractor-trailer truck east on his right. D was following X in a tractor-trailer truck each of which was 30 feet long. D attempted to pass X and in so doing went off on the left shoulder, and struck and killed S. The evidence showed that these trucks were so long, so heavy, and so powerful that it was impossible to control them exactly when making a turn. D was convicted of involuntary manslaughter. Should such conviction be reversed?

Held: To be convicted of manslaughter as the result of negligence the negligent acts must be so flagrant, so culpable and wanton as to indicate a reckless disregard for human life, and D's actions were just that. He saw where S was, knew the above facts, and still attempted to execute the movement on a narrow road. The tractor-trailer trucks may have plenty of extra force, but that does not give their drivers any extra privilege.

CRIMINAL LAW

Fine for Simple Adultery

By V6/18-32 simple adultery is punishable by fine of not less than $20. By V6/19-265, "A misdemeanor for which no punishment or no maximum punishment Is prescribed by statute shall be punished by a fine not exceeding five hundred dollars or confinement in jail not exceeding twelve months or both, in the discretion of the jury or trial justice of the court trying the case without a jury." D was convicted of the crime of adultery and sentenced to serve 12 months in jail. Is this a proper sentence?

Held: No. The two statutes must be read together and any reasonable doubt interpreted against the Commonwealth and in favor of the accused. This is a well settled rule in the case of penal statutes. Reading them thus D can be punished by fine (and by fine only) of not less than $20 nor more than $500.

CRIMINAL LAW

2d Degree Murder

(a) Deceased had drunk too much and was in an ugly mood. He made disparaging remark about D's wife and boasted that he would cut off a man's head in a minute and think nothing of it. D procured his shotgun, loaded it, pointed it at deceased and told him to leave his (D's) home. Instead deceased started towards D with one hand in his back pocket. D fired when deceased, who was actually unarmed, was 12 feet away, and killed him. D was convicted of murder in the second degree. Should the conviction be set aside?

Held: No. More words no matter how insulting will not as a matter of law be sufficient provocation to reduce murder to manslaughter. Here the killing was deliberate.

(b) In the above case the court was asked to instruct the jury that the presumption of innocence is so strong that if the case be a doubtful one the presumption is always sufficient to turn the scales in favor of the accused. The Supreme Court of Appeals has used such language in a number of cases. Was it error to refuse to give the instruction?

Held: The underlined language unduly emphasized the weight to be attached by the jury to the presumption of innocence. The Court has frequently said that language appropriate in an opinion is not always appropriate in an instruction.
Criminal Law Plea of Former Jeopardy Referring Stolen Property 192 Va. 443.

1. Defendant orally moved the court to quash the indictment against him on the ground of former jeopardy. Is this the proper way to raise that point?

 Held: No. The question of former jeopardy cannot properly be raised orally but must be made by special plea of former acquittal or conviction setting forth all the facts necessary to identify the offense and the accused.

4. Pay particular attention to the underlined parts of the following instruction which was held to be correct: "The Court instructs the jury that while under the law to sustain the charge of receiving the electric hammer and accessories knowing the same to have been stolen it is necessary for the Commonwealth to establish beyond a reasonable doubt that the electric hammer and accessories were previously stolen by some person other than the accused; that the accused received the said electric hammer and accessories from such other person; that at the time he received them he knew they had been stolen; and that he received them with dishonest intent; yet, if you believe from the evidence beyond a reasonable doubt that the accused was recently before his arrest in exclusive possession of the electric hammer and accessories mentioned in the evidence that such possession of itself affords sufficient grounds for the presumption of the fact that the accused received the said electric hammer and accessories knowing it to have been stolen and received it with dishonest intent, and in order to repel the presumption makes it incumbent on him, or being called for the purpose, to account for such possession consistent with his innocence. If he gives a reasonable account of it, then it devolves on the Commonwealth to prove that such account is untrue. If he gives an unreasonable account of it, then it devolves on the prisoner to sustain such account by other evidence.

Criminal Law Constitutional Law 192 Va. 471.

In a murder case the Commonwealth's attorney wished to explain to the jury why he was somewhat unprepared for the final argument. He stated, "Until the counsel for the accused made his argument I did not know what the defense was, as the accused had not testified." The Court instructed the jury that the failure of the accused to testify created no presumption against him and made sure that every juror so understood. Neither the original record nor the printed record contains a transcript or a narrative statement of the evidence presented at the trial court. It is admitted that error was committed but it is urged that the error was harmless because, (1) it was unintentional and not "pointed" being explanatory only, and (2) that the trial court corrected the error.

 Held: New trial granted. The presumption is that the error was harmful. The fact that it was not intended is immaterial. The burden was on the Commonwealth to show that the error was harmless. In order for the Supreme Court to determine that matter it must have a complete record of the evidence. It was the duty of the Commonwealth to prepare such a record and have it duly incorporated in the record. The attorney for the accused by not preparing it himself did not thereby admit that the evidence would show that the error was harmless.

Criminal Law Proof of Corpus Delicti Evidence 192 Va. 304.

While the mother of a three year old child was bathing him he told his mother of an act which D had committed on his person that is a felony. The child was not physically injured. When his father and police officers confronted D he said he was sorry he had done it and that the act had taken place some ten days ago. When tried D pled not guilty. He was convicted of felony. What result on appeal?

 Held: Reversed. One cannot be convicted solely on his confession outside of court. This is not sufficient proof of the corpus delicti as matter of law. The child was too young to testify. The child's statements to the mother were hearsay. They were not spontaneous exclamations brought on by excitement but a narrative of what took place days ago. Hence they were not admissible under the res gestae exception to the hearsay rule. The doctrine of fresh complaint (usually that complaint was made promptly though the details of the complaint cannot be shown) is applicable only in rape cases.

D, a contractor who had purchased materials from X for a particular job for O, represented to O that he needed $500 to pay X for said materials. O gave D his check for $500 so that D could pay X. D used the money for other purposes. Is he guilty of any crime?

Held: Yes. VA#43-13 makes it a misdemeanor for a contractor to receive money from an owner for the purpose of paying construction costs with an intent to defraud. Failure to use the money for construction costs is prima facie evidence of an intent to defraud and constitutes the burden of going forward with the evidence on the defendant. This statute is a valid exercise of the police power in the prevention of fraud. It does not provide for imprisonment for debt, but for imprisonment for fraud.

CRIMINAL LAW  Murder  Insanity  Jury  193 Va. —, 70 S.E.2d 284

D murdered X brutally in cold blood, and was tried and sentenced to death. His defense was that he did the act while under the influence of insulin shock. While the jury was being chosen J was asked whether or not D had once stolen J's car. J answered in the affirmative, but contended that he could give D a fair trial in spite of that fact insisting that he had no malice. The judge accepted J and he went back with the other prospective jurors. D's attorney then asked the judge to re-consider and the judge reversed himself and sent for J who was asked whether he had told the other jurors about D's having stolen his car. J answered affirmatively whereupon D's attorney moved to quash the venire. The judge refused to do this. Was this reversible error?

Held: Yes. This was prejudicial and would have been inadmissible in court except solely for purposes of impeachment were D to testify. (Two judges dissented on the ground that the theft of J's car had nothing whatever to do with the issue of D's insanity). Note: The trial court gave the "right and wrong" instruction on insanity. The Supreme Court of Appeals stated that the irresistible impulse principle is law in Virginia where the evidence shows that the defendant knows his act is wrong but because of a diseased mind is totally incapable of restraining himself. In the instant case there was no evidence that D's volitive powers (power to restrain himself) were any more impaired than his power to perceive the difference between right and wrong. He merely claimed that he did not remember. Under such circumstances it is not reversible error to refuse to give an irresistible impulse instruction.

CRIMINAL LAW  Homicide  Instructions to Jury  193 Va. —, 70 S.E.2d 335

H and W had been happily married for 16 years and had 8 children. H and W retired at 10 P.M. and W found his shot in the head when she woke up in the morning, and H's pistol was on the bed near her hand. She had the pistol and when the police arrived she said some stranger had shot H. Later she said she might have shot him in her sleep and told where she had hidden the pistol. She said she invented the first story because of fright. There was no evidence of involuntary manslaughter but the court instructed the jury on the law thereof and the jury returned a verdict of guilty with a one year penitentiary sentence. The Commonwealth sought to convict W of murder.

Held: Affirmed. Every homicide is presumed to be murder in the second degree and W had the burden of reducing it. The jury may not have believed her version or the Commonwealth's version. Hence she has not carried her burden to the full extent required for an acquittal. While the court should not have instructed on the law of manslaughter this was harmless. If it had not given any instruction thereon a like verdict of the jury would have stood, and it would be unavailing to hold that an instructed jury's verdict would be bad while the same verdict reached by an uninstructed jury would have been good.
CRIMINAL LAW Contempt of Court 2022. 193 Va. 773.

A labor union, in violation of an injunction, called a ferry strike in violation of the Virginia Public Utilities Labor Act, and was fined for criminal contempt. J now claims the act is unconstitutional and hence the injunction void.

Held: It is immaterial whether the law is constitutional or not. The way to test the point is not by disobedience of the injunction but by a motion to dissolve the injunction or by appeal. Quoting from U.S. v. United Mine Workers, 330 U.S. 258, 293, "We find impressive authority for the proposition that an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings. This is true without regard even for the constitutionality of the Act under which the order is issued."

CRIMINAL LAW--Rape--Presumption of Chastity of Female- 193 Va. 851.

V/18-55. I provides that upon the trial of any defendant for rape of a female child between the ages of 14 and 16 yrs., if the jury shall find that such child was of bad moral repute and that the carnal knowledge was with her consent, the defendant shall not be convicted of rape, but such finding shall not bar a prosecution for fornication or contributing to the delinquency of a minor child. D was convicted of statutory rape of a 15 year old girl. No evidence was offered one way or another as to the moral repute of the girl. Can a conviction of rape be sustained?

Held: Yes. The above statute does not make the chastity of the female an ingredient of the offense. It is presumed to be good. It is not, that is a matter of defense. "An accused who seeks to escape conviction for an offense of this nature upon the ground that the female child he has abused is lead and not of good repute must show it. The law will not help him out with presumptions against her chastity."


D was on trial for murder. After the case had gone to the jury the foreman of the jury asked the court what assurance there was that if the jury gave D life imprisonment, or a long term of years that he would actually serve his sentence and not get out. The court told the jury that it could not give that assurance; that would be in the hands of the executive branch; and that they had nothing to do with that. The court did not tell the foreman that prisoners sentenced for life are ineligible for parole. The jury gave the death penalty.

Held: Case should be reversed and remanded. The court should have told the jury that it was their duty if they found the accused guilty to impose such punishment as they considered just under the evidence and within the limits stated in the court's instructions; and that they must not concern themselves with what may afterwards happen. In the case of possible pardon or probation the future development of new facts not available to the jury may warrant a modification of the original sentence. Judges should not speculate on such matters. Moreover when the court told the jury that it could give no such assurance it should have added that if life imprisonment was given, the prisoner would not be entitled to parole. The jury were mistakenly led to believe that only by giving the death penalty could the possibility of parole be prevented. (Two judges in a concurring opinion took the view that the jury has as much right as the judge to know the laws about parole and probation, and that a failure to inform them fully thereof could easily result in erroneous sentences.)

CRIMINAL LAW Burden on Commonwealth to Prove Case- 194 Va. 675.

X, a person now unknown, told a state trooper, T, that there was a wreck down the road. T went to the spot indicated, saw D's car turned upside down, smelled the odor of alcohol on his breath, and was told by D, (1) that D had had a couple of beers earlier in the afternoon, and (2) that he ran the car off the road to avoid a three car smashup which was threatened when one of two approaching cars attempted to pass the other. A and B were also in the car along with D. At the trial T testified to the above. D did not put A or B on the stand or take the stand himself. There was no
evidence as to just when the accident took place. D contended the evidence was insufficient to support a conviction for drunken driving.

Held: For D. Bland case (194 Va. 42) followed. From anything that appears in the evidence D may have had his beers after the accident took place. He was under no duty to put A and B on the stand to prove this point, for the Commonwealth has to show guilt beyond a reasonable doubt before it has established a case to be met. Proof that D was drunk after the accident when there is no proof of the time of the accident is not sufficient. The accident, from anything that appears in the record, could have taken place long before X told T about it.

CRIMINAL LAW  Constitutional Law Pl. & Pr.  Attacking Cons. of Statute  Va. 775
D was tried and convicted of the crime of possessing burglary tools with intent to commit burglary and larceny. He attacked the constitutionality of the statute for the first time in the Supreme Court of Appeals. Is this permissible?

Held: Yes. As a general rule a party cannot raise a question before the Supreme Court of Appeals that he has not raised in the court below. But if no crime has been committed because the statute defining the crime is void, there is no penalty to inflict. "When this situation is brought to the attention of the court at any place, in any way, whether by demurrer, plea, motion, or otherwise, the case is at once
dismissed, as there is no offense to be punished." Note: It was also held that the statute making possession of burglary tools prima facie evidence of an intent to commit burglary, robbery, or larceny was constitutional as there is a reasonable relationship between having possession of such tools and a guilty intent. But where two men were in a car containing such tools and it is uncertain which of the two possessed the tools, or whether they were possessed jointly, the above presumption is inapplicable.

Deceased who was intoxicated came to D's home to see D's wife's sister who had been baby sitting for D and his wife. It was after 1 a.m. and the sister politely declined to see him whereupon D offered to drive him home or to call a cab. Deceased insisted on staying whereupon D told him he would have to get out. Deceased then struck D, knocked him off balance, and attempted to strangle him. D succeeded in escaping the clutches of deceased and in getting a pistol with which he killed deceased. D was convicted of murder in the second degree.
Held: Conviction set aside. D either acted in self-defense, or in hot blood under great provocation. In neither event was there any proof of malice. He could not have been guilty of any crime greater than voluntary manslaughter. Reversed and remanded.

CRIMINAL LAW Waiver 195 Va.169.
X plead guilty to the crime of robbery, and waived the pre-sentence report of a probation officer provided for by 1953-278.1, with the consent of his attorney, the Commonwealth's attorney and the Court.
Held: The provisions of the above statute are procedural only and can be waived with the consent of all the parties mentioned above.

CRIMINAL LAW Sentence for less than Minimum Allowed Void or Voidable 195 Va.228.
P was convicted of felony number one in 1930. He was convicted of burglary in 1935, and again in 1949. Despite the fact that the minimum penalty for burglary is 5 years, he was sentenced for only 2 years. Later in 1949 he was convicted of being a third felony offender and given 10 extra years. P brought nemes corpus proceedings alleging that since the 1949 conviction was void he was not a third offender.
Held: Proceedings dismissed. The imposition of a lesser penalty than the law allows does not render the judgment illegal and void, but merely voidable by correct appellate procedure within the proper time. The error in sentencing must have been inadvertent. The correction of the error should be by writ of error and not by nemes corpus.

CRIMINAL LAW Attempts "More than mere Preparation" 195 Va.258.
D was arrested near a still to which he admitted hauling supplies. At that time the mash was in condition for distillation the next day and the apparatus for distilling it was set up so that connection of the coil and starting of a fire was all that remained to be done before actually running the liquor. While no coil was found, the evidence permitted the inference that it was nearby. Is D guilty of an attempt?
Held: Yes. Here there is more than mere preparation. The act necessary to an attempt need not be the last proximate act to the consummation of the offense. It need only approach sufficiently near to it to stand either as the first or some subsequent step in a direct movement toward the commission of the offense after the preparations are made. Manufacturing is a continuing process and the State is not obliged to wait until it is completed and alcohol actually begins to flow.

According to D's version: X, the deceased, took D's shotgun down from the wall of D's room while D was out of the room. When D returned he asked X to give the gun to D, but X refused to do so. D then attempted to take the gun away from X. In the scuffle the gun went off and X was killed.
The court refused to give an instruction putting D's version before the jury on the ground that D had no right to kill in self-defense even if the facts were as D stated. Held: Reversible error. D is not relying on the law of self-defense. He is attempting to show that the death of deceased was due to an accident while he, D, was engaged in a lawful act. He was entitled to have his version go to the jury along with proper instructions on the law applicable to his version.

CRIMINAL LAW
Deceased and D had been good friends. They had been drinking some and were playing pool together when they got into an argument about the game and each cursed the other. Deceased then said he was quitting. As he went by D, D struck him above the ear with a pair of pliers. Deceased was wearing a cap and the blow appeared merely to have stunned him. Deceased then went to another pool hall. He seemed more and more dazed as time went on and he finally collapsed and died. There was no scalp wound, but an autopsy showed that there was a slight skull fracture with a resulting brain hemorrhage. D was convicted of murder in the second degree and sentenced to 14 years. What result on appeal?
Held: Affirmed. Words alone do not justify an assault. Malice can be inferred from the use of a deadly weapon. The corpus delicti has been proved by the medical testimony. The homicide is presumed to be murder in the second degree and D has not succeeded in proving facts that would reduce it to manslaughter.

CRIMINAL LAW
D was sentenced to serve 2 years in the penitentiary for burglary. The minimum sentence was 5 years. After serving the 2 years he was resentenced to serve a total of 5 years on the theory that the 2 year sentence was void.
Held: This was error. The 2 year sentence was not void, but only voidable. It is too late for the Commonwealth to avoid it after it has been acquiesced in by D and fully served.

CRIMINAL LAW
The Commonwealth contended that D robbed X in his apartment, hit him over the head with a blunt instrument killing him, and then set fire to the apartment to conceal the crime. D contended he had nothing to do with the crime. He was found guilty of murder in the first degree and sentenced to 40 years.
(a) The court refused to instruct that every homicide in Virginia is presumed to be murder of the second degree, and in order to elevate the offense to murder in the first degree the burden is on the Commonwealth. Held by a 4 to 3 decision that it was error to refuse to give this stock instruction which even 30 years ago was hoary with age. Dissenting judges said the instant case was either murder in the first degree or no crime at all, and that the stock instruction would be misleading under the circumstances.
(b) D was told by those in authority after his arrest that he need not make any statement at all. He was then told that the blunt instrument had been found and that he had killed X. D did not deny the allegation. Held: This is not an implied admission since he had just been told that he need not answer any questions, and he was justified in taking them at their word.
(c) D took the stand. He testified differently from S, the sheriff, and F, the fire marshal, with respect to things they all had first hand knowledge. The Commonwealth's attorney then asked D, "Is S lying?" D replied, "Yes". He was then asked if F were also lying. D replied, "Yes." Held: this was improper questioning as trying D for murder, and S and F for perjury to D's prejudice.
(d) It was also held error to allow the sheriff, who was the chief witness against D, to remain in the court room when all the other witnesses were sequestered.
D was gambling and drinking at C's home. C was the loser. On his way home D discovered that his wallet was missing and reasonably believed it had been stolen, perhaps by C. He went in search of C, found him in a restaurant, and soon engaged in an argument in which C was killed. D defended on two grounds, (a) that the killing was accidental, and (b) that it was done in self defense. There was evidence to support each of these theories but the court refused to instruct on the law of self defense on the ground that D was to blame for bringing on the conflict.

Held: Error. When D missed his money he had a right to search out C and ask about it. Hence the rule that one who brings on a conflict cannot rely on self defense for a homicide committed during the course of the conflict has no application. Where there is evidence to support both defenses defendant is entitled to instructions on the law of each.

CRIMINAL LAW--Maiming Act--Assault and Battery

D had studied medicine in Germany but was not licensed to practice in Virginia. He treated Miss H for a supposed cancer in the nose by means of three salves one of which contained zinc chloride. Her whole nose was eaten away. He was indicted under the maiming act in that he unlawfully made an assault on Miss H and by the use of certain salves unlawfully caused her bodily injury with the intent to maim and disfigure her. There was also a count for simple assault and battery, D was found guilty under the maiming statute and sentenced to 5 years.

Held: There was no specific intent proved to maim and disfigure her. "The color of the act determines the complexion of the intent only in those situations where common experience has found a relia1111 correlation between a particular act and a corresponding intent". However if a jury were to find that D's acts were done recklessly and that D's consent was obtained by false representations then D can be found guilty of an assault and battery. Reversed, and remanded for a new trial on the charge of assault and battery, if the Commonwealth be so advised.

Note: In 150 Va.611 the defendant while intoxicated and driving his automobile at a high speed on the wrong side of the road collided with another car injuring X. Held:
If the act was done with reckless and wanton disregard for the lives and safety of others, the law would impute to defendant an intent to do bodily harm and he would be guilty of assault and battery.

CRIMINAL LAW--Character Evidence

In an assault and battery case D introduced evidence of his good character. The evidence as to what actually happened was in much conflict. D asked for the following instruction, "The Court further instructs the jury that the good character of the defendant, when considered in connection with the other evidence in the case, may create a reasonable doubt and the circumstances may be such that an established reputation of good character, if relevant to the issue, will alone create a reasonable doubt, although the other evidence in the case might be convincing". Should it be given?

Held: No. In the first place, if the evidence is not relevant it should not be admitted, and the admissibility of evidence is for the court and not for the jury. In the next place such evidence is merely a circumstance and never arises to the dignity of a presumption of law. The instruction in such cases should read substantially as follows: "The character of a prisoner when proven, whether good or bad, is a fact to be considered by the jury, but its weight as affecting the guilt or innocence of a prisoner is a matter for the determination of the jury in connection with the other facts proven in the case."

CRIMINAL LAW--Juvenile Court

N aged 23 and T aged 17 planned to murder and rob X, a Country merchant, and did so in cold blood. On advice of counsel they plead guilty. The court after the trial but before the sentence heard the report of its probation officer and then sentenced both of them to death. Held: Error as to T who was under 18 years of age. Under W/16-172.42 the court should have investigated T's case before trying him to see whether or not it should have been transferred to the Juvenile Court.
H and W were husband and wife. One afternoon H took W riding in his car to visit her aunt. When they got to the house where W thought her aunt lived H asked a man on the porch if this was where W's aunt lived. He replied that W's aunt had recently moved, and that he, D, had just moved in that day. H thanked D and got in his car. A few seconds later while H was driving along the highway away from D's home a shot struck H's car at right angles and entered H's brain. The bullet cannot be removed without causing H's death and there is no way to tell its caliber. Neither H nor W heard a shot. After H was shot W stopped the car, got out, and screamed for help. D and his wife and child came by in their car and ignored W's frantic pleas. When the sheriff came to D's house to investigate he found a revolver that had been recently oiled in plain sight. He asked D when it had been last fired and D first said several months ago but when the sheriff found signs of recent use he changed his story and said he had been shooting at a tree a day or two ago. He denied that H had been on the premises. The bullet could not have been fired from D's porch and have hit the car at right angles, but it could have been fired from another part of D's premises. D was convicted of malicious wounding. What result on appeal?

Held: Reversed and remanded. While all the circumstances are consistent with guilt they are not inconsistent with innocence. D's wife, or child, may have fired the shot in which case D might have acted as he did to protect them. Some one back in the woods may have fired it, as no one heard it. The fact that D had no motive to shoot H or W, while not controlling, greatly weakens the Commonwealth's case as does the fact that no effort was made to hide the revolver. Guilt cannot be based on mere suspicion and possibility.

There were three men in the front seat of a car, and two in the back. The men in the back seat got out and went to a house which the police had under surveillance. After the two men had returned to the car and resumed their trip the car was stopped by the police who found .24 grains of heroin in a small quantity of powder on the floor of the car in the part occupied by the two men. They were convicted of having had possession of narcotics. What result on appeal?

Held: Reversed. The evidence only creates a suspicion that defendants were guilty. The heroin might have belonged solely to one of the defendants or solely to the other or to someone else. The Commonwealth has failed to prove its case beyond a reasonable doubt.

Mrs. X received a number of anonymous telephone calls suggesting sexual relations. She was in the office of a dry cleaning company about 7:30 p.m. The back door of the office was unlocked and detectives were hidden inside. D who had made the calls and who had not been invited to come to the office opened the back door and was in the act of approaching Mrs. X when the detectives grabbed him. Is D guilty of statutory burglary in that he broke into a storehouse in the nighttime with intent to commit rape?

Held: No. There was no evidence that he intended to use force rather than persuasion only.
The prosecuting witness testified that this crime against her was committed near the lights of an identified airport. There was no other evidence of venue. Defendant wishes a new trial on the ground that venue was not proved.

Held: Venue has been proved. Evidence to prove venue may be direct or circumstantial and facts proved may be aided by judicial notice of geographical facts that are matters of common knowledge.

D was indicted for a felonious assault on X with intent to maim, disfigure, disable or kill. He was tried by the court on a plea of not guilty, found guilty as charged in the indictment, and sentenced to serve seven years. Under the indictment D could have been found guilty of malicious wounding, unlawful but not malicious wounding, or simple assault and battery.

Held: A general finding of guilt is a finding of guilt of the highest offense charged. Hence there is no merit in the argument that D was found guilty of a misdemeanor and sentenced for a felony.

D was convicted of driving his car at the rate of 62 miles an hour in a 55 miles an hour speed limit zone on radar evidence. The statute (Va. § 46-215.2) makes such evidence prima facie proof of speed.

Held: The statute is valid. Since it (1) is only presumptive evidence and there is a logical connection justifying such an inference, and (2) since the over-all burden of proof is not changed but only the burden of going forward with the evidence, the statute is not an unreasonable one, and it does not deprive D of life, liberty, or property without due process of law.

H and W were husband and wife. W was convicted of housebreaking and put on probation for twenty years. The court ordered H to assist in her probation. H failed to support W and suggested that she support herself as a prostitute. Is H guilty of contempt of court?

Held: No. Under our statutes only the probation officer who has duly qualified has any duty to assist in probation. Hence the order given the husband was beyond the power of the Court and void. Nor has H made any statement directed against the dignity and authority of the court. Nor is the mere suggestion that one commit a crime a crime in itself. It is not equal to inducement. "It did not reach far enough to constitute an attempt to commit a contempt."

D left his Aunt's home at 11:30 p.m. In the early morning of the following day some one broke into the X Warehouse and stole some articles. These were found by some children under the porch of D's Aunt's house. Various parties kept things there with the Aunt's permission. The Aunt called the police. D was arrested, and escaped twice. He also knew the goods had been stolen. Can he be convicted on the above evidence of either larceny or statutory burglary?

Held: No. Knowledge of a crime does not make one guilty. D did not have the exclusive possession of the stolen property as others had equal access to the place where it was found. An attempt to escape is some evidence of guilt, but not in itself, enough to prove the commission of a crime beyond a reasonable doubt.

R was tried for violating the Sunday laws in that he kept his grocery store open seven days a week. The Commonwealth proved that he did, and he was convicted. What result on appeal.

Held: Reversed and dismissed. The Commonwealth had the burden of proving beyond a reasonable doubt that under the circumstances of his case he was not engaged in a work of necessity (or charity). It failed to offer any such proof, and hence failed to make out a prima facie case. R did not have to prove that what he did was a work of necessity—a word which embraces all work reasonably essential to the economic, social or moral welfare of the people, viewed in the light of the habits and customs of the age in which they live and of the community in which they reside.


D was a passenger in X's car. While the car was being driven by X it struck Y and injured her. X failed to stop and shortly thereafter falsely reported to the police that the car had been stolen, but on questioning broke down and told the truth including the fact that D was in the car at the time. The last sentence of the statute (V # 46-189) reads, "It shall be the duty of any occupant, witness or other person having knowledge of such an accident to furnish as much of the information hereinafter required as possible if the driver is unable or unwilling to furnish it."

Is D guilty of any statutory offense if he failed to report the accident?

Held: No. The statute is void for indefiniteness and uncertainty. It does not state when or to whom the report is to be made. The Court cannot rewrite the statute by making it read that the report should be made to the police as soon as possible for that would be judicial legislation!

CRIMINAL LAW--Perjury  Willfully Swore Falsely  198 Va.461.

D stated at his trial for reckless driving that the cause of his car going off the road was the breaking of the left "A" frame. The facts showed that the left "A" frame did not break, but there was no evidence to indicate that D willfully swore falsely as he was merely giving his opinion. He was convicted of perjury.

Held: Reversed and dismissed. In order to convict one of perjury the proof must be beyond a reasonable doubt that the defendant willfully swore falsely.

CRIMINAL LAW--Writ of error coram vobis, or coram nobis--suggested by 198 Va. 762.

1. D is charged with a brutal and revolting crime which is a capital offense. The sheriff fraudulently told him that if he entered a plea of guilty he would get off light. Accordingly he entered such a plea and was given the death penalty. What remedy, if any, has D?

He should apply for a writ of error coram vobis. The principal function of this writ is to afford to the court in which an action was tried an opportunity to correct its own record with reference to a vital fact not known when the judgment was rendered. It has been used to inquire into the validity of a claim that a plea of guilty was entered through the coercion of fear or fraud.

2. But the writ does not lie merely to contradict or put in issue a fact directly passed upon and affirmed in the judgment itself. One cannot voluntarily enter a plea of guilty and throw himself on the mercy of the court, and when it turns out that the court shows no mercy, obtain a writ of error coram vobis. He is bound by his own voluntary election and it is immaterial that had he pleaded not guilty before a jury he might have received a lesser penalty.
CRIMINAL LAW Habeas Corpus

P was illegally sentenced to serve a 25 year term in the penitentiary for armed robbery. He was also sentenced by another court to serve a 6 year term for grand larceny, the latter sentence to start after the completion of the first. The two alleged crimes were separate and distinct. After P had served out his illegal 25 year term but while there was still 3 years to run on his 6 year sentence he applied for, and was granted a writ of habeas corpus.

Held on appeal, that the decision should be reversed. He is now being held legally under the 6 year sentence. It is hence immaterial that he had been held illegally under a 25 year sentence. The trial court had no jurisdiction to inquire into the legality of a sentence already served, for that has no bearing on the legality of the one now being served. So P must go back to prison to serve out the balance of his legal sentence!

CRIMINAL LAW Statutory Burglary - "other House" 199 Va.466.

Since 1950 by #18-160 and 18-161 it has been statutory burglary to "in the nighttime enter without breaking or break and enter either in the daytime or the nighttime any office, shop, storehouse, warehouse, banking house, or other house." D was convicted of statutory burglary for entering a chicken house with intent to steal chickens. The sentence pronounced by the judge was vague and indefinite although the jury had fixed D's penalty as three years in the penitentiary. D claimed that under the doctrine of ejusdem generis a chicken house was not included under the term "other house".

Held: (1) That a chicken house is an "other house" as long as it is a house and not merely a movable crate. (2) That while the sentence was void for indefiniteness, the trial was valid, and D can be sentenced nunc pro tunc giving him credit for time already served.

CRIMINAL LAW -- Evidence -- Weight to be given Jury's Verdict 199 Va.549.

According to the Commonwealth's version P bought a fifth of wine from D, the defendant, who was not licensed to sell it, and reported this fact to the sheriff within two hours of the alleged purchase. P had thrice been convicted of felonies. There was credible evidence to the effect that on the occasion in question P entered D's filling station while drunk and demanded to buy certain groceries on credit, that D refused to sell to P on credit until his $70 bill was first paid, that P told D that he would be "damned sorry", and that P had no package of any sort when he left D's station. D was convicted by the trial court.

Held: Affirmed. The jury is the judge of the weight of the evidence. The members thereof had the benefit of the "living record" and could see for themselves how the witnesses behaved. The Court cannot set aside the conviction below just because it might have found the facts differently. While it is rather uncommon for a purchaser of liquor to inform on the seller within such a short period of time it has happened. P's evidence is not incredible nor the facts to which he testified impossible.

CRIMINAL LAW A and B were indicted jointly for forgery of a check and for uttering it. A was tried separately and convicted as a principal in the second degree. The Commonwealth's evidence indicated that A cashed the forged check and was a principal in the first degree. However A's evidence indicated that he was a principal in the second degree as a taxi-cab driver testified that A did not leave the cab and that B cashed the forged check. There was ample evidence that A and B were working together.

Held: Conviction affirmed. The jury could have just as well believed A's evidence as the Commonwealth's, or they could believe part of one and part of the other. Hence there was no error in instructing the jury about the law of principals in both the first and second degrees.
Accused was charged with murdering his wife. Accused was a sergeant in the Air Force and his wife received an allotment check each month. There was evidence to the effect that when the accused charged his wife with unfaithfulness and turning over the proceeds of the checks to other men she told him, "It is my body and my money and I'll do as I please with my own." This so infuriated the accused that he killed his wife on the spot. The court refused to give any charges on voluntary manslaughter and I'll do as I please with my proceeds of the checks to other men she told him, "It is my body and my money.

In the amacie aforethought cases the accused uses reason to plan the crime. The two are mutually exclusive.

In the heat of passion cases the actor acts instinctively without reasoning. Reason is temporarily dethroned. In the amicie aforethought cases the accused uses reason to plan the crime. The two are mutually exclusive.

CRIMINAL LAW—Former Jeopardy  Town—County Jurisdiction  200 Va.45.
W#15-560 reads in part, "The jurisdiction of the corporate authorities of each town or city, in criminal matters, shall extend one mile beyond the corporate limits of such town or city---". And W#19-232 provides that if the same act violates two or more statutes, or two or more ordinances, or a statute and an ordinance, a conviction for a violation of one shall bar a prosecution for the other. Both the X Town and the Y County had valid ordinances prohibiting and punishing drunken driving. D was arrested for drunken driving in Y County within one mile of the X Town limits and charged with that offense in the X Town. The mayor dismissed the case for lack of jurisdiction. D was then prosecuted by the County. He contended that the Mayor of X Town had jurisdiction, that he could have amended the warrant so that it would have been committed within the County and hence that he has been in jeopardy.

Held: D does not have the defense of former jeopardy. The town's ordinances have no extra-territorial effect. Even if the mayor could have amended the warrant and have taken jurisdiction of a county offense he was not required to do so. Hence he never assumed any jurisdiction. Besides W#19-232 is not applicable unless the accused is convicted.

CRIMINAL LAW  Self Defense "Retreat to the Wall"  200 Va.92
D had been on friendly terms with Mr. and Mrs. S—in fact perhaps too friendly with Mrs. S and Mr. S was jealous. One day after Mr. and Mrs. S had had a violent quarrel and after Mr. S had threatened to kill D, Mrs. S called D on the telephone and requested him to bring some pictures for Mrs. S's son's scrapbook to Mrs. S's mother's apartment. D objected on the ground that S might attack him. But Mrs. S urged him to come saying that she wanted to discuss some other matters with him which were quite urgent. D put a pistol in his inside coat pocket and was admitted to the apartment by Mrs. S. Mrs. S's mother was not then present. Mrs. S then locked and bolted the doors. The two sat down on the foot of a bed while D showed Mrs. S the pictures. There was a gentle knock on the door, and then a violent breaking through by S who was apparently armed with a gun concealed under his coat. Poor D was cornered. He told S he had a gun too, but S continued to advance on D. D fired a warning shot but S still advanced and pulled out a lug wrench from under his coat. As he was about to strike D the latter fired a second shot and killed him. The trial court held that D was guilty of voluntary manslaughter since he was partly to blame for bringing on the conflict.

Held: Reversed and dismissed. Even if D was partly to blame, he "retreated to the wall" and by his actions indicated that he would kill only as a last resort. He reasonably expected to suffer death or great bodily harm unless he acted in self defense. (Note: The court said that there was a conflict of authority with no Virginia case either way as to whether a man caught in an act of adultery by the husband can kill the husband in self defense.) But in this case there was no proof of adultery. Mrs. S had a right to meet D at her mother's apartment and S had no right to break in. Hence the Supreme Court of Appeals found it unnecessary to consider what it would have decided had the husband caught D in an act of adultery.
He saw a car being driven around midnight in such a way as to arouse his suspicions, so he hid in his store armed with a plank. D got out of the car, broke the front store window, entered, and handed his confederate a television set. X then surprised D by hitting him a sharp blow across the shoulders with the plank. D wheeled around and shot at D with a pistol but missed. D was apprehended and charged with and convicted of the crime of robbery.

Held: Reversed and remanded. The larceny was completed when the shots were fired and hence there was no larceny by force and violence against the person. (D should have been charged with statutory burglary and attempted murder—not robbery).

V/19-232 reads in part, "* * * if the same act be a violation of both a State and a federal statute a prosecution or proceeding under the federal statute shall be a bar to a prosecution or proceeding under the State statute." D was caught manufacturing illicit whisky in A County by the joint efforts of State and federal officers. The latter took D into custody. At that time D was already charged with two prior federal liquor violations. When he was tried for the prior violations the Judge took into consideration the fact that he was also charged with the A County violation in determining what sentence to give him. This was done at the request of D's attorney. The federal district attorney did not wish to prosecute D by prosecuting him for the A County offense also, as D had some serious personal problems and had promised to get out of the illicit liquor business. The federal judge sentenced D and then freed him on probation. The A County officials thought that D was getting off too lightly and succeeded in having him convicted and sentenced for the A County offense in the Circuit Court of A County.

Held: Reversed and final judgment. The taking into consideration of the A County offense in fixing D's punishment after his conviction for the prior offenses was a "proceeding" within the meaning of V/19-232 first set forth above, and hence any prosecution by the State was barred. "Proceeding" has no exact meaning but is broader than the word "prosecution".

Mrs. X became addicted to the use of paregoric. Her husband requested D to stop selling it to her, but D kept on selling it to her on the sly. The sale of this preparation without a doctor's prescription is permitted by certain classes of persons of whom D was one. But V/54-504 requires a record be kept of the date of the sale and of the name and address of the purchaser. D failed to keep such records and he was convicted of a felony.

Held: Reversed and dismissed. The statute requiring the record to be kept does not say when the entries must be made. It is elementary that criminal statutes are void if the terms in which they are couched be so vague as to convey no definite meaning to those whose duty it is to execute them. Due process of law requires enough certainty in criminal statutes so that one charged with their violation can tell whether or not he has violated the law at the time he does, or fails to do, the act which is charged to be a violation thereof.

D was indicted for breaking and entering and stealing property, at the same time, as one continuous act. The jury found him guilty of housebreaking and stealing property §25. The sentence was one year in the penitentiary, but it failed to show how much of it was for housebreaking and how much of it was for larceny.

Held: No error. There was only one crime. The proof of the actual larceny was merely evidence of the intent with which the breaking and entering were done. Hence it would not be proper to separate the sentence.
CRIMINAL LAW—Criminal Procedure Definition of Reasonable Doubt 200 Va.655.

In a criminal case the court instructed the jury at the request of the Commonwealth "*** If, on the other hand, *** you have an abiding conviction of the truth of the charge, you are then satisfied beyond all reasonable doubt."

Held: No error, in spite of the fact that it did not read "*** you have an abiding conviction of the truth of the charge to a moral certainty of the guilt of the accused." However instructions attempting to define reasonable doubt should be discouraged as it is highly probable that any definition devised would be less clear than the expression itself.

CRIMINAL LAW—Criminal Procedure Biases of Juror 201 Va. 5

W, a white man, and C, a colored man were indicted for the crime of sodomy. W demanded a separate trial. Twenty jurors free from cause were chosen in the usual way for C's trial. The twenty jurors heard the indictment read, which, of course, mentioned W's name, and heard C plead not guilty. Eight of the twenty were then stricken from the panel and told to get out. C was duly convicted and an account of his conviction was published in the local papers in connection with W's name. Later, but at the same term of court, W was arraigned and the eight men who were stricken from the jury in C's case were placed on the panel to try W who objected before the jury was sworn, on the ground that they were in all probability biased against him. The trial judge refused to dismiss the eight at that stage but stated that he would do so on the voir dire if the examination there showed them to be biased.

Held: (one judge dissenting on the ground that bias is not presumed but must be proven) reversed and remanded. The things stated above were sufficient to show a probability of bias. The panel in a felony case must consist of 20 jurors free from cause for challenge. There was no such panel in the instant case.

CRIMINAL LAW—Bad Checks—False Pretences 201 Va.61

On four different occasions and with four different car dealers D represented that he was a dealer in Richmond in second hand cars and from time to time sold new cars also, that he had a line of credit with the B Bank to the extent of $20,000, that his business was good, that he would give the car dealer in question his check for $3,000 for a new car, that he would have to have the title so that he could borrow from the B Bank as his business was one that needed considerable capital, and that as soon as he borrowed from the B Bank his account would have sufficient funds with which to take care of the check. In each case he would borrow from the B Bank on the grounds that the car dealers were unable to get back their cars, nor could they collect from D as he was insolvent. D was found guilty of larceny, (a) because he violated the bad check laws (Va.6-129 et seq.) and, (b) because he obtained property by false pretences.

Held: (1) D is not guilty of violating the bad check laws because he stated he did not then have the money in the bank and hence the car dealers knew that the check was not then good. (2) D is guilty of larceny (obtaining by false pretences) since he has misrepresented present and past material facts with a fraudulent intent and the car dealers relied on these misrepresentations. His business was not good, and he did not have a line of credit with the B Bank. The fact that the instant case, which involved only one car dealer, was not an isolated one was further evidence of his fraudulent intent.

CRIMINAL LAW Habeas Corpus 201 Va.135

P was convicted of the crime of rape under an indictment charging him with forcibly and feloniously having carnal relations with W, a female over 16 years of age. The indictment did not expressly state that this was done against her will. But P did not demur, move to quash, make a motion in arrest of judgment, or appeal. After serving four years of his sentence P seeks his freedom by habeas corpus on the ground that the indictment was a nullity.

Held: Writ of habeas corpus refused. While the indictment was defective, the defects could have been remedied had timely objection been made by demurrer, motion to quash, or motion in arrest of judgment. P knew he was being tried for rape. The defects were not jurisdictional. Habeas corpus cannot be used as a substitute for an appeal or writ of error.
(1) D was arrested without a warrant by an officer of the city of L for a misdemeanor committed in his presence. No summons or warrant was ever served on her but she gave bond and appeared in court in accordance with the conditions of her bond. It was urged on appeal that due process requires that she be served with a summons or warrant apprising her of the offense of which she is being charged.

Held: Contention unsound unless she first asked for a statement of the charges in writing. VA 16.1-129.1 permits an arrest and detention without a warrant in cases of this sort and a trial without its issuance unless the defendant shall "demand that the charges against him be reduced to writing in the form of a warrant." No such demand had been made and she knew exactly for what she was being tried.

(2) She was tried for violation of a municipal ordinance of the City of L. (Second offense of driving while intoxicated).

The ordinance was never introduced in evidence when the case was tried before a jury on appeal from the municipal court. The jury found her to be guilty. Then counsel for D moved that the verdict be set aside as contrary to the law and the evidence. He did not in any way specify why it was in conflict with the law and the evidence. On appeal to the Supreme Court of Appeals he now urges that the reason therefor was because the municipal ordinance was not introduced into evidence.

Held: For the City of L. While the ordinance should have been so introduced, Rule of Court 1:8 provides that all objections to matters requiring a ruling or judgment of the trial court shall state with reasonable certainty the ground of objection, and, unless it appears from the record to have been so stated, such objections will not be considered by the Supreme Court of Appeals except for good cause shown or to enable that court to attain the ends of justice. This rule was not complied with and the exceptions have no application.

H and W were husband and wife. They were reasonably suspected of violating the ABC laws. O, an officer, gained entry to this home by failing to make a full disclosure of that fact. When H discovered his true identity he beat him over the head with a pistol and when O fell back dazed H said, "I ought to kill him." Within sixty seconds H shot O in the wrist. W aided and abetted H. They were indicted jointly for two separate felonies. The Commonwealth, over objection, was permitted to try H and W separately. VA 19-177 provides that a person who has been indicted jointly with others for a felony may elect to be tried separately, but there is nothing in this statute which expressly permits the Commonwealth to insist on separate trials of persons indicted jointly and who wish to be tried jointly. The jurors found H guilty of two separate simple batteries—one of each count.

Held: In this case there is only one offense. Hence it was error to split the one crime into two crimes and punish for each. As to separate trials, it was held that the trial court, in the exercise of a reasonable discretion, could require separate trials of parties indicted jointly.

CRIMINAL LAW—Criminal Procedure

Code 18-75 and following deal with chemical tests for drunkenness. They provide that the defendant may request such a test if the request is made within two hours of his arrest. D drove a car off the highway and was injured. Officer One had him taken to a hospital, reasonably thinking that drunkenness might have caused the accident, he telephoned Officer Two to notify D of his rights. D requested a test. Soon thereafter D lapsed into a coma. Officer D refrained from arresting him until he was discharged from the hospital several days later. D now states that he has no recollection of ever having requested such a test, that it was not taken within two hours of his arrest, and that Officer Two was not the arresting officer, and hence not the proper officer to tell him of his rights and to assist him to get the test.

Held: For the Commonwealth. The statutes should be interpreted reasonably. A test, two hours after his arrest, which was delayed for several days, for humane reasons, would have proved nothing; a test at the request of the accused made before his arrest is proper. Officer Two while assisting Officer One had all the rights of Officer One and hence was a proper person to notify D of his rights and to assist him to get a blood sample.
D was convicted of the crime of attempted rape. At the time of the alleged crime he was not quite sixteen years of age. The statutes as to how minors should be arrested and kept in jail were not fully complied with. He made a confession, which, according to the officers, was a voluntary one, but, according to D, was procured by force and threats. The judge heard the testimony as to whether or not the confession was voluntarily made and admitted the confession. This same issue was also fully developed before the jury, and the jury were instructed to disregard the confession if they believed it had not been given voluntarily.

Held: No reversible error. It was not shown that failure to abide by the statutes with respect to the arrest of juveniles adversely affected any of D's constitutional rights. It was proper for the court to hear the evidence as to whether or not the confession was made voluntarily as it is the duty of the court to rule on the admission or exclusion of the evidence. It was also proper for the jury to consider such evidence as it is their function to pass on the credibility of the evidence.

D had been tried for violation of a city ordinance on a charge of reckless driving (40 miles an hour while drunk). The car turned over killing one of the passengers. D was acquitted on the theory that he was not the driver. The Commonwealth then prosecuted him for manslaughter. D contended that he could not be put twice in jeopardy for the same thing, and that the action was barred by virtue of Va. § 19-232 which reads, "If the same act be a violation of two or more statutes, or of two or more municipal ordinances, or of one or more statutes and also one or more ordinances, conviction under one of such statutes or ordinances shall be a bar to a prosecution or proceeding under the other or others."

Held: Neither contention is valid. Reckless driving and manslaughter are separate offenses even if resulting from the same act. Since D was not convicted the statute he relies upon is not applicable.

D was tried for the crime of rape. The verdict read, "We the jury find D guilty as charged and recommend the penalty of death be imposed." Va. § 19-267 reads, "The punishment in all criminal cases tried by a jury shall be ascertained by the jury trying the same within the limits prescribed by law." The usual form of a verdict is "fix," and in this case the word "fix" was used by the trial judge in his instructions. When the Court asked counsel for the defense if there was any objection to the form of the verdict one of them replied in the negative. D brought habeas corpus (after an unsuccessful appeal in which the form of the verdict was not considered) on the ground that the judgment was a nullity since no punishment was fixed by the jury. The trial judge granted the writ and the Superintendent of the Penitentiary appealed.

Held: Reversed. There is no reasonable doubt about the intent of the jury. Strict technical form is not required and immaterial defects should be disregarded. Besides, failure to object to the form before discharge of the jury constituted a waiver of a non-prejudicial error.

Clyde Near was convicted of the murder of Barry Chapman, and sentenced to death. He sought a new trial (1) because there were no women on the jury, (2) because the statute authorizing women to serve on juries is unconstitutional since it places such service on a voluntary basis, (3) because though the court had granted Near's motion to exclude witnesses from the courtroom it allowed the sheriff who was a witness to remain, and (4) because a juror had talked about the case while it was in progress with persons other than jurors contrary to court order.

Held: (1) The fact there were no women on the jury is immaterial in the absence of evidence that women were purposely excluded, (2) the statute is valid as stating the Commonwealth's public policy not to force women to serve on juries where they would frequently have to listen to filthy evidence that many ladies would rather not hear, (3) the exclusion of witnesses is within the discretion of the court, and the action of the court will not be set aside unless there is a clear abuse thereof and some
probability that the defendant has been prejudiced. There was no abuse of discretion in the instant case as the sheriff is an officer of the court with duties to perform, and the evidence of the sheriff was merely cumulative. (4) Unless it is shown what was said by the parties to whom the juryman talked and that it influenced his decision, this does not constitute sufficient grounds for a new trial. Besides, in this case this matter was brought before the court after the expiration of more than 21 days after judgment was entered and had become final in violation of Rule of Court 1:9.

CRIMINAL LAW Ethics  Improper Argument 202 Va.197.

In a murder case in which the defendant killed his wife's former paramour it was held improper for the Commonwealth's attorney to ask the accused (who had taken the stand) whether or not he had ever been convicted of a felony when the defendant had never been so convicted. However, this impropriety was cured by a withdrawal of the question and by the court's telling the jury to completely disregard it.

In this same case the defense, without any notice, called Dr. Hurt as an alienist as its last witness. The Commonwealth's Attorney made no objection to his qualification as an expert, but, in his closing argument, he was permitted to complain that Commonwealth had not been advised of this action, that it had been prevented from bringing in a competent alienist, a man who knows something about this kind of condition. He then berated Dr. Hurt on the ground that he came from a small town, stated that there were many local competent doctors defendant could have called, and suggested that he was getting under the skin of defendant's attorney when the latter objected to this line of argument. The Commonwealth's Attorney did not ask for time in which to obtain an expert medical witness.

Held: This type of argument constituted reversible error because sufficient "to divert the jurors' attention from the main issues, arouse their resentment over the conduct of defendant's counsel, and prompt them to give unwarranted effect to issues and evidence not before them."

CRIMINAL LAW-Revocation of Suspended Sentence 202 Va.217.

M's jail sentences were suspended by writing on the warrants, "Suspended 12 months on payment of fine and costs." Within this period M was tried for the crime of receiving stolen property, and acquitted, despite, the fact that the evidence against him was quite convincing and he had stated to a prospective purchaser that she could get it cheap because it was stolen probably. M contended (1) that since the only condition of the suspension was payment of fine and costs, there could be no suspension for any other reason, and (2) that since he had been acquitted of the charge the revocation could not be based on any such alleged misconduct.

Held: Revocation valid. Va.197 makes good behavior an express condition of the suspension. If there has been misbehavior the suspension can be revoked at the discretion of the trial court. So the only question involved is whether or not the trial court has abused that discretion. Hence an acquittal of a later criminal charge is not conclusive, as the discretion is the trial court's and not that of some jury's. Moreover the degree of proof required in the later criminal case is different from that required for a revocation of a suspended sentence since in the latter case there need not be proof beyond a reasonable doubt.

CRIMINAL LAW Burden of Proof in Insanity Cases 202 Va.236 and 311

In these two cases our Supreme Court of Appeals has adhered to the settled rule in Virginia that the burden is on the defendant to prove his insanity to the satisfaction of the jury in cases in which defendant claims that as a result of a diseased mind he had an irresistible impulse to kill.

CRIMINAL LAW-Challenge for cause-Statutory larceny 202 Va.511

Va.197 provides that if any person take, steal or carry away, without permission of the owner, oysters, bedded or planted, he shall be deemed guilty of the larceny thereof. D was tried, convicted and fined for such an offense. On his trial he was not permitted to ask prospective jurors whether or not they owned oyster beds. The evidence clearly proved that D took oysters from X's bed, but there was evidence
that the bed was not clearly marked by stakes.

Held: (1) The fact that prospective jurors owned oyster grounds is no reason for disqualification (Suppose all farmers who owned chickens were disqualified in chicken stealing cases). If D wished to ascertain the occupations of the prospective jurors to aid him in deciding which ones to challenge peremptorily he should have consulted the list of veniremen prepared by the sheriff under V#19.1-203. (2) Since this is a case of statutory larceny (and no criminal intent is required by the statute) it is immaterial that the beds were not sufficiently marked (as in such cases the defendant acts at his peril). The part in this last parenthesis is implied though not expressly stated.

CRIMINAL LAW—Evidence  
Burden of Proof  
119 S.E.2d 324, 202 Va. 667

V#46.1-190(f) reads in part, "A person shall be guilty of reckless driving who shall:* * *Fail to stop at a school bus stopped on the highway for the purpose of taking on or discharging school children* * *provided, however, that this shall apply only to school buses marked as provided in the regulations of the State Board of Education". D was charged with violation of this statute. The trial court held that the Commonwealth did not need to prove that the bus was marked as per regulations and that it was presumed to be so marked in the absence of evidence to the contrary. A witness testified that it was properly marked but D was not permitted to cross examine the witness.

Held: Reversed and remanded. The burden of proof of every element of a crime is on the Commonwealth unless a valid statute provides otherwise. There was no crime in this case unless the bus was properly marked. The witness' statement that it was so marked was a matter of opinion, and it was reversible error to deny to D her right to cross examine the witness to see if he knew what the regulations were and how the bus was marked.

CRIMINAL LAW—Waiver of Preliminary Hearing  
Jurisdictional or Procedural  
121 S.E.2d 422, 202 Va. 1009

V#19.1-163.1 provides that no person who is arrested on a charge of felony shall be denied a preliminary hearing upon the question of whether there is reasonable ground to believe that he committed the offense and that no indictment shall be returned against any such person prior to such hearing unless such hearing is waived in writing. D was charged with grand larceny. A preliminary hearing was held before the judge of the municipal court had given his decision, D was indicted. D was later tried and found guilty. At this trial D made no objection to being tried because there had not been a proper preliminary hearing. After the trial he contended that since there was no waiver in writing the Hustings Court of the City of Roanoke had no jurisdiction.

Held: Anything that can be waived cannot be jurisdictional as consent cannot give jurisdiction. Hence a preliminary hearing is not jurisdictional, but procedural, and procedural objections must be raised before trial, or they are forever lost as ground for objection.

CRIMINAL LAW—Evidence  
Proof to convict  
121 S.E.2d 452, 202 Va. 1009

B, C, and D were jointly indicted for larceny, D as a principal in the first degree and C and D as abettors. D demanded a separate trial. B, the principal, had been tried and convicted. The evidence indicated that B, C and D were close associates, that, pursuant to plan, C and D entered X's Jewelry store, that D pretended to want to buy a watch, that while X was showing D his watches B entered the store, that B, C and D gave no sign of recognition as B came in, that D told X he was in no hurry and for X to wait on B, that while X was waiting on B both C and D distracted X's attention by asking him questions thus enabling B to steal a ring priced at $1500. Within a few moments after B, C and D had left, X noticed the loss and called the police. B took the ring to K who owned a pawnshop and asked K what he would give him for the ring. K replied that he would give him $300. This reply angered B, and he left K's place of business. Within a few minutes the police called K who told them what had happened. At D's trial K was offered as a witness against D to testify as to the above facts. This was objected to as irrelevant hearsay as far as D was concerned.
Held: Objection overruled. To convict one as an abettor (principal in the second degree) it was necessary for the Commonwealth to prove the principal offense. K's testimony was relevant as to the commission of that offense, and he is testifying as to facts of which he has first hand knowledge. Note: In this case the Supreme Court of Appeals also held that the Commonwealth need not prove the commission of the main offense beyond a reasonable doubt as far as the jury trying D is concerned. It had already done that when B was tried before another jury.

Prior to his arraignment D moved the court to quash the indictment on the ground that in its charge to the grand jury the court stated that "the Commonwealth's attorney does not send all of its witnesses to the grand jury **. He just sends enough to show probable cause". D contended this practically directed the grand jury to return a true bill.

Held: No error. It is merely a general statement relating to the procedure to be followed in all cases which may be presented to the grand jury as provided for in V/19.1-154 and in no way infringes on the function of the grand jury to examine into accusations made against persons charged with crime and to determine whether it is proper that they be brought to trial.

Note: The above case was a seduction case. The court held that where the prosecutrix admitted that she had no objections to sexual intercourse other than fear of pregnancy, and where she bargained with D that if such an event he would marry her, and the promise of marriage was not the prime reason for the intercourse, there is no seduction within the spirit of the seduction statute.

CRIMINAL LAW--Municipal Corporations 203 Va.186.
The City of Lynchburg imposed a 3 cent sales tax on packages of 20 cigarettes. D sold large quantities of cigarettes through vending machines. He fraudulently made a rubber stamp which read "Lynchburg, Va.--26322--Tax Paid--Cigarettes." The number 26322 was the number of a stamp meter that was being legitimately used by a competitor. D stamped each package that he put in his vending machines with the above stamp. This violated the ordinance imposing the tax, and, under this ordinance, was punishable by fine. D was prosecuted for forgery under the state law, convicted, and sentenced to the penitentiary as a felon. He urges that he can only be fined under the ordinance which created the offense and fixed the punishment.

Held: For the Commonwealth. The City of Lynchburg did not create the offense. D was guilty of forgery under the state law. The City cannot make a felony a misdemeanor. "An ordinance in conflict with state law of general character and state-wide application is universally held to be invalid". (This) is not a case where a specific statute takes precedence over a general statute relating to the same offense. It is a case where a general State statute controls as against a later-city ordinance in conflict with it.

It was held in this case that V/18.1-87 which makes possession of burglary tools by one not duly licensed to sell them presumptive evidence of having such tools with intent to commit burglary merely shifts the burden of going forward with the evidence to the possessor, and in no way affects the ultimate burden of proof beyond a reasonable doubt which remains in the Commonwealth.
D's dog was caught killing an ewe. Someone shot at the dog and wounded him. The dog limped home and a criminal warrant was sworn out charging D with unlawfully possessing a sheep-killing dog. D appeared at the County Court proceedings where he was found guilty of the offense charged and the dog was ordered killed. D appealed to the Circuit Court on the ground that there was no such crime and hence all the proceedings were void. That Court admitted that there was no such crime, but since the dog had been shown to be guilty and had had his day in court, the judge ordered the dog to be killed as would have been proper if the correct civil proceedings had been taken, and acquitted D of any criminal offense.

Held on appeal (3 justices dissenting) that while it was error to proceed criminally when there was no crime, the error was harmless as the dog was clearly guilty and his owner had availed himself of an opportunity to give evidence in the dog's behalf. The dissenting judges agreed that the dog was guilty and that there was no more despicable creature than a sheep-killing dog, but urged that that was no reason to take a short cut to justice by changing a criminal warrant into a civil one and following an entirely different procedure then that laid down in the Code.

(CRIMINAL LAW--Sheep-Killing Dog 203 Va.682.)

For over 30 years D had served as a special commissioner of the Court in some nine chancery suits. He had failed to keep proper records. The Chancellor appointed P as a special commissioner to investigate and determine what amount was still due. P investigated painstakingly for some six years and reported that a certain sum was due. The Chancellor then entered a decree in favor of P who was under a duty to collect from D what was still due and pay certain lien creditors whose rights had been determined in the chancery suits in which D had been a special commissioner. D refused to pay P and the Chancellor issued a rule against D for him to show cause why he should not be adjudged guilty of contempt. D was found guilty and sentenced. D appealed.

Held: D is not guilty of contempt. Failure to pay a sum of money due as a result of a judgment or decree where there has been no order to pay is not contempt. Reversed and remanded.

(CRIMINAL LAW--Contempt of Court 203 Va.704.)

It is thought that D on Jan.11, 1959 forced a car, driven by J and occupied by Mrs. J and two small daughters, off the road, at gun point forced the occupants into his car, that he shot J in the head and killed him and one daughter in S County, and that after assaulting Mrs. J killed her and the other daughter in Maryland. D had been tried in a federal court for kidnapping and been given a life sentence. In the instant case he was tried in S County for the murder of J, convicted, and given the death penalty. He appealed. Some of the more important principles of law applied in this case are set forth below.

(1) D's father's house was searched with probable cause to believe that D's gun was there and with the father's consent, but not with D's consent. D no longer lived there but was welcomed as a guest whenever he visited his father. An accordian case with a .38 caliber revolver in it, and a write up in D's handwriting as to some of the horrible details of the crime were found in the attic. Some plastic grips found at the scene of J's murder matched the gun perfectly. It was contended that none of this evidence was admissible even in a State Court because it had been illegally obtained. Held that a search with the consent of the owner of the portion of the premises searched in the absence of fraud or duress is not an illegal search. (If D had had a room there for which he paid rent then his father's consent to a search of that room without a warrant would not have justified the search.)

(2) The incriminating writing found in the case was not admissible. The admissions therein had not been made to anyone. Their admission would have violated his privilege against self-incrimination. D's father could not waive this privilege. D could not have been compelled to produce the writing.

(3) Evidence as to finding of the bodies in Maryland was admissible as an exception to the rule that one crime cannot be proved by proof of another. The killing of Mrs. J was part of his overall plan and showed a motive for the killing of J.

The excellent opinion of the trial judge, the Hon. John D. Butzner, Jr., was adopted by the Supreme Court of Appeals as their Per Curiam opinion. Affirmed.

(CRIMINAL LAW--The Rees Case--Evidence 203 Va.850.)
D was indicted by a grand jury for embezzlement and arrested after indictment. She was thereby deprived of a preliminary hearing. The evidence showed that over a period of time she was short a considerable sum, but it also showed that others had access to the petty cash fund and to the books and it was impossible to tell from the records and the poor internal control system used who was responsible for how much. An expert witness was allowed to testify over objection to the effect of two deposit slips prepared by D which contained receipts that had not been recorded in the books that since they indicated that there was a shortage "they had to replace funds from other customers which had been removed."

Held: (1) It is only in the case where one is arrested for a felony that a preliminary hearing must be held under Va.1-163 in order to determine whether reasonable cause for suspicion of guilt exists. If the grand jury itself indicts before an arrest, reasonable cause has been shown. Since a preliminary hearing can be waived such a hearing is not per se a necessity for due process. (2) The mere showing of a shortage in D's books is not enough to overcome the presumption of innocence where evidence of guilt is circumstantial and others could have committed the crime with which D is charged. (3) It was error to allow an expert witness to express his opinion on the conclusions he would draw from his testimony where these conclusions bore directly on the issues of the case as such testimony usurps the functions of the jury. Case reversed and remanded for a new trial if the Commonwealth be so advised.

CRIMINAL LAW--Failure to Take Arrested Person Promptly before Judicial Officer

The great weight of the evidence indicated that P was driving an automobile while under the influence of intoxicants. He was arrested at 12:30 a.m. when he drove his car into a stopped bus. He was not given an opportunity to get bail until 9 a.m., There was no explanation for this delay. He was told that he was entitled to submit blood tests, but expressed no desire for any. It was urged in his behalf that he was denied due process and that he should be released as per the Court's holding in the Winston Case (49 S.E.2d 386) on p.1817 of the Constitutional Law Cases of these Notes. You should refer to this case.

Held: (Mr. Justice Spratley dissenting) that despite the gross violation of P's rights, he was not permanently deprived of the opportunity of obtaining evidence in his behalf as in the Winston Case. Two wrongs do not make a right, and it would be wrong to deprive the Commonwealth of its right to punish a guilty man because police officers were guilty of a wrong, as long as that wrong did not prevent a fair trial on the merits.

CRIMINAL LAW--Legal Ethics--Evidence

Va.4-57(b) provides that, "Every person found at any distillery *** where alcoholic beverages are being manufactured "in violation of law", shall be deemed prima facie guilty of manufacturing the same or aiding and abetting in such manufacture ***". Illegal manufacturing is a felony. W, a State investigator, testified only that he saw D, a 16 year old boy, "at the still site". The juvenile court certified the case to the circuit court to be tried as a felony. The Commonwealth's Attorney told the jury, "If you make a mistake the Court can correct it". The jury found D guilty and sentenced him to fine and imprisonment. What errors, if any, were committed?

Held: (1) It was not error for the juvenile court to refer a felony case involving a minor under 18 and over 14 to the Circuit Court. If he does, that Court may, in its discretion, try him as an adult or as a juvenile. There was no evidence in this case of an abuse of discretion. Va.16.1-176 and 177.

(2) It was error to convict D on the above evidence. W did not even testify that any alcoholic beverages were being manufactured, or how close D was to the still.

(3) The statement to the jury that, "If you make a mistake the Court can correct it" was highly improper. It is an invitation to the jury to do as they please regardless of their oaths as jurors. "Attorneys for the Commonwealth should always remember whose commission they bear and should scrupulously respect the rights of the accused."
CRIMINAL LAW Maiming Statute—Defective Verdict
204 Va. 640.

O, a police officer, while attempting to arrest D for being drunk in public discovered D had a gun. O ordered D to hand the gun to him. Instead, D shot O. D was prosecuted under the maiming act(V#16.1-65). He could have been found guilty of maliciously maiming with intent to main, disable, disfigure, or kill for which the penalty is 3 to 20 years, or of unlawfully but not maliciously maiming with the intent aforesaid for which the penalty is up to three years in the penitentiary or confinement in jail, or of simple assault and battery. The jury returned a verdict as follows (misspelling theirs), "We the jury find the defendant D guilty of unlawful maiming and fix punishable by confinement in the penitentiary for a period of five years."

Held: (1) A finding of unlawful maiming is an acquittal of the more serious offense of maliciously maiming.
(2) The verdict of guilty of unlawful maiming is otherwise fatally defective as it does not include a finding that the maiming was done with the intent to main, disable, disfigure, or kill, or as charged in the indictment. "The failure, to name the person wounded in the verdict was not of itself fatal, but the failure to recite the requisite intent to main, etc., or to state 'as charged in the indictment' rendered the verdict and the judgment entered thereon a nullity." 190 Va. 58, 55 S.E. 2d 450 on p. 2017 of the Criminal Law cases of these notes followed. Reversed and remanded.

CRIMINAL LAW—Habeas Corpus Voidable Sentence
204 Va. 851.

Hayes was inadvertently indicted for manslaughter instead of murder. The only difference in the statutory short form indictments is that the manslaughter indictment uses the expression "kill and slay" while the murder indictment reads "kill and murder". Everyone at the trial including Hayes and his attorney assumed that he was being tried for murder and his punishment was fixed at life imprisonment. On appeal no claim was made that the indictment was for a lesser crime. Hayes has now served the maximum time for manslaughter and seeks his freedom by writ of habeas corpus. Is he entitled thereto?

Held: No. The trial court had jurisdiction over both murder and manslaughter cases. If it gave an excessive sentence for manslaughter the sentence is thus not void, but voidable on appeal. Hayes failed to urge the point on appeal. Habeas corpus is not a substitute for a writ of error (appeal). No one has a right to appeal, and when that is denied, test the whole thing over again by habeas corpus. The conviction cannot be attacked collaterally. There was no element of unfairness in Hayes' trial for murder as he was not mislead in any way.

CRIMINAL LAW—Criminal Procedure—Habeas Corpus
205 Va. 347.

P was convicted of Larceny #1, and of Larceny #2. He was sentenced to serve a term of ten years for each. In the case of Larceny #1 sentence was suspended on condition that he be of good behavior. In the case of #2 sentence was suspended on the same condition and on the further condition that he disclose the whereabouts of the stolen property. This P declined to do and as a result he served his 10 year term. The Court then revoked the suspension of the sentence for #1 when it found that he was still unwilling to tell where the stolen property was. Instead of appealing from the order of revocation P instituted habeas corpus proceedings in the Supreme Court of Appeals.

Held for P. The Commonwealth is bound by the terms of the suspension of sentence. Disclosure was not a term or condition of the suspension of sentence of Larceny #1. Since P is being held in violation of his constitutional rights he is entitled to the writ of habeas corpus, and was not limited to a right to appeal from the order of revocation.

CRIMINAL LAW—Criminal Procedure—Constitutional Law—Recidivists
205 Va. 369.

C was tried as a recidivist in 1960 (V#53-296). He was then indigent and no counsel was provided for him. He was found guilty and sentenced to serve an additional year in the penitentiary. This proceeding was void under the ruling of
Chewing v. Cunningham, 368 U.S. 413 because of a failure to provide counsel. The Commonwealth is now seeking to retry C and counsel has been appointed. His counsel sought a writ of prohibition in original proceedings before the Supreme Court of Appeals. It is contended in his behalf that under W#53-296 the trial would be in Richmond, where he has committed no crime, that although a felony is involved the statute only provides for a jury of five, and that such a trial would constitute double jeopardy, all in violation of section 8 of the Constitution of Virginia.

Held: The statute is valid. There is no such crime as being an habitual criminal. Rather it is a status involving two factors(1)A prior record of conviction of a felony (which the court determines) and (2)Identity of the person tried (which a jury determines). An incident of this status is additional punishment for a crime already committed. While the proceedings are of a penal nature, they are not criminal proceedings and hence Section 8 of the Constitution of Virginia is not applicable.

CRIMINAL LAW--Right to Counsel--Judge's reply to question "Does a life term mean to the end of his life?"

D, an ignorant 17 year old Negro youth, was arrested on a charge of rape. He was eventually taken before a juvenile court judge for the purpose of ascertaining whether he should be tried as an adult, and that judge held that he should. He had no counsel at that time, but did procure counsel of his own choice for all later proceedings including the preliminary hearing. While the jury was out the trial judge was asked by the foreman whether a life sentence meant to the end of his life. The judge replied that pardons and paroles were matters for the executive branch and that they should disregard such matters and impose a fair and just penalty. A short time thereafter the jury found D guilty and fixed his penalty at death.

Held: (1) D was not entitled to counsel as a matter of right at the hearing before the juvenile judge. The matter to be determined at that hearing did not involve D's fundamental rights, but only the procedural question of the court before which he would be tried. (2) But it was error to tell the jury that life convicts may be pardoned or paroled. That query should have been simply answered, "Gentlemen, you should inflict such punishment as you think just and proper and that is the full measure of your duty."

CRIMINAL LAW--Double Jeopardy

X, a police officer, was travelling north on C Avenue in the westermost of three lanes. He testified that D, a taxi driver, drove his cab diagonally from the eastermost lane into his lane of travel so nearly in front of him that he had to apply his brakes violently to avoid a collision. He arrested D on a charge of failing to yield the right of way. This charge was nol prossed as there was no proof of any such offense as applied to the above facts. It was admitted that this was the same as an acquittal. A new warrant was issued charging D with reckless driving. D pleaded his acquittal (the nol pros) as a bar to the prosecution since it was based on the identical facts.

Held: The plea is bad. Reckless driving and failure to yield right of way are two distinct offenses just as are manslaughter and hit and run, and driving under the influence and reckless driving. A warrant charging failure to yield right of way could not be amended to one for reckless driving as that would change the nature of the charge. One can fail to yield the right of way without driving recklessly and one can drive recklessly and still yield the right of way. In Virginia the test of double jeopardy is not identity of facts but whether one can be convicted of both offenses on identical evidence.

CRIMINAL LAW--Contempt of Court--Sheep killing dog case

L was found guilty of contempt of court in that he had refused to turn over his sheep killing dog to the authorities for execution (I thought the dog was a victim of circumstances and that he was not a sheep killer). I appealed on the ground that it was impossible for him to turn the dog over as ordered as the dog had been sent out of the State and his present whereabouts was unknown.

Held: Affirmed. One cannot escape punishment for contempt of court on the ground of impossibility when he himself caused the impossibility.
CRIMINAL LAW

Robbery

A and B were being tried for robbery. It was charged that they had taken a truck key from C by force and violence. The value of the key was not proved. It was stated in the indictment to have been 35 cents. According to C no money was ever given him for the truck in question by the defendants who had testified that A had given C $115 for the truck on a $150 purchase price, that C then raised his price and that A and B went to C's home to get A's money back or the truck, that C refused to give A either, and that the truck was taken under a bona fide claim of right. A and B were impeached as witnesses and told inconsistent stories.

Held: (1) As long as the key had some value it is immaterial what its actual value was, and hence its actual value need not be proved; (2) the verdict of the jury against A and B on the issue of bona fide claim of right (which would have been a defense to the crime of robbery) was amply supported by the evidence.

CRIMINAL LAW

Bringing stolen automobile into Va.

D was convicted of larceny of a car in Virginia under §19.1-220 in that he stole a car in North Carolina and brought it into Virginia. The Commonwealth failed to prove what specific statute of North Carolina had been violated.

Held: No error. D is not being prosecuted for larceny for what he did in North Carolina. There is continuing larceny in Virginia and it is for this that he must answer. The law laid down by an old case holding that D could not be held in Virginia has been changed by statute. §19.1-220. The constitutionality of this statute was again affirmed.

CRIMINAL LAW

Person of ill fame

D, a telephone operator, and a married woman with two children but living separate from her husband was seen by a police officer, O, in a car with a male companion at about 1:20 a.m. She was driving the car which when seen was in an alley with the brake lights on and the headlights off. O turned his car around to investigate, and as he did so, D backed the car from the alley. D's male companion had a criminal record. O admitted that he had no basis to suppose that the car was taken into the alley for an immoral purpose. He thought that they were planning on breaking and entering some building in the vicinity. There was no evidence that D had a criminal record or a bad reputation. No burglarious tools were found in the car. D was prosecuted as being a person of ill fame and a night prowler and placed under a $300 good behavior bond for one year. The Commonwealth contended that the Supreme Court of Appeals had no jurisdiction to hear the appeal (because this is not a civil case nor is it a criminal one since the bond is not a punishment but preventative only and there was no fine or jail sentence—but one too poor to post such a bond goes to jail—§19.1-20 et seq) and even if it did, the decision below was correct.

Held: This is a quasi-criminal statute in the criminal procedure section of the Code and hence the Supreme Court of Appeals has jurisdiction. Since there was no sufficient evidence of intended immorality or probability of the commission of crime, and no evidence of D's bad reputation, the decision below was without evidence to support it and it should be reversed and dismissed.

CRIMINAL LAW

Presumption in forgery cases

The trial judge in a forgery case instructed the jury that when one is in possession of a forged instrument, and endeavors to obtain money thereon, this raises a presumption that such person forged the same, and unless such possession or forgery is satisfactorily explained, the presumption becomes conclusive.

Held: Error for two reasons: (1) The presumption is not conclusive but may be rebutted. The jury should consider the evidence as a whole keeping in mind the rules about the presumption of innocence and the burden of proof beyond a reasonable doubt which the Commonwealth has. (2) The defendant if innocent may be able to explain his possession, but it is hard to see how an innocent man could explain the forgery. "The instruction should have told the jury that the unexplained possession of a forged instrument by one who endeavors to obtain money thereon is prima facie evidence that such person forged the instrument, but that such prima facie evidence may be rebutted by an explanation satisfactory to the jury as to how he came into possession of the instrument!"
CRIMINAL LAW Statement to jury of penalty already given accomplice

B who was 16 years of age was disciplined by his stepfather for misconduct at school. D who was 19 years of age and a close friend advised B to kill his mother and stepfather. In pursuance of plan B secured an ice pick and D a gun. B stabbed his stepfather while he was asleep in a chair. The stepfather attempted to flee and in so doing went in D's direction. D then shot him in the stomach—accidentally according to D. The indictment for murder was in the statutory short form and did not charge the degree of murder. The court refused D's request for a bill of particulars, and refused to declare a mistrial on the two occasions in which the Commonwealth's Attorney called the jury's attention to the fact that B had already been found guilty and sentenced to a term of 48 years. He first called B as a witness and asked him if he had been convicted of murder. Then in his closing argument he said, "Are you going to let B bear the whole burden?" The trial judge sustained D's objection to this line of argument but refused to declare a mistrial.

Held: (1) It is not necessary to allege the degree of murder for which a person is indicted or to indict him as a principal in the first or second degree. The statutory short form indictment for murder charges murder in the first degree and all lesser offenses included therein. (2) Since D already knew all the facts he was in no way prejudiced by the court's refusal to require a bill of particulars. (3) But it was reversible error not to grant a mistrial under the facts of this case. The Supreme Court of Appeals quoted the following with approval: "We can scarcely conceive of a more hurtful question than to ask if the witness, who was engaged in the commission of the same offense for which the appellant was charged, had not already been convicted for such offense and was serving a term in the penitentiary therefor. The appellant's attorneys were forced to object thereto, and such objection could only lead the jury to conclude that such facts were true, and that the necessary implications had to follow. We think that the court's prompt instruction (to disregard the matter) could not possibly eliminate these conclusions and implications from the jury's mind."

CRIMINAL LAW—Arrest under invalid ordinance

D was arrested on a charge of driving under the influence of intoxicants and a warrant was sworn out for violation of a city ordinance. Blood tests were taken. The City ordinance was void because its minimum penalty was inconsistent with state law. Later a state warrant was issued. D contended that he should be acquitted because the blood test was taken as the result of an illegal arrest and detention.

Held: Conviction affirmed. D was tried for violation of a valid state law and not for violation of an invalid ordinance.

CRIMINAL LAW— Forgery Commision of 3 Distinct Crimes

D was charged in separate counts in an indictment with (1) forgery (raising a check from $10 to $610), (2) uttering of forged paper, (3) larceny of drawer's money.

Was it error to allow several felonies to be charged in separate counts in one indictment? No. "Each of the counts charged *** alleged a separate offense. The offenses charged in the counts were of the same general nature and connected with the same transaction. Under these circumstances D may be charged in separate counts with more than one crime even if two or more felonies are charged."

Can D be convicted of all three if the evidence is sufficient? Held: Yes. Forgery, uttering, and larceny (obtaining by false pretences) are separate offenses. They require different evidence to support convictions. If D commits three distinct crimes there is no reason why he cannot be found guilty of all three.

CRIMINAL LAW Parole No credit for time of suspension

X was sentenced to serve a term of 6 years in the penitentiary. After serving a portion of his time he was paroled subject to certain conditions. Two years later he violated the conditions of his parole and was put back in the penitentiary. Is he entitled to credit for the two years he was on parole or must he serve out the entire balance of his term?

Held: Under §53-256 X is not entitled to credit for the 2 years he was on parole. He was not serving time during that period. His sentence was merely suspended as per the terms and conditions of his parole.

R was convicted of felonies for the third time, and while serving his third sentence was tried under our recidivist statute (Va. Code 53-296) and sentenced to serve an additional ten years. While serving under his third sentence he escaped, but was recaptured and this added another year to his sentence. As the result of an unexpected Supreme Court of the United States decision which required persons tried as recidivists to be represented by counsel the additional ten year sentence was void. After R had served his third sentence and while he was still detained as a prisoner serving his extra year for an escape, he was retried as a recidivist. This time he was provided with counsel who claimed that if one is to be tried as a recidivist he must be tried while serving a sentence and not after he has completely served out the particular sentence that is to be enhanced because he is thought to be a recidivist. Reliance was placed on a Florida case (138 So.2d. 500) which held that one could not be tried as a recidivist after he had been released from the penitentiary.

Held: That case is inapplicable. R has never been released from the penitentiary. He has not made a new start in the outside world and then brought back on a charge that in all fairness should have been made, if at all, before he was given his liberty.

CRIMINAL LAW  Constitutional Law  Rule 1:8  205 Va. 883.

A four year old girl was molested and D was indicted for rape. Arrangements were made to have the girl's mother question the girl so that it would appear to the girl that she was alone with her mother. The room in which this questioning occurred was "bugged". Later D, after having been advised of his rights, was questioned by a police investigator, P. D did not ask to see an attorney. During the questioning the tape recording of the mother-daughter conversation was played, and at the end thereof P asked D, "Why did you do it? There must have been some reason", to which D replied, "I don't know why." At D's trial the recording was again played back, and P was allowed to state that after this recording had been played before D, and after he was asked why he did it, D had replied, "I don't know why". No objection was made at the trial that this procedure violated D's constitutional rights, but such objection was made for the first time on appeal. D was sentenced to 30 years imprisonment. D was of the lower limit of normal intelligence, and had never been in trouble before.

Held: Reversed and remanded. Here D was a man of lower normal intelligence, unacquainted with criminal procedure, and charged with a capital offense. Under these extreme circumstances he should not have been interrogated in an accusatory manner in the absence of counsel. Merely advising him of his rights was not enough. D had a right to a fair trial. A confession obtained as above by a skilled police investigator is inadmissable in evidence. The fact that its admission was not objected to on constitutional grounds below does not preclude the Supreme Court of Appeals from considering this objection for the first time on appeal, as Rule 1:8, after stating the general rule that objections not made below cannot be made for the first time on appeal, contains an exception, "except *** to enable this court to attain the ends of justice." The instant case clearly comes within this exception.

CRIMINAL LAW  Former Jeopardy  Separate Offenses  205 Va. 867.

D was convicted of uttering forged paper. Later he was convicted of larceny in that he succeeded in cashing the same forged check at a bank by false pretences. He appealed this conviction and the case was reversed and remanded. On the re-trial of this case D contended that he should be discharged because he could not be put in jeopardy twice.

Held: The contention is without merit for two reasons: (1) Uttering and larceny are two separate offenses even if committed at the same time and in the same transaction; (2) Since the case was appealed at his request he cannot make the defense of double jeopardy if he wins on the appeal and the case is remanded for a new trial because he has not yet been acquitted or convicted.
CRIMINAL LAW—Murder or Manslaughter 206 Va.14

By 7/18.1-21 "Murder by poison or by any wilful, deliberate or premeditated killing is murder of the first degree." D, who was 25 years of age, lived with her husband and six children. The deceased was her youngest child three months of age. Her husband kept telling her when he was in an ugly mood that the children were not his, and that her step-father was the father of deceased. When her husband was in a good mood she attended to the children's needs, but when he was angry (which was often) she became upset and neglected the children to such an extent that deceased died of starvation and dehydration. She was convicted of and sentenced for the crime of murder in the first degree.

Held: Reversed and remanded. The evidence shows death from neglect rather than from malice of willfulness. If such is the case it is not murder but involuntary manslaughter.

CRIMINAL LAW—Constitutional Law—Confessions 206 Va.14 et seq.

D's three months old child died of starvation. She and her husband were taken to the police station for the purpose of ascertaining how often and when the deceased was fed, and questioned separately. D first stated that she fed the child regularly. She was left alone while the husband was questioned and when the police officers returned they found her crying and one of them asked her if she wanted to tell the truth about the baby's feedings, and she said she did. She was not told that she need not answer questions or that she had a right to counsel. She then made a voluntary confession to the effect that sometimes days passed without the baby being fed when her husband was in an ugly mood. Is this confession admissible?

Held: Yes. Despite the holding of the United States Supreme Court in Escobeta v. Illinois, 378 U.S. 178 (1964). In the Escobeta case it was stated

"The critical question in this case is whether, under the circumstances, the refusal by the police to honor petitioner's request to consult with his lawyer during the course of an interrogation constitutes a denial of the Assistance of Counsel in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment' (citing authority) and thereby renders inadmissible in a state criminal trial any incriminating statement elicited by the police during the interrogation." (Emphasis added).

"We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as made obligatory upon the states by the Fourteenth Amendment' (citing authority) and that no statement elicited by the police during the interrogation may be used against him at a criminal trial."

This case has been variously interpreted by state courts, but in the instant infant-starvation case, the Supreme Court of Appeals of Virginia held that where, as here, the circumstances of the death were only being investigated and the proceedings had not reached the accusatory stage, the only question is whether the confession was voluntary. The fact that she was not told of her rights is only a circumstance bearing on the voluntary character of the confession. In this case the confession was clearly a voluntary one and there was no duty to inform her of her right to remain silent and of her right to procane counsel.

CRIMINAL LAW—Refusal to Take Lie Detector Test 206 Va.241.

D was convicted of the murder of his wife on evidence that left no reasonable doubt as to his guilt. While D was being properly questioned by an officer who had told him of his rights, D stated that he did not wish to make any further statements until he had consulted his attorney. Later, after having talked to his attorney, he told the officer that he had told his attorney that he had killed his wife. The officer asked him if he was willing to take a lie detector test and he answered that there was no need to take such a test as he had told the truth to his lawyer. The above matter was brought out during the trial in an incidental
206 Va.

Police officers obtained a valid search warrant based on personal observation and information from responsible third parties authorizing them to search D's premises for articles commonly used in the numbers game (lottery). After obtaining the search warrant they illegally tapped D's telephone to be sure that no one tipped D off before the scheduled hour of the raid. At the appointed time the officers entered and found numerous incriminating articles. D moved that all things found be excluded from the evidence because of the illegal wire tap.

Held: Evidence admissible. The articles were not obtained as a result of the illegal wire tap but under a valid search warrant obtained before the wire tap and completely independent thereof.

CRIMINAL LAW Evidence Confessions

D confessed to the crime of statutory rape to a State Police Investigating officer after having been fully informed of his rights. When D objected to the admission of this confession at the trial the court, out of the presence of the jury, heard the facts to determine whether or not the confession had been given voluntarily or obtained by coercion or by promise of leniency or other reward. There was some conflict in the evidence as the officer denied that any promises had been made and D claimed that he was promised favorable recommendations for a suspended sentence if he would confess. The trial judge admitted the confession. Then D asked for instruction A to the effect that if the jury believe from the evidence that the confession was obtained by threats or by promises of reward they should disregard same. Was it error to refuse to give this instruction.

Held: No error. Virginia (and many other states) has the Wigmore orthodox rule of law on this matter. The admissibility of the confession (independently of its truth) is determined by the court. Its weight, value and sufficiency are matters for the jury. In determining these latter matters the jury is entitled to know under what circumstances the confession was obtained. The Wigmore view has been upheld by the U.S. Supreme Court. It gives the accused a fair opportunity to challenge the validity of the confession. The Commonwealth has the burden of proving that confessions have been voluntarily made.

CRIMINAL LAW

This case should be compared with the one just above. In the instant case D confessed to having poured kerosene on the deceased while she was in bed and then throwing a lighted match on the bed. When the question of the admissibility of this confession came before the court, the trial judge, out of the presence of the jury, heard only the witnesses for the Commonwealth who testified that it was freely and voluntarily given. Then D asked to present evidence to the contrary, but the judge refused to hear such evidence saying that D would be given such opportunity later.

Held: Error. The court should have heard D as well as the Commonwealth's witnesses in order to determine whether the confession was admissible. By refusing to do so he forced D to take the witness stand in violation of his right not to
testify in order to get all relevant facts bearing on the admissibility of the confession before the court. The procedure set forth in the case above (144 S.E.2d 303) should have been followed.

CRIMINAL LAW—Illegally? Obtained Evidence Abandoned Property

D was convicted of statutory burglary. The evidence showed that he broke and entered X’s house in the day time, took certain items of property, placed them in a car, drove the car to a motel in Maryland, and abandoned the car there. After the car had remained eight days on the motel property the police were notified, and the car was searched. No search warrant was obtained. The incriminating articles were found in the car. Should evidence of their having been found be suppressed because of an illegal search and seizure?

Held: (1) If this evidence was illegally obtained, recent decisions of the U.S. Supreme Court would compel its exclusion even in State Courts; but (2) it was not illegally obtained. No search warrant is required where the place to be searched has been abandoned. In such a case the abandoner has no right to be secure in his rights with respect to that which he has abandoned.

CRIMINAL LAW—Discovery Depositions

D was convicted of the crime of murder in the second degree. He sought to obtain discovery depositions from two police officers. The Court refused its aid. Was this error?

Held: No. At common law depositions are used only in courts of equity. They are available at law and in criminal procedure only to the extent provided by statute. There is no statute in Virginia authorizing their use in criminal matters for the purpose of discovery. D is entitled to a bill of particulars and to the right of confrontation. While testimony, by statute, in rape cases can be given in part by depositions, this is not such a case.

CRIMINAL LAW—Interpretation of “knowingly”

D, the treasurer of Vienna, Va., prepared the town budget annually and from the period 1959 to 1962 received extra pay for her overtime work expended thereon. In 1962 the town adopted the “Yarger Plan” which prohibited overtime pay except in case of an extraordinary emergency. In January 1963 the town manager sent to all department heads, including D, authorization for them to approve overtime pay except for work performed by one in a supervisory position in which case payment would have to be specifically approved by the town manager. In May and June of 1963, D again prepared the budget, paid herself for her overtime and then presented a memorandum of her overtime hours to the town manager who declined to authorize it. (This was the same procedure followed by D in 1962 except that approval was granted then.) Code §18.1-110 makes it a crime for a town officer to knowingly misuse or misappropriate or dispose of public funds otherwise than in accordance with law. D testified that her right to this overtime pay had not been previously questioned, that she acted in good faith with no purpose or intent to do wrong, and that she thought this overtime was authorized by a state statute which she had read. The jury was instructed to find her guilty if they found that she wrote or caused to be written the checks, “knowing that such expenditures of public funds were not authorized by the council of the town of Vienna or its town manager.”

Held: This instruction was error. Code 18.1-110 makes it a crime for the described person having custody of public funds to “knowingly misuse or misappropriate the same or knowingly dispose thereof otherwise than in accordance with law.” The essence of the crime is the scienter, the guilty knowledge of D that these payments obtained by her for overtime were a misuse or misappropriation of public funds, or a dispositive of them not in accordance with law. The evidence was without conflict that these expenditures were not authorized by the town manager or council. Consequently, the above instruction in effect was a direction to the jury to find D guilty. It was not in accord with the language or meaning of the statute.
D was convicted in Charlottesville for aiding in the concealment of stolen goods and claims that the trial court erred because it admitted evidence relating to the shipment, by his confederate, of stolen goods to a "fence" in Ohio. D also claims error in the admission of evidence relating to the shipment of clothing from Lynchburg because, he claims, the Charlottesville court had no jurisdiction over an offense committed in Lynchburg.

Held: Conviction affirmed. There was no error in admitting evidence relating to the confederate's shipment. Everyone connected with carrying out a common design to commit a criminal act is concluded and bound by the act of any member of the combination, perpetrated in the prosecution of the common design. This is true though the defendant was not present when the act was committed. D's other contention is also without merit. When goods are stolen and concealed, it is proper to show the connection of the accused therewith wherever they have been or may be traced. From D's possession of the stolen goods in Lynchburg, it would have been proper for the trial court to infer that he participated in secreting the goods out of Charlottesville. That act of secretion related directly to the offense of aiding in concealing stolen goods in Charlottesville, an act within the jurisdiction and venue of the trial court.

D was convicted as an accessory before the fact of statutory burglary. He appealed, contending that, having been indicted for statutory burglary, he could not be convicted as an accessory before the fact.

Held: Judgment affirmed. Section 18.1-11 of the Virginia Code provides that every principal in the second degree and accessory before the fact may be indicted, tried, convicted and punished in all respects as if a principal in the first degree.

D contracted to build a home for P on a lot he was to convey to P free of liens. P agreed to pay cash and to deed D the house in which he was living. D, who was in general financial difficulty, encumbered the house he had built for P and sold the house formerly owned by P.

Held: D was not guilty of embezzlement. The statute defining that crime, like all criminal statutes, is to be strictly construed and in terms applies only to entrusted personal property.

At the end of a criminal trial, the jury brought back a verdict of guilty with a recommendation of leniency. The trial judge asked both attorneys if they accepted the verdict and each one did. The court then accepted the verdict, but, despite the jury's recommendation, gave a severe verdict. The defendant objected to the court's apparent disregard for the jury recommendation.

Held: Affirmed. The trial court is not bound by a jury recommendation, even after accepting the verdict. Consideration is sufficient.
D was accused of killing X. At the trial, testimony of a friend showed that D knew X had a large sum of money and that X had given D a ride not long before he was killed. The gun which was in D's possession was proven to be the murder weapon. D claimed insanity...that he had killed as a result of an irresistible impulse. Several psychiatrists testified that, while D suffered from mental disease, he still knew right from wrong, and his method of killing (in concealment) was not consistent with the method of those killing by irresistible impulse. The judge instructed the jury that if the evidence showed the crime to be planned, then a verdict based upon irresistible impulse would not lie. The jury found D guilty and he appealed claiming that he should have been found insane.

Held: Affirmed. The burden of proof is upon a party claiming insanity to prove it, since there is a presumption of law that every person charged with a crime is sane and responsible when the act is committed. The court was correct in instructing the jury that a killing by irresistible impulse could not be planned. There was sufficient evidence to show that the killing was planned and there was a horde of properly admitted expert testimony to the effect that such a killing was inconsistent with a killing by irresistible impulse.

In 1963, D legally changed his name from J.E. Moore to D.E. Moore. In 1965, D cashed three checks, drawn by him as J.E. Moore against a non-existent bank account. On two of the checks, D listed his address as X Street and on the other check as Y Street. D had lived at both of these addresses previously, but did not at the time he cashed the checks. D was convicted of forgery and of uttering forged checks. He appeals claiming that the evidence does not show that he had any intent to deceive as to the identity of the person signing each of the checks; that he presented the checks as having been signed by himself in his former name without any representation that they were made by another; and consequently, while he may have been guilty of obtaining money by false pretenses or petit larceny, he could not be convicted of forgery.

Held: Affirmed. While D's contention is correct under the narrow definition of forgery, Virginia has adopted a broad definition of forgery. Under the broad definition, forgery is the false making or materially altering with intent to defraud, of any writing which, if genuine, might appear to be of legal efficacy, or the foundation of legal liability. This definition is sufficiently broad to cover the situation where a party falsely makes a writing; using not the name of another actual person, but either an assumed name for a dishonest purpose or a fictitious name.

D, who allegedly committed a robbery in Fairfax, Va. on February 7, 1965, was arrested in N. C. on February 8 and charged with the commission of a local robbery. During the course of the investigation of the N. C. robbery, D confessed his guilt in the Va. robbery to the sheriff (who was unaware of the commission of the Va. robbery) who notified Virginia authorities. When Virginia officers arrived in N. C. eight days later, the sheriff conducted them to D, warned D of his constitutional rights, and then repeated to the Virginia officers what he claimed D had told him. When he was through D confirmed the correctness of his account. The following morning the Virginia officers again interviewed D, after warning him of his constitutional rights, reduced his statement to writing and D signed it after reading it aloud. This confession was introduced into evidence in D's later trial over D's objections because he claimed that the initial confession to the sheriff in N. C. was made after promises of leniency and that thus the subsequent written confession was involuntary.

Held: Affirmed. Prima facie the undue influence which induced the first confession was deemed to continue. However the presumption may be overcome by strong and clear evidence that a subsequent confession was made when the mind of the accused was free from the influence which induced the initial confession. Among the factors which may indicate that the influence which induced a first confession has been dispelled
are the length of time intervening and a proper warning of the consequence of another confession. Here more than eight days had elapsed between the first confession to the sheriff and the subsequent oral and written confessions of the Virginia officers. There was also evidence that D was advised in detail of his constitutional rights before freely confessing to the Virginia officers his participation in the Va. robbery. Moreover, it is apparent that the sheriff knew nothing about the Virginia robbery until D told him in the course of his investigation of the N. C. robbery. Hence the trial court was justified in holding under the evidence that the initial influence, if it did exist, had been dispelled before the oral and written confessions were made to the Virginia officers.

CRIMINAL LAW—Indictment and Information

The indictment against D charged him with assault and attempted robbery. The court, however, had told D that he was being tried for assault and robbery and found him guilty of robbery. When the variance between the indictment and the verdict were discovered, the court gave D’s counsel the opportunity to object or move to set aside the verdict. D’s counsel chose to do neither and the court gave D a 40 year sentence for robbery. D now appeals, seeking a verdict and sentence consistent with the crime as charged in the indictment.

Held: Conviction affirmed. Conviction of a higher crime than charged in an indictment is not void but only voidable, as the requirement of indictment is not constitutional but only statutory. Under Rule 1:8 the Supreme Court of Appeals will not consider objections to the judgment of a trial court unless the record shows that grounds for objection were stated to the court with reasonable certainty. Counsel here made no objection to the court’s sentencing D in accordance with the verdict. The decision by D’s counsel not to make such objections was a matter of trial tactics, within his discretion, and therefore binding on D.
are the length of time intervening and a proper warning of the consequence of another confession. Here more than eight days had elapsed between the first confession to the sheriff and the subsequent oral and written confessions of the Virginia officers. There was also evidence that D was advised in detail of his constitutional rights before freely confessing to the Virginia officers his participation in the Va. robbery. Moreover, it is apparent that the sheriff knew nothing about the Virginia robbery until D told him in the course of his investigation of the N. C. robbery. Hence the trial court was justified in holding under the evidence that the initial influence, if it did exist, had been dispelled before the oral and written confessions were made to the Virginia officers.

**Criminal Law**

Indictment and Information

The indictment against D charged him with assault and attempted robbery. The court, however, had told D that he was being tried for assault and robbery and found him guilty of robbery. When the variance between the indictment and the verdict were discovered, the court gave D's counsel the opportunity to object or move to set aside the verdict. D's counsel chose not to do neither and the court gave D a 40 year sentence for robbery. D now appeals, seeking a verdict and sentence consistent with the crime as charged in the indictment.

**Held:** Conviction affirmed. Conviction of a higher crime than charged in an indictment is not void but only voidable, as the requirement of indictment is not constitutional but only statutory. Under Rule 1:8 the Supreme Court of Appeals will not consider objections to the judgment of a trial court unless the record shows that grounds for objection were stated to the court with reasonable certainty. Counsel here made no objection to the court's sentencing D in accordance with the verdict. The decision by D's counsel not to make such objections was a matter of trial tactics, within his discretion, and therefore binding on D.

**Criminal Law**

(John E.) Daily v. Commonwealth

**Facts:** Defendant convicted Sept. 20, 1966 of malicious wounding on Dec. 19, 1965. At the time of arrest the police detective warned the defendant that he had the right to counsel and that any statements he made might be used in evidence against him. Defendant's counsel objected to any evidence taken after this warning on the grounds that the detective failed to tell defendant that if he could not afford to hire an attorney one would be appointed for him.

**Held:** For defendant, reversed and remanded. Under the Miranda Rule the defendant had to be informed of his privilege of having counsel appointed for him if he could not afford it. And he need not speak until his counsel was present even tho statements were not damaging to his case. Defendant came under the Miranda Rule even tho he was arrested prior to the decision, because he was convicted after it was made.

**Criminal Law**

P was indicted by a grand jury on a charge of robbery. A member of the local bar was appointed to represent him. On the day set for his trial P was taken from his cell and escorted into the trial judge's chambers where, having waived a jury trial he was tried and convicted. The trial lasted approximately ten minutes. Meanwhile P's relatives, some of whom planned to testify in his behalf sat in the courtroom waiting for his trial to begin. P now appeals from his conviction, contending that he was denied the right to a public trial guaranteed by the Federal Constitution.

**Held:** P's conviction is void. The right to a public trial guaranteed in Federal criminal trials by the Sixth Amendment is so fundamental and essential to a fair trial that it is made applicable to state criminal trials through the due process clause of the Fourteenth Amendment. The mere fact that P was tried in the judge's chambers and not in open court does not in itself constitute a denial of a public trial. The test is whether or not the public had freedom of access. Here the trial was held behind closed doors and was not open to the free observance of the members of the community.