Pleading and Practice, Part Two

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1. Section 43-17 of the Code of Virginia provides that no suit to enforce a mechanics lien shall be brought after six months from the time when the whole amount covered by such lien becomes payable. A brings a suit in equity to enforce such a lien seven months after the time when the amount covered by the lien became payable. B, the defendant,
demurred to the bill on the ground that the right to enforce the lien was barred by the six months statute of limitations. Is the demurrer proper in this case?

The demurrer is proper. Where a right is created by statute an exercise of the right within the statutory period is of the substance of the right and the party's pleading must show affirmatively that he has exercised his right within the time so limited or it does not state a cause of action and is demurrable. Notes: (1) Where statute of limitations is a matter of remedy and not of substantive law it must be pleaded specially and cannot be taken advantage of by demurrer. (2) The statute of limitations is a matter of substantive law: (a) Where the right is created by statute and a time limited within which the right may be exercised. Examples are the mechanical lien law mentioned above, and recovery for a death by wrongful act of another in which the time limit is one year; (b) Where the running of the statute actually passes title as in detinue and ejectment.

2. What is the object of the action of detinue, and what are the essentials to maintain the action?

The object of the action of detinue is to recover back specific personal property wrongfully held by another, or if that is impossible, the value of that property, together with damages for its wrongful detention. The essentials to maintain the action are (1) Plaintiff must have a general or specific property in the goods sued for, (2) together with the right to the immediate possession, (3) The goods must be capable of identification and indentified by the plaintiff in his pleadings, (4) the goods must have some value which must be stated, (5) The defendant must have detained or be detaining the goods wrongfully prior to or at the time suit is started. Procedure is now by notice of motion for judgment, as per Rule 3:3.

Notes: (1) In Virginia the common law action of Replevin has been abolished. Detinue took its place and now, instead of bringing detinue a motion for judgment is filed with the clerk as per the Rules at Law. (2) The judgment in detinue is for the goods or their alternate value. (3) In certain cases covered by Ws 5:568 among which are insolvent of defendant, danger of neglect or destruction of property by defendant, or a sworn statement that affiant believes himself entitled to the goods, the goods shall be taken at once and delivered to the plaintiff provided he puts up a bond for at least double the value of the goods; but the defendant may get the property back by putting up a forthcoming bond of double the value of the property.

3. What are the grounds in Virginia for a motion in arrest of a judgment?

A motion in arrest of judgment lies only for material error apparent on the face of what is per se a part of the record. The court, in a proper case, not only grants the motion but takes such additional action as the case demands. Examples: (a) X sues B for a tort. B pleads infancy by way of confession and avoidance and asks for a rep. X traverses the infancy. The jury finds that B was an infant. X should make a motion in arrest of judgment and also ask for a judgment non obstante veritatis. (b) X sues B for conversion of a horse on Dec. 28, 1951. B denies he stole the horse on Dec. 28, 1951. The jury returns a verdict that the horse was not stolen on Dec. 28, 1951. X is entitled to a motion in arrest of judgment and a replacer as it is probably material whether the horse was taken on Dec. 28, 1951. Note that the court in this case cannot tell for whom judgment should be given but can in (a). Note also that in (a) the pleading is always by way of confession and avoidance while in (b) it is by way of traverse, with no issue being joined on the material fact. (c) X sues B. The pleadings are correct but the jury was improperly chosen as appears by the record, or returned an uncertain, or imperfect, verdict. Either party is entitled to make a motion in arrest of judgment and also ask for a venire facias de novo. This results in a new trial but should not be confused with a motion for a new trial. (d) In any of the above cases if the defect is cured by the statute of limitations, Ws 8:487, the motion would be overruled. The gist of this statute is that no judgment shall be arrested or reversed for any defect in the record, or for any error committed upon the trial where it plainly appears from the record and the evidence given at the trial that the parties have had a fair trial on the merits and substantial justice has been reached.

Query: Suppose an error not apparent on the face of the record is made and not discovered until after verdict. What can be done then? A. If not cured by the statute of limitations, a motion for a new trial may be made. The usual grounds for such a motion are (1) Error or misconduct of the judge (2) Of jury (3) Of counsel (4) Of a party (5) Of third persons (6) Accident and surprise (7) Inadequate or excessive damages
(8) Newly discovered evidence provided (a) the evidence has been discovered since the trial; (b) it is material and probably will change the result; (c) it is not merely cumulative; (d) it could not have been discovered before the trial by use of due diligence. In all the above cases remember that a motion for a new trial is addressed to the sound discretion of the court and is not a matter of right as are the motions in arrest of judgment.

5. If all the counts in a motion for judgment are good except one, and the defendant desires, before going to trial, to get rid of the bad count, what is the remedy? Interpose a demurrer to the faulty count or move the court to reject it and instruct the jury to disregard it. Do not demur generally, for the demurrer would be overruled because of the good count. Note: Under Rule 4:11 the court might order the bad count stricken at the pretrial conference.

6. A, an employee of the Hercules Auto Co., a Virginia corporation, the chief office of which is in Richmond, was injured on January 2, 1957, in Roanoke County by the negligence of the company. He sued the company in Roanoke County by notice of motion for judgment. The notice was served in Roanoke County upon B, the agent of the Company for the City of Lynchburg, who resides in Lynchburg. Is the service valid? Give reason.

The service is not valid. By §§ 8-59 service on any person other than the Secretary of the Commonwealth (after July 1, 1958 Clerk of the State Corporation Commission) in connection with service of process on a corporation "shall be by delivering to him a copy of the process or notice in the county or city wherein he resides or his place of business is, or the principal office of the corporation is located; and the return shall show this, and state on whom, and when the service was; otherwise it shall not be valid."

Query 1. What facts should be remembered about service of process on domestic corporations? A. By §§ 8-59 (1) a city or town may be served with process by serving its mayor, recorder, or any alderman, councilman, or trustee of such city or town; (2) if it be against any other corporation created by the laws of this State, on its president or other chief officer, or on its vice president, cashier, treasurer, secretary, general manager, or any one of its directors, or any agent of such corporation, if any such officer or agent be found in the city or county, in which the proceeding is commenced, and whether any such officer or agent be so found or not, it may be sent to the county or city in which is located the principal or registered office of such company and be there served on the registered agent or on any officer or agent of such company found in such county or city. Note: §§ 13.1-9 (corporation law) requires each corporation to have and continuously maintain in this State (a) a registered office which may be, but need not be, the same as its place of business; and (b) a registered agent, which agent must be an individual resident in this State whose business office is identical with such registered office and who is an officer or director of the corporation or a member of the Virginia State Bar, and by §§ 13.1-11 this registered agent may be served with any process, notice, or demand. If the Corporation fails to maintain such an agent or he cannot be found with due diligence then process may be served on the clerk of the Corporation Commission. This section is cumulative and does not limit the right to serve process under §§ 8-59 (supra).

(1) Substituted service is not valid on a corporation.

Query 2. Where are actions usually brought and how are corporations affected by the statutory provisions thereon? A. This is governed by §§ 8-38, 8-39, 8-40, 8-41, 8-42, 8-43, 8-44, 8-45, 8-46, 8-47. Suits may be brought unless otherwise provided, (1) wherein any of the defendants reside; (2) if a corporation be a defendant wherein its principal or registered office is, or wherein its mayor or chief officer resides; (3) if it be to recover land or to subject it to a debt, wherein such land or part of it may be; (4) if it be a suit to construe a will or for the direction of the court in the administration of the estate of a deceased person, or a suit or action against a personal representative, curator, committee, guardian, or other fiduciary, in the county or corporation wherein the will was admitted to probate, or such fiduciary qualified; (5) if it be against a foreign corporation, wherein its statutory agent resides, or its registered office is situated or, in case of withdrawal from the State where its last statutory agent resides or its last registered office was situated or where it has any estate or debts owing to it within this State; (6) if it be against a non-resident and the cause of action arose because of the operation of a motor vehicle on the highways of this State wherein the plaintiff resides, or wherein the cause of action or any part thereof arose; (7) if it be against a de-
7. P claims $500 and a verdict of $100 is rendered. Can P or defendant appeal? The appealable amount in pecuniary matters is $300 exclusive of costs. Interest may be included at the date of judgment of trial court. Hence P could appeal but defendant could not. See W,2,1-41.

9. Then a surety on a bond containing a waiver of homestead is compelled to pay the bond, and then sues the principal to collect the debt that he had paid for him, can the principal plead homestead against the surety?

No. W,3,2-22 provides in part, "If a debt which is superior to the homestead, or as to which the homestead is waived, be paid off by a surety thereon, the principal shall not be allowed to claim the homestead as against such surety."

Query 1. What debts are superior to homestead exceptions? A(1) Purchase price of
property in which exemption is claimed, or if it has been exchanged for other property such property shall not be exempted from the payment of such unpaid purchase price.
(2) Services rendered by a laboring person or mechanic (3) liability of a fiduciary for money collected (4) taxes, levies, assessments (5) rent (6) legal or taxable fees of any public officer (7) no exemption may be claimed in a shifting stock of merchandise (8) nor in any property the conveyance of which by the homestead claimant has been set aside on the ground of fraud or want of consideration (9) Since tort claims are not "debts" they are superior to homestead. See V#34-5.

Query 2. What else should be remembered about the homestead exemption law? A. (1) It applies only to heads of families (2) the amount is $2,000 (3) it can be claimed only once. Property set aside by the writing may be exchanged for other property, but if the property set aside is consumed there is no further exemption (4) It is claimed by a writing signed by the householder (if alive) and duly recorded as deeds are recorded in the county or corporation wherein the real estate claimed is and/or if claimed in personal property where he resides. Each piece of property is valued. (5) The exemption may be set aside at any time before the property is subjected to legal process (6) The exemption may be waived. The waiver must be in writing. (7) The rent and profits of the homestead are also exempt and may be put back into the corpus. (8) A widow cannot claim her husband's homestead and also dower or jointure.

Query 3: How does homestead exemption differ from poor debtor's exemption? A. (1) Homestead exemption is in addition to poor debtors' exemption. This latter exemption embraces among other items wearing apparel, beds and a few supplies, a farmer's work animals and implements, and three-fourths of a wage-earner's wages but not more than $150 per month nor less than $100 per month. Three-fourths of everything earned in excess of $100 per month but not in excess of $150 per month is also exempt. (2) It may be claimed as often as needed, need not be set apart by writing, and cannot be waived (3) A non-head of a family is entitled to one-half of the exemption of a head of a family. (4) A non-resident has the same wage exemption as does a resident.

10. John Smith verbally agrees to rent a farm from William Brown for a period of two years, agreeing to pay a lump sum of $1,000 at the end of the two years. A few days later Brown informs Smith that he will not rent the farm, he having been advised that the verbal contract was unenforceable because of the statute of frauds. Smith sues Brown, and the latter files a plea of the general issue. Can the defense of the statute of frauds be proved under the general issue?

No. By Rule 3:5 the general issue is no longer allowed. The defense would have to be stated by defendant in his grounds of defense.

11. A person, not a party to an action at law, is in the possession of a certain paper that you desire to introduce in evidence. He refuses to deliver this paper to you or let you see it. Under our statute what steps would you take to compel its production?

V#2-301 provides that when it appears by affidavit that any book, etc., is in the possession of a person not a party and is material and proper to be introduced before a court, such court or a judge thereof in vacation, may order the clerk to issue a subpoena duces tecum to compel such production at a time and place to be specified in the order. Note: If the adverse party has possession and refuses to produce, the court, having control of the parties before it, may dismiss suit or give judgment by default. See V#2-321. See also Rule 4:9.

12. You are plaintiff's counsel in a damage suit against the Southern Railway Co. for personal injuries. The company files its grounds of defense, but you are desirous of being better informed of the exact nature of the company's defense. What steps, if any, could you take?

Rule 3:18(d) provides that on motion made promptly, a bill of particulars may be ordered to amplify any pleading that does not, in the opinion of the court, clearly inform the opposite party of the true nature of the claim or defense.

Note: Under the Rules if defendant wishes to rely on the defense of contributory negligence he must so state in his grounds of defense unless plaintiff's own evidence shows that he is barred by his contributory negligence.
There are two errors alleged to have been made: (1) the overruling of the demurrer to the evidence and (2) an erroneous instruction. A demurrer to the evidence is a pleading and is part of the record. By Rule 5:1 §3(b), "If the judge gives instructions to the jury he shall initial each instruction; and they thereby become part of the record," and by sub-section (c) thereof, "If the refusal to give an instruction is excepted to, the judge shall mark it "refused" and initial it; and it thereby becomes part of the record." So the defendant should object to the refusal of the instruction, and then the objection is overruled, except to the refusal. This would normally be done in chambers and not in open court. The judge would then mark the instruction "refused" and initial it and thereby make it part of the record. If the defendant does not except to the court's ruling he has waived his objection. An objection not so made in the trial court will not be considered in the Supreme Court of Appeals. In Virginia the trial court need not be given a chance (other than the 21 day period before judgments and decrees become final) to correct its own errors. Hence no motion to the trial court for a new trial or in arrest of judgment is a condition precedent to a right to seek an appeal. The rest of the steps in outline form are as follows: (a) take a motion for an order suspending execution. Before the trial court will grant such a motion a bond with surety must be given. The suspension period ordinarily is from 60 to 90 days and may be extended. (b) Prior to the expiration of 60 days after entry of final judgment file with the clerk of the trial court a notice of appeal and assignments of error. "Within days thereafter counsel for appellee may file with the clerk his assignments of error, if any. Assignments of error must be filed by both parties at this stage, because, until it is known what points will be raised on appeal, it is impossible to know what parts of the record will be material on appeal. (c) The Clerk of the trial court makes up the record and send it to the clerk of the Supreme Court of Appeals as per Section 7 of Rule 5:1. (d) Appellant prepares his Petition for Appeal. This may serve as his brief as well. The attorney must state that in his opinion the case should be reviewed. Any judge of the Supreme Court of Appeals may grant an appeal, or, if he refuses to grant it, the petition may be submitted to the court en banc. Opposing counsel must be given opportunity to oppose the granting of the petition. A transcript of the record must accompany the petition. (e) If the petition is granted it indicates that bond must be filed and whether or not supersedeas shall issue. (f) The case is docketed in the Supreme Court of Appeals. (g) Briefs must be filed. (h) The Supreme Court of Appeals certifies its decision to the lower court. The upper court will make a final disposition of the case unless it is remanded for the determination of issues designated by the high court.

On January 1, 1944, A executes and delivers to B his promissory note for $500 payable on demand. On January 1, 1947, A pays to B the sum of $300 on this note. He dies February 1, 1950, leaving the balance unpaid. His administrator seeks your advice as to whether or not he should pay the residue. What would you advise?

Do not pay it. The statute of limitations on written contracts is 5 years; in Virginia a partial payment does not start the statute running over. A demand note is due as soon as made.

Query 1. What is the statutory period of limitations? A. Oral contract, 3 years; written contracts, 5 years; sealed instruments, 10 years. B. Recovery of property (real) 15 years. C. Tort actions that survive, 5 years; Tort actions not surviving, 1 year unless otherwise provided. By Va Code as amended in 1954 the statute of limitations in the case of an action for personal injuries was changed to 2 years. This change is not applicable to actions under the death by wrongful act statutes.

Define a supersedeas as used in Virginia.

A supersedeas as used in Virginia, is an ancillary process, addressed to the officer charged with the execution of the judgment of the trial court, directing him to stop the execution of the judgment below, and also directing him to summon the defendant in
16. The plaintiff institutes an action on a contract for the payment of money, he obtains personal service of process on the defendant, and files with his notice of motion for judgment an affidavit made by himself as to the best of his belief he is entitled to recover the sum of $300; that such amount is justly due and that he claims interest thereon from Jan. 1, 1952. The defendant denies all liability and employs you to represent him. What steps would you take to protect your client's interest?

A sworn plea (i.e., one denying by affidavit) denying liability in whole or in part should be filed. Unless this is done no defense would be allowed to a motion for judgment on an account where plaintiffs have sworn to the amount and justice of their claim unless plaintiff failed to object to the filing of an unworn plea within seven days. The object of the statute is to prevent delay by means of frivolous pleas. See V#8-511 and V#8-721. Query 1. What pleas must be sworn to?
(a) The one above (b) All pleas in abatement (c) Plea denying allegation of partnership or incorporation (d) Special plea of equitable set-off (V#8-241) (e) Plea denying allegation of signature (f) Plea denying allegation of ownership, operation, or control.

17. State two rules of pleading which tend to produce singleness of issue
(1) Pleadings must not be double. That is the rule against duplicity. Example: Defendant in one plea pleads infancy and statute of limitations. In such a case defendant should plead two separate and distinct pleas instead of one double one. Duplicity, however, is a defect of form rather than of substance and under our present statutes would not be fatal (except in the case of pleas in abatement which must be technically correct.)
(2) The common law rule that one cannot demur and plead to the same matter. This rule was designed to prevent issues of law and fact at the same time. However, by V#8-131, "Any party in any action, at any stage of the pleadings, may plead as many several matters, whether of law or fact, as he shall think necessary."

22. For what purposes are dilatory pleas available, and at what stage of the proceedings must they be interposed, if at all?
Dilatory pleas or pleas in abatement are available principally to contest the venue. A plea in abatement cannot be made by a defendant after he has answered, demurred, pleaded in bar, pleaded to the merits, nor after the expiration of 21 days after service of the notice of motion for judgment or the subpoena in chancery upon him. Such pleas, not being to the merits, and tending only to delay, are discouraged. Example: X sues D for a debt in the Circuit Court of Y County instead of Z County where D should be sued. However, he alleged facts which D can prove are wrong which (if true) would show that the Court in Z County was the proper court. D should file a plea in abatement if D does not wish to be tried in Y County.

23. You represent a client upon whose goods a distress warrant has been levied for rent which he claims he does not owe. How would you test the validity of the levy, and mode of procedure?
Replevin, the common law remedy, has been abolished in Virginia. The client should put up a delivery or forthcoming bond of double the amount for which the distress is made. The property is then delivered to the client. He fails to deliver the property as he agreed to; the bond is declared forfeited which has the force and effect of a judgment against the obligors. The landlord then gives ten days' written notice that on a certain day he will move the court for an award of execution on the bond, and, in reply the client may show his defense.

If the tenant is unable to give bond, and yet has a valid defense, he may make affidavit to these facts, and the officer levying the distress warrant is required to permit the property to remain in the possession and at the risk of the tenant, unless the landlord is willing to give bond. (See Burks #404 (4th Ed.))

24. A client places in your hands for collection a claim for $1,000 against B, a resident of Ky. You learn that a carload of horses has been shipped by B via the C & O. R.R. from Lexington, Ky., consigned to a firm in Newport News, Va., for export to France. Can you sue B in Va., and if so, how would you proceed?

Yes, a judgment in rem by attachment under V#8-520 may be obtained. This has been held not to be an unreasonable interference with interstate commerce. However, if the cattle have been shipped under an order bill of lading no attachment will be valid unless the bill be first surrendered to the carrier or its negotiation enjoined.
Query 1. What are the grounds for an attachment? (1) That defendant is a foreign corporation, or a non-resident, and has estate or debts owing to such defendant in the county or city in which attachment proceedings are brought, or is entitled to the benefit of a lien legal or equitable. (2) Is removing or about to remove out of state with intent to change domicile. (3) Debtor is removing, or has removed, or intends to remove the property sued for out of the State so that there will probably not be enough in the State to satisfy the judgment. (4) Is about to, or has converted his property into money, securities or evidences of debt with intent to hinder, delay, or defraud his creditors. (5) Has, or is about to assign or dispose of his estate with intent to hinder, etc., his creditors. (6) Has absconded, or is about to abscond from the State, or has concealed himself therein to the injury of his creditors, or is a fugitive from justice.

Note: Where separate and distinct grounds of attachment are stated and all are relied upon, they must be stated conjunctively.

25. Steps to be taken by a sub-contractor to perfect his mechanics' lien; within what time must suit be instituted to enforce it, and where funds in the hands of the owner due to the general contractor are less than the aggregate of all of the subcontractors' liens, what priority, if any, is there between them?

This is regulated by Va. Code Ann. § 45-1 et seq. The sub-contractor has two remedies. (1) If the general contractor has perfected his lien, the subcontractor may obtain the benefit thereof by a written notice of his claim against the general contractor to the owner, or his agent, before the amount of the general contractor's lien is paid off or discharged. (2) He may take out an independent lien by doing just what the general contractor is required to do, and, in addition, give notice in writing to the owner of the property, or his agent, of the amount and character of his claim but the amount secured by this lien cannot exceed the amount in which the owner is indebted to the general contractor at the time the notice is given, or shall thereafter become indebted to the general contractor.

Note: The steps that must be taken by the general contractor to perfect his lien are (1) The filing of a memorandum in the clerk's office of the county or city in which building is located at any time after the work is done and before the expiration of 60 days from the time the work is terminated. This memorandum must contain (a) Name of owner (b) Name of claimant (c) Amount claimed (d) Consideration (e) Time or times same will become due or did become due. It must be verified by oath, be accompanied by statement claiming the benefit of the lien, and give notice that claimant intends to perfect his lien. It is recorded in the miscellaneous lien book and indexed in the Deed Book. A copy of the notice is sent to the owner. A lien takes in as much land as necessary to the proper enjoyment of the building. (2) The lien must be perfected by a bill in equity within six months from the time the debt becomes due. If the owner has any defense he may make it in those proceedings.

Note 2. A sub-contractor has preferences over a general contractor. There is no preference as between subcontractors of the same class except that those furnishing labor are entitled to a preference for not more than 30 days immediately preceding the date of performance of the last labor.

26. You offer a deed for record to the clerk of the proper court, and tender the proper tax and fees for recordation. The clerk refuses to record the deed on the alleged ground that a higher tax should be paid. How would you proceed to require the deed to be admitted to record?

To compel the performance of a public duty of a ministerial nature Mandamus is the proper remedy.

Notes as to other extraordinary remedies. (1) Prohibition is a writ issued by an upper court to a lower court ordering it to cease its determination of a case because of lack of jurisdiction. (2) Habeeb Corpus ad sublacendum is a writ directed to one who is illegally restraining another of his liberty and directs him to cease therefrom or to give the person so restrained to a legal custodian. Habeeb Corpus ad testificandum is a writ directed to one having custody of a person to produce that person at a certain time and place that he may give testimony in a judicial proceeding. (3) Certiorari is an order from a higher court to a lower court ordering the record of the case to be certified and sent up to the higher court. In Virginia, practically the only use made of this writ is by the Supreme Court of Appeals, to obtain a further or more perfect record, when a complete record has not been furnished. (4) Quo warranto
is a discretionary writ, given by a court, upon petition of the attorney general, or Commonwealth's attorney, or, if they refuse, by any one having a special interest, against (a) a domestic corporation (other than a municipal one) for a misuse or non-use of its corporate privileges and franchises (b) a person for the misuse or non-use of any privilege conferred by law (a) any person who shall intrude into or usurp any public office.

Note also that an extraordinary remedy never lies if there is an adequate ordinary remedy.

27. A recovers a judgment against B for $2,500 in an action for breach of promise to marry. B asserts a claim to his homestead exemption. Can he sustain it against the judgment?

No. A breach of promise to marry, while technically in the nature of a contract, is often regarded as substantially a tort. Thus exemplary damages may be awarded, and the action dies with the person. Since this claim is not substantially contractual it is superior to homestead exemptions. And the statute of limitations is one year.

28. A enters upon B's land and hauled away a lot of building stone without permission. Are B's remedies in tort or contract?

In either his option. Thus B may waive the tort and sue on quasi-contractual principles, or file a motion for judgment for the building stone.

The theory on which a contract action is brought by a notice of motion for judgment is that in order to keep A from being unjustly enriched the law will imply a promise to pay B for the property.

29. To an action for personal injuries not fatal, the defendant pleads that the cause of action did not accrue within 2 years. Soon after the infliction of the injury the defendant left the State in order to escape being sued and did not return until just before you sued. How does this affect his plea, and how would you raise such an issue on the pleadings?

If defendant was a resident of this State and left after the action accrued, thereby obstructing suit, the time out of state would not be counted as any part of the total time. See V# 8-33.

[As to the method of raising such an issue, Rule 3:11 reads in part, "If a plea set up new matter and contains words expressly requesting a reply the adverse party shall within 21 days file a reply admitting or denying such new matter. If it does not contain such words the allegations of new matter shall be taken as denied or avoided without further pleading."

30. To an action on an ordinary note not under seal, the defendant pleads that the cause of action did not accrue within five years. You wish to prove a new promise in writing within that time. How do you raise this question on the pleadings?

V# 8-26 provides that if the plaintiff's action be on the original cause of action, and the defendant pleads the statute of limitations, the plaintiff shall be allowed to reply specially such promise, or he may, without replying specially, show such promise in evidence to repel the bar of the plea, provided he shall have given the defendant reasonable notice before the trial of his intention to rely on such promise.

31. A fire insurance policy for $1,000 on a house worth $1,500 is issued to A, the owner, "loss, if any, payable to B as his interest may appear." (B holds a lien on the property for $1,000.) The house is totally destroyed by fire. In whose name would you sue?

By V# 56-22 B may bring the action in his own name since the contract was meant for his benefit in whole or in part. A could sue because he is the party who made the contract. Thus either (but not both) could sue, and each would hold any money recovered but belonging to the other as trustee for such other.

32. State briefly when, how and why a guardian ad litem is appointed, and his duties.

When an infant or insane person for whom no committee has been appointed is sued, a guardian ad litem is appointed. How? By clerk, judge or court. Why? Because the infant or insane person is not deemed capable of protecting his interests. Duties? To defend the particular suit brought in every legitimate manner so as to protect the rights of his ward. A guardian ad litem is under the control of the court in which appointed and may be summarily dismissed for cause.
36. What is a next friend and what are his duties?
An infant, or insane person for whom no committee has been appointed, sues by next friend. His duties are to diligently prosecute the suit, and to look out for his ward's interests therein.

37. In an action for libel or slander, can the truth of the defamatory words be proven under the general issue?
No. The Rules abolish the general issue. At common law in an action on the case anything may be shown under the general issue of not guilty except statute of limitations, truth to an action for defamation, and discharge in bankruptcy.

38. Up to what time can a plaintiff in an action at law amend his notice of motion for judgment as of right?
Rule 3:14 provides that no amendment shall be made to any pleading after it is filed save by leave of court.

Note: By W# 8-119 a court may at any time in furtherance of justice, and upon such terms as it may deem just, permit any pleading to be amended. The court must at every stage of the proceedings, disregard any error or defect which does not affect the substantial rights of the parties. Of course no amendment will be permitted under this section which changes the entire theory of the case.

39. On demurrer, what defects in pleadings are not to be regarded?
Except as to pleas in abatement, all defects of form are to be disregarded. By W# 8-109 no demurrer shall be sustained to a declaration in negligence because the facts of the negligence are not stated.

40. From what interlocutory decree in chancery can an appeal be taken?
By W# 8-462 an appeal is allowed from the following interlocutory decrees: (1) Decree dissolving an injunction. Example: pending the conclusion of a hard fought divorce case the court enjoins the husband from disposing of certain property. Before the divorce case is finally determined the court dissolves this injunction. An appeal lie (2) Decree or order requiring money to be paid. (3) Decree or order requiring possession or title to property to be changed. Example: appointment of receiver pending final determination of rights. (4) Decree or order adjudicating principles of the case. Example: Court decides case is not barred by laches and proceeds with same.

41. The Court of Appeals of Virginia has before it an appeal in a chancery cause, and a writ of error in a suit at law in which the evidence has been certified. What is the difference in the consideration of the evidence in these two cases by the court?
Barton's Chancery Practice 3rd Ed. p. 971 reads, "The findings of a commissioner will be given great weight and though not as conclusive as the verdict of a jury, they will be sustained unless plainly unwarranted by the evidence. This rule operates with particular force in an appellate court where the findings of the commissioner have been approved by the court below, but if the findings are disapproved by the chancellor, they will be regarded merely as a circumstance, of more or less weight, to be considered with the evidence in testing the correctness of the decision of the court."

In the case at law the findings of fact by the jury, or by the judge where there was no jury, will not be disturbed unless plainly contrary to any reasonable view of the evidence. Everything not in conflict with the evidence is admitted and all reasonable inferences are drawn to support the findings of the court below.

43. A claims his exemptions as householder and head of a family in personal property valued at $1,500 and in a house and lot valued at $500. He consumes and uses up the whole of the personal property so set apart as his exemptions and then acquires other personal property worth $1,200. His creditors seek to subject this property to their debts, and he claims it as exempt. Can the creditors subject it to their debts?
Yes, once used up the homestead exemption is gone forever. Had he merely reinvested the original exempt property it would still have been exempt.

45. In December, 1949, Charles Jones executes and delivers a deed of trust on a flock of 100 sheep to secure the Bank of Lexington in the sum of $400. There is an increase in the flock to the extent of 75 lambs, and on June 1, 1950, a judgment creditor of Jones levies an execution on the lambs for his judgment. Whose rights are prior as between the bank and the judgment creditor?
46. What is the office of a petition in a pending suit in chancery?

A petition in a pending suit in chancery may be filed by a person not a party who is interested in the results and wants to be made a party, for the purpose of asserting a right or seeking relief therein. W & C 126; Rule 2:15.

47. What principles govern a court of equity in determining whether it will set aside or confirm a judicial sale?

Two apparently conflicting principles govern. One principle is that the property should bring as much as possible so as to do justice to defendant and his creditors. The other principle is that nothing should be done to discourage the public from bidding at such sales. If everyone who gets a bargain is deprived thereof by the courts there will soon be no bidders. So a sale will not be set aside, if it has been duly held, unless the price is grossly inadequate. If someone comes along with a higher bid in the meantime (an upset bid) the court may, if the bid is substantially higher and the upset bidder accounts for his failure to bid before, allow the new bid, upon the new bidder giving bond that he will keep his bid open, and after giving the prior bidder a chance to meet the new bid.

48. The Front Royal National Bank obtains a judgment against William Reid in the Circuit Court of Rappahannock County, Reid being a resident of that county. Reid owns no personalty, but he is the owner of a tract of land in Warren County. The bank employs you to subject the land to the lien of its judgment. Where could you proceed?

See 6 Query, (a), (d). So the answer is either place as the venue statute is cumulative in this situation.

49. James Smith, William Lewis, John Moore and Charles Jones jointly execute a bond for $1,000. Smith and Lewis become insolvent and Jones is compelled to pay the entire sum. Jones employs you to protect his rights. State: (1) How would you proceed?
(2) From whom and what amount would you recover?

The remedy at law is inadequate because at law Moore could only be held on an implied promise to pay his pro-rata share. So the procedure should be by bill in equity. Could recover $500 from Moore in a court of equity. See cases cited in 2 Digest 945.

50. William Johnson is engaged in the mercantile business, and his assets consist of a stock of merchandise and a debt owing him by the Southern Railway Company. On June 1st the Luray Supply Company obtains a judgment against him for $500, upon which the clerk issues an execution and delivers it to the sheriff the same day. On June 4th Johnson makes a general deed of assignement, conveying his entire stock and all his debts that may be owing him to a trustee for the benefit of all his creditors, which assignment is forthwith recorded. On June 10th the sheriff levies his execution on the stock of merchandise, and on the same day garnishes the Railway Company. What are the rights of the judgment creditor and the trustee, respectively?

The Luray Supply Company would be ahead as regards the tangible property, and the assignee as regards the debt. At the moment the execution process was placed in the sheriff's hands he was bound to put the date and hour on the back thereof. At that moment a lien attaches on all tangible and intangible personal property. When the levy is actually made the lien is clinched, and failure to make the levy before the return day of the execution process annuls the lien.

The rule as to property capable of being levied upon is that the lien has preference even against a bona fide purchaser for value. Caveat emptor.

But debts cannot be levied upon. The rule as to such property is that an assignee for value for a bona fide purchaser for value before garnishment proceedings have been taken takes precedence over the execution lien. In Virginia a conveyance to pay or secure a pre-existing debt is one for value. See Burks #373 (4th Ed.)

51. Charles Morris is the head of a family and a resident of Jefferson County, W.Va.; he owns a farm situated in Clarke County, Va., worth about $1,500; he also owns personalty on the farm worth about $500. He owns no other property anywhere. The Bank of Clarke County catches him in Clarke, sues him on a note for $600 and obtains judgment. He consults you as to his right to claim the homestead exemption. Assuming that the note did not waive the homestead, what would you advise?
He has no right to homestead exemption, as such exemption is given only to residents of this State. W# 34-4.

52. Frank Warner institutes an action against the Norfolk and Western Railway Company for $25,000 for personal injuries alleged to have been negligently sustained. The jury returns a verdict for $250. What are the rights of the respective parties to carry the case to the Supreme Court of Appeals?

Plaintiff only could appeal. This is a pecuniary matter and so far as defendant is concerned there is not $300 involved.

54. William Jones of Warren County, holds a note executed by Frank Smith, of Fauquier County, for the sum of $200. Smith failing to pay the note, Jones proceeds by notice of motion for judgment, seizes Smith in Warren, and the sheriff serves a copy of the notice on him. When the case is called Smith's attorney moves to dismiss for the lack of jurisdiction. What should be the order of the court?

Since Smith does not reside in Warren County that County does not get jurisdiction by virtue of W# 8-39, "First, Wheresoe'ry a dispute of the defendants reside."

Where no place of payment is expressed in the note the place of payment by the way of authority is the maker's residence. The place of business, 8 C.J. 567. But parol evidence would be admissible to establish that it was agreed that it should be paid at the payee's residence. Assuming such an agreement, then the cause of action arises in Warren County and under W# 8-39 that is a proper county in which to sue. Provided service can be obtained on Smith in Warren County as was done in this case. So Smith's motion should be overruled. In the absence of any agreement as to the place of payment the proper venue would be Fauquier County. But this is a matter of venue and not jurisdiction. Smith is privileged to have the case tried in Fauquier County provided he insists on his right to have it tried there. Where the proper venue depends on a question of fact the plaintiff is entitled to have that fact put in issue by a plea in abatement. Hence Smith's motion to dismiss for lack of jurisdiction should be dismissed as that would not be the proper way to test venue. Note: If the matter involved jurisdiction in the strict sense rather than venue only then a motion to dismiss would be proper. Example: X sues Y in an action of ejectment in a trial justice court. Y moves to dismiss for lack of jurisdiction. The motion should be granted.

55. A, B and C are joint tort-feasors against D. The latter elects to sue A and obtains a judgment for $300. It later develops that A is insolvent and the judgment cannot be paid. Can D sue B and C if either of them?

At common law a judgment against one joint tort-feasor releases the others on a theory that their liability was extinguished by merger in the judgment. In our 1919 reversion Virginia changed the rule. W# 8-368 provides that the plaintiff may proceed against one tort-feasor severally or jointly, and that satisfaction of the judgment as distinguished from judgment only, discharges the others.

Note: If one joint tort-feasor is forced to pay the entire judgment W# 8-627 provides that contribution among wrong-doers may be enforced where the wrong is a mere act of negligence and involves no moral turpitude.

57. When may an issue out of chancery be awarded in an equity suit?

In any case in which either party demands it when the evidence on a material point is in conflict. Furthermore if there is a square conflict in the evidence the court of its own motion should direct an issue out of chancery. Also where a plea is entered as a plea of nolo contendere only one question of fact, and where it is necessary to inquire as to the amount of damages.

58. What control has the court over verdict of jury on an issue out of chancery, and also a verdict of jury in a common law case?

In theory the verdict of a jury which decided an issue out of chancery is purely advisory, but as a matter of practice it is almost always followed.

In the case of a common law suit the verdict of the jury should only be overturned when it is clearly contrary to the evidence upon any reasonable view taken. All facts not covered by the evidence and all inferences that can be fairly drawn from the evidence must be considered to be in favor of the verdict. But if no verdict could possibly reasonably be sustained the court may enter judgment non obstante veredicto.
What courts have jurisdiction to entertain a suit for collection of a lost bond or note?

In absence of statute only courts of equity, as no proof of the bond could be made and a lost note might be in the hands of a holder in due course. By Va § 8-517 courts of law are given jurisdiction and must require an indemnity bond the condition of which is to save harmless the defendant from loss if he is compelled to pay to some other person.

Note the principle brought out by the case of Kabler v. Spencer, 114 Va 589, "Court of equity have jurisdiction to enforce payment of a lost bond, and although courts of law are given jurisdiction by this section, it is well settled that courts of equity, having once acquired jurisdiction never lose it because jurisdiction of the same matters are given to courts of law, unless the statute conferring such jurisdiction uses prohibitory or restrictive words."

What would you say as to the conclusiveness of record in the following cases: (a) A judgment in an action of debt was based upon process served upon the defendant's wife the return upon which process did not state that the defendant was not found at his usual place of abode. (b) In sale of infant's land in suit by his guardian, a decree of sale recited that the guardian ad litem filed answer for the infant and in proper person as required, but some years later an attorney examining the title to the land and looking through the papers in the suit (which suit had been final and dismissed from the docket for at least ten years), was not able to find either answer among the papers in the suit. Could the attorney examining the title rely upon the recital in the decree that the answers in question had been filed?

(a) Assuming that this was a judgment by default it would be void, for the defect is apparent on the face of the process and the service was not personal, but substitutional.

Note 1: Suppose the officer had not served the process at all, but had endorsed it so that on its face it seems to have been regularly served? The rule in Virginia is that the record imports absolute verity, and a judgment based thereon is good. The return cannot be directly or collaterally attacked. See Burks, p. 96, 4th Ed.

Note 2: If the writ itself is valid and the service personal (i.e., not substitutional), a judgment rendered on defective service is not void, but voidable only, and cannot be collaterally assailed. Example: An officer serves the writ on X, personally, but neglects to endorse the time and manner of service. This defect must be taken advantage of, if at all, by a plea in abatement.

Note 3: Formerly if a party defectively served entered an appearance other than a special one for the sole purpose of objecting to the defective service, he was deemed to have waived the defect. But Rule 3:6 now reads in part, "A plea in abatement or motion to quash process need not be filed upon a special appearance, and may be filed by the defendant in proper person or by counsel."

(b) As a general proposition an attorney examining title is safe in relying upon a decree that states the steps have been taken when these steps are all that are required. This creates a presumption that they have taken them.

In order to take advantage in the appellate court of a wrong ruling of the trial court, in not permitting the witness to answer a question, what must the record show? What must the record show if any, was prejudicial. State what was expected to be proved by him.

Note 1: "When a witness is rejected on account of his incompetency, it is not necessary to state what it is expected to prove by him. The objection to his competency implies materiality, and that he is adverse." Burks § 305 (4th Ed.).

If a defendant in action of debt desired to offer proof of payment or set-off, what must he do before issue is joined for the trial of the case?

By Rule 3:8 he must within 21 days after service on him of the notice of motion for judgment-plead his set-off as a counterclaim. If the defense is payment he must plead it specially by filing his grounds of defense as per Rule 3:7.

What is necessary to support a plea of res judicata?

(1) That the issue involved in the second proceeding was necessarily involved in the
first. (2) That former proceeding was before a court of competent jurisdiction. (3) That the issue is between the same parties or their privies. (4) That there was no fraud or collusion in the former proceedings (5) In the case of a civil action that there was a final judgment or decree. In a criminal case that the proceedings went as far as impanelling and swearing of the jury and charging them with the issue i.e., former jeopardy.

66. What is meant by a case agreed? And state the proceedings thereunder.

It is a substitute for a special verdict and is treated in the same manner. It consists of an agreed statement of facts and no facts are to be inferred that are not set forth in this statement. The duty of the judge then is to apply the law to the facts and render his decision accordingly.

67. What is the leading difference between a plea in abatement and a plea in bar? A plea in bar is a plea to the merits of the case whereas a plea in abatement has nothing to do with the merits of the case, and, if successful, only causes delay.

Problem: What, if anything, is wrong with the following plea in abatement?

In the Circuit Court of York County

C------C------

v.

D------D------

Plea in Abatement.

The said defendant comes and says that this court ought not to have or take any further cognizance of the action aforesaid of the said plaintiff, because the said defendant says that the supposed cause of the said action did not nor did any part thereof arise in the said county of York and of this the said defendant puts himself upon the country.

Therefore he prays judgment whether this court can or will take any further cognizance of the action aforesaid.

J.G.E., p.d.

(a) It should conclude with "And this the defendant is ready to verify" and not with putting himself upon the court.

(b) It should negative all other grounds of jurisdiction; in this case it should state that defendant is not a resident of York County.

(c) It should give plaintiff a better writ, i.e., it should set forth facts that would show plaintiff in what county he should proceed.

(d) It should be verified by affidavit as all pleas in abatement are required by statute to be so verified.

Note: By Rule 3:6 a plea in abatement may be filed by the defendant in person or by counsel.

70. In what counties or corporations may non-resident defendants be sued?

(a) In the case of non-residents suits may be brought where ever they can be served with process in Virginia in the case of transitory actions, or wherever he has property or debts due him in this State.

72. A picks up a loaded gun, believing it to be unloaded, and, though warned that it may be loaded, points it at B. The gun goes off and kills B. (a) What crime, if any does A commit? (b) Suppose B to be merely wounded? What crime if any does A commit? (a) Manslaughter (b) Probably none, but possibly assault and battery on the theory that the conduct of defendant was reckless and wanton and hence equivalent to intentional.

73. In the latter case (that is, the wounding) suppose that the occurrence was in F County on February 6, 1950, that A lived in R County, and left F County right after the accident. If you advised any proceedings, what action would you bring?

Notice of motion for judgment as per Rule 3:3.

74. In what court would you bring it?

It might be brought in either county. Since a tort is involved service could be sent out of F County to R County.

75. Suppose that you are employed on Tuesday, February 14, 1950, that a term of the court having jurisdiction begins on the fourth Monday in February (the 27th), and another on the fourth Monday in March (the 27th). Which term could you catch and why
Since the defendant must be given 21 days in which to file responsive pleadings it will not be possible to reach a February term of court. If defendant files his grounds of defense within the 21 days the case will be sufficiently matured to be docketed for the March term. But if defendant pleads in abatement or demurs such pleading would be disposed of in the March term of court and further progress of the suit would depend upon what additional time the Court allowed defendant in which to file his grounds of defense.

Outline of Steps in Trial of Case at Law

1. Preliminary to trial:
A. Filing in clerk's office a motion for judgment and a copy for each defendant paying the required writ tax and deposit against costs. Rule 3:3(a).
B. Clerk prepares the Notices of Motion for Judgment and attaches a Notice to each copy of the Motion for Judgment. These combined papers constitute the motion for judgment which the clerk delivers for service as plaintiff may direct.
C. Service, and Return on a paper-styled "Proof of Service" within five days after the earliest service upon any party as per Rule 3:4.
D. Within 21 days of service defendant must file his responsive pleadings. If this pleading is a demurrer or plea in abatement and is overruled in due course he must file his grounds of defense within whatever time the Court orders him to do so.
E. Case-docketed and set for trial. F. Pre-trial conference.

II. Trial.
A. Case called.
B. Jury impanelled. See Note 1, infra
C. Opening Statements-Plaintiff first-then defendant.
D. Introduction of Evidence-See Evidence, 19.
E. Instructions given Jury.
F. Closing arguments-Plaintiff Defendant
G. Jury retires.
H. Verdict.
I. Judgment-Is ipso facto a lien on real property.

III. After Trial.
A. Execution-Lien on personal property as discussed in question 50, supra.
B. Levy. C. Sale.

Note 1. Each side has a constitutional right to a trial by jury, but the court may try the case unless a jury is demanded. "A common law jury was a jury of twelve, but by the Virginia Constitution there may be a jury of not less than seven in cases not cognizable by a justice of the peace at the time the Constitution was proclaimed, or not less than five in cases so cognizable. Provision is also made for a jury of three by consent of the parties entered of record, each party to select one, and they to select the third, and it is provided that any two concurring shall render a verdict in like manner and with like effect as a jury of seven.

Note 2. Service of process on natural persons, residents of Virginia. This may be (1)on defendant himself if found anywhere in the officer's bailwiek, or (2) substituted service. This is of two kinds: (a) on the consort of the defendant or on any member of his family above the age of sixteen. If served in this way the fact that it was so served and the fact that the defendant was not to be found at his usual place of abode must be endorsed on the process, and also the further fact that the purport of such process was explained to the one on whom the notice was served. (b) If no one is found above the age of 16 and a member of the defendant's household then the process may be tacked upon the front door. If served in this manner the possibility of personal service, or service upon a member of the household over 16 must be negatived. Note well that these methods are not cumulative but successive.

No Directed Verdict. A 1/2

77. On the trial the court instructs the jury as follows: "Gentlemen of the jury, I instruct you to find for defendant." The jury does so, and the court in due course enters judgment. Was this proper procedure?

No. V\#6-218 reads, "In no action tried before a jury shall the trial judge give to the jury a peremptory instruction directing what verdict the jury shall render."

But note well that there are less summary methods to accomplish the same result. A demurrer to the evidence may be interposed; evidence may be stricken; the trial court may set aside the verdict, and in a proper case give judgment non obstante verdicto; the trial court may decline to give any instruction where the evidence would not sustain a verdict, and it may in substance direct a verdict by stating in
an instruction a hypothetical case and telling the jury if they so believe to find etc. 139 Va 618. And Rule 3:20 provides that either party may file a motion for a summary judgment at any time after the parties are at issue. If it appears from the pleadings, the order, if any, made at the pretrial conference, and the admissions, if any, in a deposition that the moving party is entitled to judgment, the court shall enter judgment in his favor, but that no summary judgment shall be entered if the amount of damages or any other material fact is genuinely in dispute.

78. What papers constitute the record in the appellate court?

This is governed by Rule 5:1, section (3). The papers are:

1. All writs
2. Processes
3. Returns
4. Reports
5. Pleadings
6. Grounds of Defense
7. Bills of Particulars
8. Notices
9. Depositions
10. Stipulations
11. Notices of Appeal
12. Assignments of Error
13. Original drafts of orders, decrees and judgments signed or initialed by the judge.

15. Instructions both granted and refused when properly initialed.
16. Exhibits whether admitted or rejected when properly initialed.
17. Oral testimony and other incidents of the trial or hearing transcribed by a reporter and
18. Any written statements of facts, testimony or other incidents of the case if the transcript or statement is signed the end by Counsel for all parties and tendered to the judge within 60 days a signed by him within 70 days after final judgment and
19. A transcript or statement not signed by Counsel for all parties as per the provisions of subsection (f).
20. While the verdict of a jury is not expressly mentioned it will most certainly be part of the record.

Comment on 17, 18 and 19 above: These provisions accomplish everything that was ever accomplished by the most formal bill or certificate of exceptions.

Query 1. The Court refused to allow a certain paper to be admitted in evidence. Does such order prevent it from becoming a part of the record? No. Sub-paragraph (a) expressly provides that an order rejecting, striking or suppressing all or part of a paper lodged with the clerk shall not have the effect of taking it out of the record on appeal.

Query 2. What happens if the judge who presided at the trial dies? Sub-section (g) provides that the transcript may be tendered to or signed by any judge having authority to enter orders in the case. Comment by Judicial Council, "Code section 8-342 provides for some but not all situations in which the judge who tried the case is not available to sign the transcript. The present proposal is designed to cover all such cases. It allows the transcript to be tendered to one judge and signed by a different judge. Whenever possible the transcript should, of course, be signed by the judge who presided at the trial. The reason for not making it mandatory that the transcript be signed by the judge 'whenever possible' is to avoid controversies over whether it is possible."

79. Suppose a case is reversed and remanded for a second trial. You discover that your principal witness has moved to a certain address in New York City. How, if at all, could you secure the benefit of his knowledge of the facts?

Take his deposition after giving adverse parties due notice.

80. Suppose he had died before the second trial. How, if at all, could you secure the benefit of his knowledge of the facts?

Under the reported testimony exception to the hearsay rule testimony given by a witness in a former trial is admissible in a later proceeding which involves the same parties and the same issues.

81. Suppose your client dies before the second trial. How, if at all, does it affect your suit, and what would you do?

By Rule 3:17 if a party becomes incapable of prosecuting or defending because of
death or other cause his successor in interest (in this case plaintiff's personal representative) may be substituted as a party in his place. This is done on motion of the successor or of any party to the action.

Note 1: If no suit had been started and death was due to defendant's wrongful act then the personal representative of the deceased may institute an action for the benefit of statutory beneficiaries for not more than $25,000 under the death by wrongful act statutes also known as "Lord Campbell's Acts". V#8-633 et seq.

Note 2: V#8-263.1 reads in part, "No cause of action for injuries to person or property shall be lost because of the death of the person in whose favor the cause of action existed, provided, however, in such action no recovery can be had for mental anguish, pain or suffering, (and) provided (further) that no such action for personal injuries, except an action brought by any person under disability at the time of the injury, may be brought more than two years, after the injury occurred."

82. Suppose the defendant dies before the second trial, but the plaintiff does not. How, if at all, does it affect your suit, and what would you do?

V#8-628 provides that any right of action which may accrue by reason of any injury done to the person of another, and not resulting in death, by the wrongful act of any person, shall survive the death of the wrong-doer, and may be enforced against his executor, either by reviving against such personal representative a suit which may have been brought against the wrong-doer in his lifetime, or by bringing an original suit against his personal representative whether or not the death of the wrong-doer occurred before or after the death of the injured party. So the thing to do is to revive the suit against the personal representative by motion as per Rule 3:17 quoted above.

83. Suppose for the purpose of this question that the plaintiff dies before the second trial, and that his death does not affect the suit. Under what circumstances, if any, can the defendant testify on the second trial?

At common law parties and persons interested in the result were incompetent witnesses. Where one party has died the common law rule as to the other party is still retained in many jurisdictions. But in Virginia, by V#8-286, the surviving party is a competent witness but cannot recover upon his own uncorroborated testimony. Note: In such a case interested parties cannot corroborate each other.

A business man, finding that his debts amount to $50,000 (none of them reduced to judgments), and his assets to only $25,000, makes a deed of assignment to a trustee, securing first two notes to his wife, and son, respectively, of $10,000 each, and then, after their payment, his other creditors pro rata, and authorizing the trustee to turn the assets into cash and distribute as above. You have reason to believe that the debt to the wife and son are not bona fide. You are employed by creditors representing $30,000 to collect their debts. Assume for the purposes of the next four questions that the bankruptcy law has been repealed.

84. Have the creditors any remedy? If so, what?

They may bring a creditor's bill in equity, for the purpose of setting aside the assignment as a voluntary or fraudulent conveyance. If the debts to the wife and son are not bona fide, a court of equity would set aside the conveyance. Note that if the debts were bona fide the fact of preference alone would not be a sufficient ground for the setting aside of the conveyance at Common Law. But by V#5-156 no preferences are allowed (except to the extent of the value of security given for secured debts) in the case of assignments for the benefit of creditors.

85. If you advise any proceeding, state exactly what steps you would take towards instituting and maturing it from your employment until it is at issue.

The steps are as follows: (1) File the Bill of Complaint (and copies enough for each defendant) in the clerk's office paying the required writ tax and deposit against costs. (2) Clerk issues subpoenas in Chancery attaching one to each copy of the bill of complaint; (3) Service of process (subpoena in chancery attached to copy of bill of complaint) and return on a paper styled "Proof of Service" as set forth in Rule 2:5(4). Defend ents file their responsive pleadings within 21 days after service. Rule 2:7. If defendant files pleas in abatement, demurrers or other pleas and these are overruled he has 21 more days in which to file an answer or within such shorter or longer time as
the court may direct. Should defendant fail to file any responsive pleading within the required 21 days the bill is taken as confessed except in divorce cases. (5) If plaintiff does not give more he is deemed to have filed a general replication, i.e., a blanket denial of everything in the answer of plea. Rule 2:9.

85. In such cases how is the evidence taken?

It is generally taken by deposition after due notice to all parties other than the as to whom the bill is taken as confessed, and before a commissioner in chancery to whom the Chancellor has referred the case for investigation and report. Rule 2:21 however provides that evidence may be heard orally before the court in any case, but if there are defendants proceeded against by order of publication who have not appeared, such evidence shall be reduced to writing and preserved as a part of the record. In other cases preservation of the evidence may be required by the judge in his discretion.

87. Is there any method by which on bringing your suit, you can secure priority for your clients in the distribution of the assets in case the litigation is successful; if so, what?

A party instituting such a suit in equity gets a priority at the time of the institution of the suit. In order to protect himself he should file a lis pendens in the clerk's office which should set forth the names of the parties, the objects of the proceedings, and a description of the property. The theory is that one who discovers facts that redound to the benefit of all the creditors should, because of his superior diligence, have a lien on the assets so discovered or freed from liability. 15 C.J. 441. Generally in other types of cases before one can resort to equity he must have first gotten a lien at law. In a case of death of a common debtor the general creditors, if necessary, may subject the decedent's real property to the payment of his debts without first getting a lien at law, but in this latter case no priorities are allowed.

91. The Valley Trust Co. places in your hands a negotiable note, executed by John Smith, and instructs you to obtain judgment. State the different remedies, both at common law and in Virginia, to which you may resort. Debt, or assumption at common law. If under seal covenant also. Now the procedure in Virginia would be by notice of motion for judgment pursuant to Rule 3:6.

93. What is the effect of a failure to waive answer under oath in a bill in equity?

At common law it gives the answer the force of evidence so far as the answer is responsive to the bill. W# 8-123 reads in part as follows, "Unless a complainant in a suit in equity shall, in his bill, request an answer or answers under oath to certain specified interrogatories, the answer of the defendant, though under oath, shall not be evidence in his favor, unless the cause be heard upon bill and answer only."

94. What is meant by marshalling of assets in a court of equity?

Where no harm will be done to one holding a senior incumbrance, a court of equity if it already has jurisdiction of the case, will require the holder thereof to satisfy that incumbrance in such a way as will do the least harm to those holding junior incumbrances.

95. In what cases has the Supreme Court of Appeals of Virginia original jurisdiction

Mandamus, Prohibition, and Habeas Corpus. Note that this jurisdiction, while original, is not exclusive.

96. In what civil cases has the Supreme Court of Appeals of Virginia appellate jurisdiction irrespective of the amount involved in litigation?

Even in such cases the right of appeal is discretionary. Cases concerning title to or boundaries of land, the condemnation of property, probate of a will, appointment of personal representative, guardian, committee, or curator, or concerning a mill, roadway, ferry, wharf, or landing, or right of State, county, or municipal corporation to levy tolls or taxes, or involving the construction of any statute or ordinance imposing taxes, or by any final order, judgment, or finding of the State Corporation Commission, irrespective of the amount involved, the interlocutory decree mentioned in question 40, refusal to grant a writ of quo warranto, or by the final judgment of said writ. See W# 8-462.
97. What is a bill of review? For what may it be filed? And when is leave of court not necessary? What is the limitation on filing a bill of review?

(1) A bill of review is the only remedy to set aside a final decree in equity and obtain a rehearing in the trial court, if the term of the court at which the final decree was entered has expired. (2) It may be filed only in two cases: (a) First, to correct some error in law apparent upon the record itself, (b) when some material fact has been discovered or has occurred subsequent to the decree. (3) In (2)(a) leave of court is not necessary. In any other case, it is. 

Note: If the proceedings are interlocutory and not final the remedy is not a bill of review but a petition to rehear.

Note 2: Note well that a bill of review is not in an appellate court but is a review of the trial court's own final decree in equity.

99. Can the statute of limitations be taken advantage of in Virginia, either at law or in equity, by demurrer? If any exception, state it.

(1) Where a statute of limitations is a matter of remedy it must be specially pleaded. Demurrer will not lie. This is the usual case.

(2) Where a statute creates and limits a right within a certain period, there is no right after that period has expired. Here it may be taken advantage of by demurrer if the pleading does not affirmatively show that the action was brought in time.

(3) In any case where the defense of the statute cannot be set up under the pleadings, it may be taken advantage of by instructions. See Burks #236(4th Ed).

101. Under the law and practice in Virginia, what are essential in a demurrer to the evidence both on the part of the demurrant and the demurree?

(1) It must be in writing (2) Set forth the evidence introduced by each party (3) State the grounds relied upon by demurrant. (4) Must be joined in by demurree.

102. For what will the court refuse to compel joinder in a demurrer to the evidence?

(1) No joinder will be required unless demurrer in writing, (2) where the inferences from the demurror's evidence are conflicting, or (3) where it clearly appears it is interposed solely for a delay.

Query 1. What is a demurrer to the evidence? A. It admits the truth of the demurror's evidence, withdraws the demurrant's evidence in conflict therewith, and allows all reasonable inferences to be drawn in favor of demurror and against demurrant except where demurror's evidence is conflicting and doubtful in which case the issues should be submitted to the jury. A demurrer to the evidence takes the case from the jury, and leaves it with the court. If the demurrer is overruled the damages are fixed by the jury, and the demurror's only remedy is to note an exception and ask a higher court for a writ of error.

103. A recovers a judgment against B, and execution issues on the judgment within a year from its rendition and is returned "no effect" by the sheriff. Then B dies. What are the proper proceedings to revive this judgment against B's administrator, and within what time must this proceeding be had to prevent bar of statute of limitations?

Generally the lien of a judgment may be enforced by a bill in equity at any time so long as a valid execution may be issued on the judgment. (1) By Code #86-396 execution can be issued or scire facias or action brought within 20 years from the date of judgment. It can be kept alive perpetually by extending its life by scire facias or action brought within the 20 year period. (2) Where the scire facias or action is against the personal representative of a decedent, it shall be brought.
within five years from his qualifications, thus cutting down the life of a judgment against a judgment debtor who dies to five years from the qualification of his personal representative, unless within that time the judgment be revived by scire facias or action. (3) By VA-393 no suit can be brought to enforce the lien of a judgment against lands which have been conveyed by the judgment debtor to a grantee for value unless the same be brought within ten years from the due recordation of the deed from such judgment debtor to such grantee.

Applying (2) to question 103 no revival would be necessary until just before the expiration of twenty years or just before the expiration of five years from the appointment of a personal representative (whichever should happen first).

109. What statutory substitute is provided in Virginia for the bill of discovery? VA-320 to 326 provide that in any proceeding at law pending before court or commissioner a party may file interrogatories to adverse party. This does away with the necessity of a separate equity suit in cases at law though pure bills of discovery have not been expressly abolished.

111. What is the method of procedure to subject to payment of judgment the following property of debtor: (a) Land; (b) Money in bank; (c) Growing crop of wheat on land leased for term of years by debtor; (d) Livestock (e) Shares of stock in a corporation.

(a) The judgment is against the land. A bill to subject the land to the judgment lien is the proper method of procedure. Note (1) that it is not necessary to exhaust the personal property first in this case and (2) that the land cannot be sold if the rents and profits will probably pay off the judgment within five years.

(b) Have an execution issued on the judgment. This becomes a lien on all personal property tangible and intangible. Garnishment process is necessary to enforce the lien on debts due the judgment debtor.

(c) VA-421.1 provides that no growing crop of any kind (not severed) shall be liable to distress or levy except Indian corn, after Oct. 15, and also except sweet and Irish potatoes over five barrels after same has been matured sufficiently to sever or to market. Hence the remedy here would have to be by bill in equity.

(d) Ordinary execution, levy and sale.

(e) Issue execution. Garnishee the corporation, if it is impossible to get the stock. VA-1-114 reads, "A creditor whose debtor is the owner of a certificate shall be entitled to such aid from courts of appropriate jurisdiction, by injunction and otherwise, in attaching such certificate or in satisfying the claim by means thereof as is allowed at law or in equity, in regard to property which cannot readily be attached or levied upon by ordinary legal process."

112. A sub-contractor's bill for lumber furnished for the building of a house was due January 1, 1949. The house was completed July 1, 1949. A mechanic's lien for the claim was filed July 15, 1949. State whether this lien could be enforced, and if so, how?

VA-17 provides that no suit to enforce any lien shall be brought after six months from the time when the whole amount covered by such lien has become payable.

113. A contractor, for full value, assigns to a creditor balance due them by city for paving work. Before the assignment is presented for payment, another creditor holding judgment against the contractor, has a writ of fieri facias issued upon the judgment and then a garnishment process sued out against the city. As between the first mentioned creditor and the one having the garnishment process issued, which would be entitled to the funds in the hands of the city?

The assignee because the lien of an execution creditor on the debts due his judgment debtor is defeated by an assignment to a bona fide purchaser for value before the execution creditor has perfected his lien by garnishment proceedings against the judgment debtor. See also answer to question 50.

114. What motions should be made before the trial court after verdict of jury where it is desired to apply for a writ of error?

None have to be made. But the various motions in arrest of judgment discussed in 3, and a motion to set the verdict aside because contrary to the evidence might be made if the facts justified it as this procedure, if successful, would be cheaper than going up on writ of error.
116. A owns real estate, but no personal property, and dies largely indebted. Give the character of the suit, parties defendant, and the several steps to be taken by the creditors to secure the payment of their debts.

Creditor's bill in equity. May be brought by any creditor. Proper parties defendant would be any creditor who refuses to join, the heirs of the deceased, those having claims to the property. The executor or administrator should not be joined unless land was charged or set aside for payment of debts. The steps are in the main those already considered in answer to questions 84 and 85.

118. Give an illustration of special appearance and state how the right to appear specially may be waived.

Plea in abatement to the jurisdiction. This would be waived at common law by asking for a continuance of the case or making any plea to the merits. This is all changed by the new Rules.

In speaking of the changes made by the Rules in the case of pleas in abatement the Judicial Council wrote with reference to Equity Rule 2:10, "A plea in abatement being a dilatory plea must be filed at the outset. Equity Rule 2:10 prescribes the time in close conformity with the present statute, with a change made necessary by the expiration of rule days. This rule also abolishes all the technical confusion about how the special appearance must be made. It also enables the defendant to have an order of the trial court overruling such a plea reviewed on appeal. (which could not have been done before the adoption of these rules) where the defendant has contested the case on the merits" And further, "Law Rule 3:6 removes the traps and pitfalls from the plea in abatement. If the plea is overruled the point can be saved on appeal even after a trial on the merits. At present (i.e. before the adoption of these rules) the rules of procedure frequently take away important rights that the venue statutes give because few lawyers have the nerve and confidence required to let final judgment go against their client and then appeal from an order striking a plea in abatement."

119. A makes B a deed to Blackacre and delivers it, B paying the price in full. B loses the deed and A refuses to execute another. What can B do, if anything? File a bill in equity to set up lost deed making A and anyone else who appears to have title the defendants. See 6 Digest 908.

120. A sues B for injuries caused by the latter's negligence, avering B's negligence sufficiently, but omitting to aver that he himself was not negligent. Is his motion for judgment demurrable? Why?

No. Contributory negligence is a matter of defense to be proved by defendant, and will not be presumed against the plaintiff since men ordinarily use due care for their own self-preservation which is the first law of nature.

122. To suit by A, B pleads a special plea of equitable set-off. A wishes to defeat the set-off by showing that it is barred by the statute of limitations. How does he raise this issue in the pleading?

This is now governed by Rule 3:11. "If a plea, motion or affirmative defense sets up new matter and contains words expressly requesting a reply, the adverse party shall within 21 days file a reply admitting or denying such new matter. If it does not contain such words, the allegations of new matter shall be taken as denied or avoided without further pleading." Take advantage of the statute of limitations by instructions to the jury. See also question 39.

The Judicial Council has stated, "Rule 3:8 gets rid of the troublesome common law and statutory differences between set-off and recoupment, and allows the defendant to assert them against the plaintiff, whether the counterclaim sounds in debt, assumpsit or trespass. Consequently it will no longer be possible for a non-resident to sue a resident without submitting to the jurisdiction as to any cause of action which the resident defendant may have against the non-resident plaintiff. Also a defendant who carelessly runs over and injures his insolvent debtor will be allowed to deduct the amount owed by the plaintiff from the damages assessed against the defendant."

123. On whom is the burden of proof in an action by a servant against a master for personal injuries alleged to arise from negligence of defendant? Since negligence is not ordinarily presumed the burden of proof is on the plaintiff. He who affirms must
125. What is the statute of limitations in the following cases: (a) A bond for the payment of money? (b) A deed of trust securing same? (c) A vendor's lien? (d) A bond given by an administrator? (e) How is a judgment lien kept alive?

(a) 10 years from date of maturity. (b) 20 years. See W# 8-11. (c) 20 years (d) Generally 10 years from accrual of the right. (e) by successive-revivals by scire facias or action.

126. What is the doctrine as to the plea in abatement for too few defendants when A brings the following actions: (a) against one only of two joint makers of a promissory note, not negotiable; (b) against one only of two joint tortfeasors? (2) If A gets judgment under (a) can he get judgment later against the other joint maker? (3) If judgment is obtained under (b) can A get judgment later against the other tortfeasor?

(1) (a) By statute no plea in abatement lies for non-joinder of parties. W# 8-96. Proper remedy is a motion to add the parties improperly omitted unless they are non-residents, or have defenses of statute of frauds, or statute of limitations. (b) Since joint tort-feasors are jointly and severally liable plaintiff, both at common law and now, can sue one only, all, or any intermediate number.

(2) Yes. W# 8-514, which changes the common law, reads, "Upon all contracts hereafter made by more than one person, whether joint only or joint and several, an action or motion may be maintained and judgment rendered against all liable thereon, or any one or any intermediate number, and if, in an action on any contract heretofore or hereafter made, more than one person be sued and process be served only on a part of them, the plaintiff may dismiss or proceed to judgment as to any so served, and either discontinue as to the others, or from time to time as the process is served, proceed to judgment against them until judgment be obtained against all. Such dismissal or discontinuance of the action as to any defendant shall not operate as a bar to any subsequent action which may be brought against him for the same cause."

(3) Yes. W# 8-366, which changes the common law, reads, "A judgment against one of several joint wrongdoers shall not bar the prosecution of an action against any or all of the others, but the injured party may bring separate actions against the wrongdoers and proceed to judgment in each, or, if sued jointly, he may proceed to judgment against them successively until judgment has been rendered against, or the cause has been otherwise disposed of as to, all of the defendants, and no bar shall arise as to any of them by reason of a judgment against another, or others, until the judgment has been satisfied. If there be separate judgments against different defendants for a joint wrong, the plaintiff shall elect which of them he will prosecute, but the payment or satisfaction of any one of such judgments shall be a discharge of all, except as to the costs."

127. (1) When is a bill multifarious? (2) What is meant by subrogation? Give an instance.

(1) A bill is multifarious (a) when it unites several distinct and incongruous matters between the same parties, or (b) when it unites several matters, in all of which the plaintiffs on the one side, or all the defendants on the other, do not have a joint and common interest. Example of (a): X, an executor, brings a bill against Y in the name of the estate, for specific performance and joins with this a matter on his own account. Example of (b): A bill stating two alternative claims, some of the plaintiffs being interested in one claim and some in the other, but not all in both.

Note: Creditor's bills are not multifarious merely because all of the creditors have different interests.

(2) Where one party pays money (not as a mere volunteer) which another party in equity and good conscience should have paid, the party so paying is entitled to step into the shoes of the party paid as against the party who should have paid provided (a) he thereby gains some advantage he would not otherwise have (b) the party paid will not be injured or possibly injured.

Example: Where general rule applicable. A, a surety, pays a bond running in favor of the U.S. Government which B should have paid. By law the U.S. Government has a preference in the distribution of B's assets. A, by subrogation, is entitled to that preference.

Example (b): A is the principal debtor on a note for $1,000. B and C each go surety for $500. After the debt becomes due B pays the holder $500. He is not subrogated
to the holder's rights to sue A on the note, because the holder, in case of partial insolvency of A, might be injured by any such suit.

129. A commissioner is appointed by a decree in a chancery case to sell land, but to give the bond required by the decree. He sells the land, collects the price, and in bank to his credit as commissioner. Before the making of the deed of trust to the purchaser, the bank failed. Can the purchaser be made to pay again? If so, has he a remedy over against anyone, and if so, whom?

Since the commissioner had not given bond he had no authority to receive the money and the purchaser can be compelled to pay again. He would have a remedy over against the commissioner for breach of his implied warranty of authority.

130. If there is an error in final decree on the facts, what is the remedy?

An appeal. If interlocutory instead of final, a motion to rehash.

131. (a) What is a demurrer to the pleadings? (b) Who can demurr to the evidence? (c) Is it necessary that a demurrer to pleadings, or to the evidence, be in writing?

(a) A demurrer to the pleadings admits for the sake of argument only that all the facts properly pleaded are true, and raises an issue of law as to their sufficiency. (b) Either party, but it is generally the defendant. (c) Wv 8-140 requires a demurrer to the evidence to be in writing. By Wv 8-99 all demurrers to the pleadings except in criminal cases must be in writing.

132. At a judicial sale bonds with sureties are taken by the commissioner of the court for the deferred payments on land. What remedy or remedies against the priner and against the sureties?

Motion for judgment under Wv 8-717 and Rule 3:3. Besides, Wv 8-664 provides for simple and easy method. Defendant purchaser or surety is given at least 15 days notice by rule from court or clerk to show cause why judgment should not be entered against him for whatever amount the court shall find to be due.

133. What are the rights of a purchaser of land at a judicial sale, when title proves defective, and his relation to doctrine of caveat emptor: (a) Before confirmation? (b) After confirmation?

In general, the doctrine of caveat emptor applies. The purchaser knows he is only buying the debtor's interest, and should make inquiry. But in case of non-negligent mistake or fraud, and before a confirmation a court of equity will relieve the purchaser. After confirmation the rule of caveat emptor is even more strictly applied. See 36 C.J. 76.

134. What are the usual actions for the recovery of possession of land; when does each lie; and where and in what court or tribunal may each be brought? State the plea in each. (a) Ejectment. Plaintiff must recover on the strength of his own title and not or weakness of one in possession unless an estoppel exists or while in peaceful possession he has been ousted therefrom. A plaintiff with a legal title can recover possession from one with an equitable title only, unless (I) vendor is in possession under a written contract, not in default, has fulfilled all conditions precedent to his right to a deed, or (II) the party in possession is the mortgagor, or grantor of a deed of trust, the condition of which have been fully performed.

To maintain ejectment the plaintiff must be out of possession and defendant either in or out. This is an action at law. (b) Unlawful detainer. This is a statutory real action and lies against a tenant who detains possession of land after his right has expired, without the consent of him who is entitled to the possession. Wv 55-225. "If any tenant or lessee of premises anywhere used for residential purposes, and not for farming or agriculture, being in default in the payment of rent shall so continue for five days after notice, in writing—such tenant shall thereby forfeit his right to the possession."

(c) If a party who is in possession is ousted in any than the legal manner he may regain possession even as against the landlord himself (even if holding over and not paying rent) in an action of Forcible Entry. In ejectment title is in issue.

In Forcible Entry only right to possession. The statute of limitations is 3 years.
135. (a) Describe the ordinary proceedings in a suit to partition land from its institution to a final decree; and (b) state by whom, where, and under what circumstances a suit to sell an infant's land may be brought.

(a) Partition is accomplished by a bill in equity. If practical, it is made in kind. If not, the property is sold, and the proceeds divided. It is instituted and natural as any other suit in equity. A consent does not have to be joined, and the inchoate right of dower or curtesy is lost where property is sold and proceeds divided.

(b)(1) By the infant's guardian, or, if held in trust by the trustee, or by any interested party. See §§ 8-674 and 8-675.

(2) In the Circuit Court of the county in which the land is situated on the equity side thereof.

(3) Where it will be for the welfare of the infant.

Note 1. (a) A special guardian ad litem must be appointed.

(b) If infant is over 14 he should answer in person, but suit is not defeated by absolute refusal to so answer.

(c) The bill must set forth the property the infant has and the reasons the sale will be for his benefit.

(d) Those who would be the infant's heirs were he dead must be joined as defendants.

(e) The bill must be sworn to.

(f) Decree of reference is made, etc., as in any other equity suit.

137. (a) What are pleadings and their object? (b) What is process? Give an illustration of process, original, mesne and final.

(a) Pleadings are the orderly and logical statements of the parties to a suit of their claims and defenses. Their objects are (1) to give reasonable notice to the adverse parties of the nature of the claim or defense; (2) to produce an issue or issue (3) to preserve a record. (b) Process is a writ or order issued from a court of competent jurisdiction ordering something to be done. It is original, mesne or final. A subpoena in chancery is an example of original process, a subpoena duces tecum of mesne process, and a fieri facias (fi. fa.) of the final process.

138. When may a bill in equity be taken for confessed and a decree rendered without proof against the defendant?

Rule 2:8 reads, "If a defendant fails to file a pleading within 21 days after service on him of the subpoena, the cause is set for hearing and docketed as to such defendant upon the bill taken for confessed as to him. In suit for annulling a marriage or for divorce, however, the bill is not taken for confessed."

Note however that Rule 2:23 reads in part, "The time allowed for filing answers on other pleadings may be extended (except pleas in abatement) by the court for good cause shown, and such extension may be granted though the time fixed has already expired."

141. How many pleas to a notice of motion for judgment can be pleaded at common law, and how many under our statute?

Only one plea of law or fact could be made to the same count at common law, the object of this rule being to obtain singleness of issue. Under §§ 6-134 any number of pleas of law or fact may be pleaded at any stage of the pleadings.

142. An execution goes into the hands of the sheriff to be levied on the property of D. At the same time an attachment is levied on a chose in action payable to D. Subsequently D assigns the chose in action for value and without notice of either the execution or the attachment. Which of the three, the execution creditor, the attaching creditor, or the assignee, has priority?

As regards the execution creditor the lien created on intangible property gives way in favor of a bona fide purchaser unless a lis pendens has been filed. See §§ 6-142. If the intangible property is a share of stock §§ 13-178 applies, "No attachment.... upon shares of stock....shall be valid unless such certificate be actually seized by the officer making the attachment or levy, or be surrendered to the corporation which issued it, or its transfer by the holder be enjoined." The doctrine of lis pendens has no application to negotiable paper.

143. (a) Within what time and how may a judgment by default be corrected? (b) What defenses may be made to a forthcoming bond given upon a distress warrant for rent? What when it is given on a fieri facias?
(a) At any time within three years by action in the court that rendered the judgment for errors apparent on the face of the record. There will be no rehearing on the merits. Burke #416 (4th Ed.). (b) Not due in whole or in part, or bond otherwise illegal. \# 8-458. Also any defense available on any bond as forgery, conditions performed, set-off, etc. (c) Forgery, satisfaction of original judgment and costs since accrued, property levied upon was exempt, tender of property as stipulated in the bond, fraud in the procurement of bond, etc.

145. How are attachment statutes interpreted?

Attachment statutes are construed strictly because they are in derogation of the common law, and provide for an execution by anticipation, i.e. satisfaction at the beginning of the suit rather than after the right has been decided.

146. In what manner may a judicial lien be obtained upon the lands, and also upon the chattels of a debtor; from what time would such lien be effective (a) between creditors and debtor; (b) as to other creditors who might be proceeding in like manner; and (c) as to purchasers?

A judgment creates ipso facto a lien on lands. An execution creates a lien upon the chattels of a debtor as of the time of its delivery to the proper officer. (a) From the moment it arises. (b) As regards land \# 8-390 reads, "No judgment shall be a lien on real estate as against a purchaser thereof for valuable consideration without notice until and except from the time that it is duly docketed in the proper clerk's office of the county or city wherein such real estate may be. \# 8-378 reads: "Every judgment shall, as soon as it is docketed, be indexed by the clerk in the name of each defendant—and shall not be regarded as docketed as to any defendant in whose name it is not so indexed." As between creditors docketing is not necessary. The first creditor to get judgment as far as land is concerned has priority over later ones unless at the same term of court and other creditors could have gotten judgment if their case had been heard first. Other creditors may in proper cases institute bankruptcy proceedings against the judgment debtor in which case all preferences obtained by legal proceedings within four months of the filing of the petition in bankruptcy are void.

149. (a) What is period of limitations upon enforcement of accounts between merchant. (b) What disabilities stop the running of the statute and for how long?

(a) \# 8-13 provides that an action by one partner against his co-partner for the settlement of the partnership account, or upon accounts concerning the trade of merchants between merchant and merchant may be brought within five years from the cessation of the dealings in which they are interested together, but not after.

(b) Infancy and insanity existing at the time the statute would otherwise have commenced running. Note that intervening infancy or insanity does not stop the statute from running. A party is given the same length of time after termination of infancy or insanity as he had at first except that in no case shall the total time be more than 20 years.

151. A is sued in Roanoke county by the Armour Fertilizer Works, upon a judgment rendered against him in the State of North Carolina. Upon the trial A pleads, offers to prove and is allowed to prove, over the objection of the plaintiff, that the judgment against him in North Carolina was rendered without due notice and without service of process upon him. Was the ruling of the trial court correct? Why?

Yes. Such a judgment would not be valid in N.C. and if not valid there it is not valid anywhere. Due process of law requires proper notice and proper service of process.

154. D and his wife have been divorced, and D was given the custody of his infant son B, a boy ten years old. D's wife lives in Roanoke, while D lives in Bedford county, Virginia. During D's absence from home, his wife kidnaps B and carries him to her home in "onoke, where he is held and not allowed to communicate with his father. D consults you. What course would you advise him to pursue to regain the custody of his child, and to what courts could you apply for relief?

Habeas corpus is the proper remedy. The Supreme Court of Appeals has original jurisdiction of cases of habeas corpus, mandamus, and prohibition. But this jurisdiction, while original, is not exclusive. \# 8-595 reads, "The writ of habeas corpus as a subjiciendum shall be granted by any circuit court or corporation court to any person who shall apply for the same by petition, showing by affidavits or other evidence probable cause to believe that he is detained without lawful authority." \# 8-598 "The
155. The First National Bank of Martinsville, Va., sues out an attachment against M upon an affidavit made and signed by W as vice-president of the bank, without more. Is the affidavit in the case sufficient to sustain the attachment?

V. § 34-524 requires all petitions in attachment to be verified by affidavit. V. § 49-7 provides that an affidavit by or for a corporation may be made by its president, vice-president, general manager, cashier, treasurer or director without any special authorization therefor. Hence, the affidavit is sufficient.

156. M owns a mill on Goose Creek, in Loudon county, and desiring to increase his water power raises his dam eight feet. This action on the part of M causes the back water to flood the land of L, the proprietor above and also renders L's home unfit for habitation by reason of the stagnant water and mosquitoes bred therein. Will a court of equity interfere in a case of this kind and if so, what remedy will it apply? This act of M creates a private nuisance. L is entitled to a mandatory injunction as he has no adequate remedy at law and the injury is regarded as irreparable since all land (and especially a man's home) is regarded in equity as unique.

158. John Jones recovers against William Smith a judgment for the sum of $200 on an open account. At the time of the recovery of the judgment Smith was a single man with no family, owning a farm in Bedford County, worth $2,000. After the recovery and docketing of the judgment Smith marries and immediately files a homestead deed, setting aside the farm as his homestead. Is the claim of homestead good against Jones' judgment?

The present rule in Virginia (after conflicting decisions) is that the homestead may be claimed by a householder against a judgment obtained against him before he became a householder, V. § 34-17: "The real or personal estate, which a householder, his widow, or minor children are entitled to hold as exempt may be set aside at any time before the same is subjected by sale or otherwise under judgment, decree, order, execution, or other legal process."

160. A city council passes an ordinance requiring a railway company to station a flagman at a street crossing. The railway company refuses to comply with the ordinance. What would be the legal proceeding to compel compliance?

Since this is a duty of a public nature and ministerial in its nature mandamus is the proper remedy.

161. A decree of court orders one of the parties to the cause to execute a deed. He refuses. How, if at all, can he be compelled to obey?

If he refuses he is guilty of contempt of court. See V. § 18-255 (Fifth).

162. The limitation for contracts not specially provided for is three years. The limitation for personal injuries is one year. A purchaser a railroad ticket, and while traveling on it is injured by the railroad's negligence. Two years thereafter he sues in assumpsit on the breach of contract to carry safely. Which limitation applies and why?

Burks §234 (4th Ed.)—"If the injury sought to be redressed is merely personal, whether resulting from breach of contract or tort, the action dies with the person and the tort limitation applies." Where there would be no duty to use due care but for a contract then the contract limitation would apply.

163. A brings an action for an assault against B. It turns out that C and D participated in the assault. Can he sue B without joining the others?

Yes. Tort liability is joint and several. Hence one or all could have sued at common law. Note: At common law judgment against one tort-feasor merged the claim and hence resulted in the discharge of the other joint tort-feasors, but by V. § 388 the judgment must be satisfied in order to have this result.

164. A bill in chancery charges that defendant holds $1,000 in trust for complainant, that the trust is ended and said amount now due, and prays that he be compelled to pay.
it over. Is the bill demurrable, and if so, why?
The bill is not demurrable. Equity always had jurisdiction over the settlement of
trusts. The fact that a court of law would now allow an adequate remedy is immaterial
as equity does not give up its jurisdiction because law courts later see the light
also grant relief unless a statute so requires.

165. An answer in chancery is insufficient in law. How do you make the point of it
insufficiency?
Do not except as exceptions to answers for insufficiency are abolished. V# 6-122.
Do not demur, as a demurrer in equity lies only to offensive pleadings. Move to set
down the case for hearing on the bill and answer. The effect of this is to admit the
truth of all matters of fact sufficiently pleaded in the answer, and to submit to the
court the decision of the question whether on the facts as they appear from the answer
the decree should not go in favor of the defendant. The result is decisive for one
or the other of the parties.
A still safer procedure would be to move to strike out the answer. V#6-122. reads
in part: "The test of sufficiency of answer shall be made by motion to strike out;
if found insufficient, but amendable, the court may allow amendment on terms. If a
second answer is adjudged insufficient, the defendant may be examined upon interroga-
tories and committed until he answers them, or on motion of the plaintiff the court
may strike out the answer and take the bill for confession." See Lile #228 through 231
Equity Pleading and Practice (Moode's Ed.)

166. When will an award in arbitration proceedings be a good defense to a subsequent
suit touching the same matter between the same parties?
An award properly made bars action on the original cause. Unless an award is ex-
pressly made a condition precedent he may bring an action on the original claim even
if he has promised to submit, the other party's only remedy being to bring an inde-
pendent action for breach of contract. Equity will not grant specific performance of
an agreement to arbitrate. However, after an award, or if the submission is under
rule of court there can be no revocation. Burks #18, #20 (4th Ed.)

166. B deposits with the First National Bank for safe keeping $5,000 of Virginia
State Bonds, payable to bearer. After B's death, C presents to the bank an order for
the delivery of the bonds to him duly signed by B. This order B's executor instruc-
ted the bank not to honor on the alleged ground that it was obtained by fraud. C then
sues the bank for possession of the bonds. How should the bank proceed in order to
protect itself?
V#8-226 (which applies only after an action is instituted) provides that upon
affidavit of a defendant in any action that he claims no interest in the subject mat-
ter of the action, but that some third party has a claim thereto, and that he does not
conclude with such third party, but is ready to pay or dispose of the subject matter
of the action as the court may direct, the court may make an order requiring such
third party to appear and state the nature of his claim, and maintain or relinquish
it. This is called statutory interpleader.

169. Motion for judgment for $1,000 is instituted in the Corporation Court of Char-
lottesvile, Va., against the C & O RR Co. The process is served on the president of
the company on May 25th at his residence in the city of Richmond just as he is leave
the city. He forgets about it, fails to notify the attorney for the company of the
institute of the suit, and judgment goes against the company by default. Is the
judgment valid, and reason?
V# 8-59 provides that if the case be against a domestic corporation process may be
served on its president, vice president, cashier, treasurer, secretary, general mana-
or, general superintendent, or any one of its directors, or any agent of such corpo-
rations, if any such officer or agent be found in the city or county in which the act
is commenced, and whether so found or not, it may be sent to the county or city in
which is located the principal office of such company and be there served on any offi-
cer or agent of such company found in such county or city. Assuming that C & O is
a domestic corporation with its principal office in Richmond the service would be good
and the judgment valid.

170. A is the payee of a $500 bond with condition attached executed by P. A files
motion for judgment on the bond without alleging performance of the condition. P can not demurr, but pleads set-off, issue is joined on said plea, and on that issue the court finds for plaintiff. What can P do, if anything, to avoid the effect of the verdict?

P should make a motion in arrest of judgment as the error is one that is apparent on the face of the record and is one of substance not cured by the statute of jocain. The court would then allow A to amend setting aside all pleadings back to and including the faulty one and allow the parties to plead over.

171. William Jones brings an action for $5,000 damages against the N.A.W. R.R. Co., for personal injury. After the trial has begun you, as Jones' attorney, are informed that the witness on whom you chiefly rely to establish your claim is too ill to attend the trial. What can you do to avoid losing your case?

Ask for a continuance. Under these circumstances it would probably be an abuse of discretion for the court to refuse it. Or I could take a voluntary non-suit.

172. P recovers judgment against S for $500. Execution issues thereon and the sheriff, without taking an indemnifying bond, levies the execution upon a horse in the possession of S, but really the property of B. What redress has B, and against whom B may bring the statutory equivalent of an action of trover against the sheriff, or he may levy a possessory action to recover the property from the execution purchaser. By §§ 8-229 the sheriff (if he has reason to suppose that there is some question as to the title of execution debtor) may refuse to make a levy unless the execution credit will enter into an indemnifying bond.

173. Where no suit is yet pending (although one may be anticipated) and there is danger of losing the testimony of a material witness from death or absence, how may his testimony be preserved for subsequent use?

§§ 8-317: "A person desirous of perpetuating the testimony of witnesses as to a matter in respect to which there is no suit, may file with a commissioner in chancery of a court wherein, if there were a bill to perpetuate testimony, such bill might be filed, a petition addressed to such commissioner stating such matter, and what person may be affected by the testimony."

174. What is the difference between the methods employed by a court of law and of equity, in taking of evidence and the determination of the issues made by the pleading respectively?

In general evidence in equity cases is taken out of court by depositions, and the issues are decided by the court, or by a commissioner in chancery subject to the court of the court, while at law the evidence is generally given in open court and the parties have a right to a jury tria; on the issues.

175. What is the effect of a failure to swear to a plea in abatement?

By Rule 3:14 objection that a plea required to be sworn to by statute has not been sworn to must be made within 7 days after the pleading is filed by a motion to strike otherwise the objection is waived.

177. State briefly the present mode of procedure to obtain a writ of mandamus?

Burks §199 (4th Ed.): "Application shall be on petition verified by oath, after the party against whom the writ is prayed has been served with a copy of the petition and notice of the intended application a reasonable time before such application is made. The petition is to state plainly and concisely the ground for the application, and conclude with a prayer for the writ. If no defense is made and the petition states a proper for the writ, a peremptory writ is awarded with costs. If the defendant appears and makes defense, the defense is to be by demurrer, or answer on oath, or both."

178. You desire to institute an action at law against an insane person for whom no committee has been appointed. Whom would you sue and by whom would such an action be defended?

Actions against an insane person when no committee has been appointed are against him personally, but the court will appoint a guardian ad litem to look out for the interests of the insane party.

180. Jones brings an action at law against Brown in the Circuit Court of the City of
Richmond. The court did not have jurisdiction of the subject matter but nevertheless Brown appeared, demurred and filed several special pleas. The court overruled the demurrer and struck out the pleas. After losing on the demurrer and special pleas, Brown moved the court to dismiss the proceedings because of lack of jurisdiction. What should be the court's ruling on the motion?

If the court has no jurisdiction of the subject matter of a suit not even consent can give jurisdiction. Thus a trial justice court has no jurisdiction to try a felony case and consent cannot give it. Consent can waive venue but cannot give jurisdiction using this term in its technical sense. Hence the motion should be granted.

181. What are the exceptions to the householder's right to claim homestead against execution?

Homestead exemptions cannot be claimed as against torts as it is allowed only against debts. It cannot be claimed against rent, or against a claim of a laboring person or mechanic for services furnished. It cannot be claimed in property that has been conveyed in fraud of creditors and the conveyance set aside, nor can it be claimed in a shifting stock of merchandise, nor for the purchase price of property in the property so sold, or in property exchanged for such property. For complete list see Burks #445(4th Ed.)

182. Doctrine in Virginia as to breaking outer doors of dwelling houses to levy distress or execution?

This is allowed by statute after demand has been made for admittance. V#6-122.

184. "A", of Buckingham, sues "B", of Richmond, in Buckingham county, upon a contract made and to be performed, and breached, in Richmond. "B" files a plea in abatement, stating that no part of the cause of action arose in Buckingham county, and also that at the time of the service of the writ "B" was in Buckingham solely for the purpose of defending another suit brought against him by "A", all of which was true. Is the plea good?

Assuming that it is correct as to form, both contentions are sound and the plea is bad for duplicity. Since the cause of action did not arise in Buckingham county the action will not lie there, and even if it did the defendant was privileged from service of process while attending court as a party to the proceedings. See headnote 6 of 25 S.E.390. Pleas in abatement are still subject to special demurrer for defects of form, although special demurrers have otherwise been abolished.

185. How long must the parties reside in Virginia before a suit for divorce can be maintained?

At least one of the parties must have been domiciled in Virginia for one year. V#20-27.

186. John Jones, Thomas Brown and William Smith own, jointly, a tract of twenty acres of land in Chesterfield county. Not being able to agree upon a division, Jones brings suit against Smith and Brown for partition. He does not make Mrs. Smith or Mrs. Brown parties to the suit. The Court, ascertaining that the land cannot be conveniently divided in kind, orders it sold for division. Does the purchaser get a good title as against the dower rights of Mrs. Smith and Mrs. Brown?

Yes. V#8-695: "A sale of land so made by order of the court shall operate to bar the contingent right of dower of the wife in the share of her husband in the land so sold, and to bar the right of curtesy of the husband in the share of the wife in the land so sold, whether the said wife or husband be made party to the suit or not."

187. Can an administrator, as such, maintain a suit for the sale of his decedent's lands for the payment of decedent's debts?

Harrison #460: "In Virginia a personal representative may not file a bill to subject the real estate to the payment of the debts of the decedent, unless he is specially authorized by the will." The title to real estate vests in heirs or devisees and not in the personal representatives. If the land must be taken to pay the debts the proper procedure is for the creditors to file a creditors' bill in equity.

188. W, a citizen of Franklin county, Virginia, gives C, of Henry county, his note,
payable at a bank in Henry County. He fails to pay the note, and C brings action in the Circuit Court of Henry, proceeding by notice under section 8-717 of the Code. The notice was served on W in Franklin County. Is the service good?

No. While the cause of action arose in Henry County, process will not issue out of Henry County since this is not a tort, nor is the defendant a corporation, nor is it a suit on an official bond, nor is it a case of joint liability where one of the parties has been served in Franklin County.

189. John Brown, an engineer on an N&W train, engaged in interstate commerce, is killed by an accident in Roanoke county, Virginia. His administratrix sues for damages under the Federal Employer's Liability Act, bringing her action in the Circuit Court of Roanoke County. Has the court jurisdiction, and, if so, how much may she recover?

Congress has given State courts concurrent jurisdiction over cases arising under the Federal Employer's Liability Act. If plaintiff institutes a suit in the State court defendant (under this statute) cannot remove the case to the Federal court. The Circuit Court of Roanoke County has jurisdiction. See 45 U.S.C.A. § 51 et seq.

Under the Virginia death by wrongful act statute $25,000 is the maximum amount recoverable but under the Federal Employer's Liability Act there is no maximum limitation. She may recover a reasonable compensation for loss of husband's support, but if her husband's death was due to his contributory negligence that may be shown in mitigation of damages under the Federal Employer's Liability Act unless the injury was due to the railway's failure to comply with the requirements of the Safety Appliances Act, in which case the employee's negligence in assuming the work cannot be shown at all.

190. A, of Charlotte, N.C., while passing through Virginia in his automobile, negligently runs into B's car on the highway in Roanoke county and damages same to the extent of $500. B at once sues out an attachment for this damage, which is levied on A's car before the car leaves Virginia. Can B maintain this attachment?

Yes, since A is a non-resident. However if B wants an officer to take possession of the car B will have to give bond conditioned upon his winning out when the case is heard for trial.

191. A bill of exceptions in the year 1949 shows that a proper question was asked by the exceptor in the lower court and ruled out, but fails to show what answer the exceptor expected in reply to the question. Will the Court of Appeals consider the exceptions?

In 47 S.E. (Va.) 307 it is said: "Where a question is asked a witness and he is not permitted to answer, and exception thereto is taken, the bill of exceptions must show what the party asking the question expected to prove, else the appellate court cannot tell whether or not the witness had any knowledge on the subject, or the question was relevant or material. Under the Rules, there is no need for a formal bill of exceptions. Rule 51, section 3, subparagraph (e) and (f) provide that oral testimony and other incidents of the trial transcribed by a reporter, and any written statement of facts, testimony or other incidents of the case become part of the record when delivered to the clerk, if the transcript or statement is tendered to the judge within 60 days and signed by him within 70 days after final judgment. In this case the transcript or statement would be valueless unless it indicated what the witness' answer would have been had he been permitted to answer.

192. John Hardy, an employee of the Blue Ridge Mica Co., a Delaware Corporation, having its chief office in Dover, Del., but operating a mine in Henry County, Va., is injured there by the company's negligence. There is no officer or director of the company residing in Henry county. The company has a manager there who looks after the mine. You wish to sue for Hardy's injury. Can you bring suit in Henry county, and if so, how would you serve the process?

Yes. Process can be served on the registered agent of the foreign corporation, or on any director, officer or agent, or, if none can be found, on the clerk of the Corporation Commission. If such foreign Corporation does business in Virginia without a certificate of authority it is deemed to have thereby appointed the clerk of the Commission its attorney for service of process. Since the cause of action arose in Henry County, the action is maintainable there, and since the defendant is a corporation (also since this is an action for a wrong) process will issue out of Henry County under Va. R. 17.
193. What is the usual method of trying title to an office, or of removal of an officer for malfeasance?

Headnote 16 to case of 96 S.E.819 reads: "The usual common-law method of contesting title to an office is by writ of quo warranto or a writ in the nature of a writ of quo warranto, which procedure is available in Virginia."

Note: Headnote 17 reads: "While generally the title to an office cannot be tried indirectly by a writ of mandamus, the availability of such remedy is settled in Virginia as affording a simple, expeditious, adequate and complete remedy."

194. What is a writ of procedendo? A writ of procedendo is a writ commanding an inferior court to proceed to judgment. See 50 C.J.424.

195. In what court and venue(exclusive of the Supreme Court of Appeals) would you bring prohibition?

Section 42: "Jurisdiction of writs of mandamus, prohibition and certiorari(except such as may be from the Supreme Court of Appeals) shall be in the Circuit Court of the county, or in the circuit or corporation court of the city."

196. Give an instance where consent can confer jurisdiction and one where it cannot.

Where jurisdiction is used in the sense of venue consent gives jurisdiction as venue is merely the privilege of defendant to have the case tried in a certain county if he desires to have it tried there. When the word "jurisdiction" is used in its strict sense(that is the power to hear, decide and enforce its decision) jurisdiction is given by law and not by consent. Thus consent cannot give a trial justice jurisdiction over felony cases, nor State courts jurisdiction over bankruptcy cases.

197. Defendant moves to dismiss a bill-(1) For lack of proper service;(2) For lack of equitable jurisdiction over the subject matter. Assuming that the first point, if made independently, is good, and the second bad, what should be the action of the court?

A motion to dismiss for want of jurisdiction where(as here) if such a motion is granted it would be a bar to a further prosecution of the same case in any Virginia court of equity amounts to a general appearance and hence would waive any irregularity as to service of process. However, under the Rules, the defendant could file a plea in abatement within 21 days of the service of the subpoena in chancery upon him. If this plea is not sustained he no longer waives any rights by contesting the case on its merits. See Rule 2:10.

198. The return on a valid summons is defective. How should the defendant avail himself of this defense?

In 48 S.E.(Va.)899: "Where the matter relied upon to abate an action is a fact not appearing on the record, or the return of an officer, it must be pleaded in abatement so as to give the other party an opportunity to traverse and try it, but where all facts relied upon appear by the record, including the return of the officer—there the action may be dismissed on motion." Burks p.101(4th Ed.)

199. Robert Taylor files a bill in equity in which he alleges that he is the owner of Blackacre and has good legal title, that William Harris is in possession of said land claiming title thereto under an invalid deed, and praying that the court establish the plaintiff's superior title, oust Harris, and put plaintiff in possession. Is the bill demurrable and reason? The bill is demurrable as it shows on its face that plaintiff had an adequate remedy at law, i.e. the present equivalent of ejectment. But Va8-138 provides that no case shall be dismissed simply because it was brought on the wrong side of the court, but whenever it shall appear that a plaintiff has proceeded at law when he should have proceeded in equity or in equity when he should have proceeded at law, the court shall direct a transfer to the proper forum, and shall order such change in, or amendment of, the pleadings as may be necessary to conform to the proper practice.

200. C recovers a judgment against B and execution issues thereon within the year returned "no effects" and B then dies. What are the proper proceedings to revive this judgment against B's personal representative, and within what time must this proceeding be had in order to prevent the bar of the statute of limitations?
Burks p.66(4th Ed.) reads: Where the scire facias or action is against the personal representative of a decedent, it shall be brought within five years from his qualification, thus cutting down the life of a judgment against a judgment debtor who dies to five years from the qualification of his personal representative unless within that time the judgment be revived by scire facias, or action be brought thereon.

202. What are the jurisdictions of the various lower courts in Virginia?

The lowest courts are not courts of record and have only the jurisdiction given them by statute. They are as follows: In cities over 45,000 by last census police courts presided over by police justices, and civil courts presided over by civil justices. The former have jurisdiction over misdemeanors, violation of municipal ordinances and preliminary hearings in felony cases but not the trial of the felony case itself. The latter have jurisdiction over all civil matters formerly given to justices of the peace, and in addition have concurrent jurisdiction with the circuit and city courts of any claim to damages for any injury done to the person which would be recoverable in an action at law, if such claims do not exceed $300; have jurisdiction over attachments where the amount of the claim does not exceed the general jurisdiction of said justice; and have concurrent jurisdiction with the circuit courts and city courts of general jurisdiction in actions at law where the amount in controversy does not exceed $2,000 exclusive of interest, costs and attorneys fees contracted for, but if it exceeds $300 the defendant may remove the case to the proper circuit or city court. See V/16.1-7.

In towns from 10,000 to 45,000 there is a civil and police justice who combines the two jurisdictions mentioned above. In all other localities there are trial justices. The jurisdiction of these courts is in general the same as the combined jurisdiction of Police Courts and Civil Courts in cities of over 45,000 as described above. An appeal lies from all these courts where more than $50 is involved exclusive of interest, costs, and attorney's fees contracted for. V/16.1-106.

The courts of record of general jurisdiction are the circuit courts of the counties, the corporation courts of the cities, and some special courts as Hustings Courts, Court of Law and Equity. In their own special fields the Industrial Commission and the State Corporation Commission are on a par with these courts of general jurisdiction. If the amount involved is $20 or less only courts not of record have jurisdiction.

Note: Since July 1, 1956 the name of the trial justice courts has been changed to that of County Courts. The Police courts, civil courts, and civil and police courts are now also called municipal courts.
D ran into P, a pedestrian, while driving his car. The evidence was conflicting as to whether or not D was crossing at an intersection. The court instructed the jury that the pedestrian's right of way extends from one side of the street to the other. It does not begin at any point in the intersection or does it end at any particular point. It begins on one side of the street and extends until the pedestrian has negotiated the crossing. There was another instruction which stated that pedestrians had the right of way at intersections and motorists had it elsewhere. Verdict and judgment were for P for $8500.

Held: Reversed and remanded. The instruction in quotes was taken from a Virginia case out of context and is erroneous as given since it could reasonably be interpreted as always giving the pedestrian the right of way. It is not cured by a later correct instruction as there is no way to tell whether the jury relied on the wrong or right instruction. Only the jury knows that.

A warrant which charged only unlawful and reckless driving was issued against D. As a matter of fact D had been convicted during the preceding twelve months of the same offense. The County Court Judge could have amended the warrant so that it would have charged a second offense (for which there is a greater penalty) but he did not. D appealed from the County Court and demanded a jury trial. Over objection evidence was introduced of his prior conviction and instructions were given as to the penalty for a second offense occurring within twelve months of the prior offense. D was found guilty and fined, and also assessed with the costs of the jury.

He contended that he could not be tried as a second offender unless the warrant stated that he was being tried for a second offense.

Held: This contention is correct. A man charged with a less serious offense cannot be tried for a more serious offense whether the prosecution is by indictment or on a warrant.

He contended that his right to a jury trial is impaired if the costs of the jury are to be born by him in the event of a conviction.

Held: This contention is wrong. The Commonwealth is only being reimbursed its costs which his wrongful act has caused, and V#19-296 which provides that the clerk shall make up a "statement of all the expenses incident to the prosecution" and issue an execution therefor is valid even though it includes the costs of the jury.

PLEADING AND PRACTICE 106 S.E.2d 618, 200 Va.597.
P filed a bill in equity for the specific performance of an oral contract to convey realty. By agreement of counsel an issue out of chancery on two questions was submitted to a jury who found the matters in favor of P. Despite this finding the Chancellor dismissed the suit on the ground that there was not sufficient part performance referable to the oral contract that could not be adequately compensated in money. P appealed on the ground that the Chancellor's decree was contrary to the evidence, but he did not incorporate the evidence into the record on appeal.

Held: P failed to comply with Rule 5:3, #3(e) of the Rules of the Supreme Court of Appeals in that he did not incorporate into the printed record so much of the evidence as was necessary for the Supreme Court of Appeals to give full consideration of the assignment of error. Under the circumstances it is impossible to pass on the point that the decree is contrary to the evidence. Since the decision below is presumed to be right it is binding on the Supreme Court of Appeals in this case.
P L E A D I N G  A N D  P R A C T I C E  5 8 8

P who was X's personal representative, paid J $6,000 for injuries received in an automobile wreck. P is now suing D for contribution on the ground that D was a negligent joint tortfeasor. D denied that he was negligent and that even if he were that his negligence was a proximate cause of J's injuries. D moved the court for summary judgment in his favor and the court granted the motion.

Held: Error. Summary judgment should not be granted where, as here, material facts are genuinely in dispute. A motion for summary judgment is not a substitute for a demurrer, nor should the court grant such a motion when pleadings can properly be amended. Hence if P fails to allege that D's negligence was a proximate cause of J's injury the Court should not grant D's motion for summary judgment for that reason for P may wish to amend.

P L E A D I N G  A N D  P R A C T I C E  R u l e  5:1 section 3(f)

In the course of attempting to perfect an appeal appellant's counsel delivered to appellee's counsel at his residence at 7 P.M. a notice that he would that day present to the judge at his residence a narrative of the evidence. This was done 30 minutes later. Eight days later the judge signed it. The judge stipulated that appellee's counsel had an opportunity to examine it. Appellee's counsel declined to examine it on the ground that thirty minutes' notice was not the reasonable notice required by Rule 5:1, section 3(f), while appellant contended that appellee had eight days to examine it.

Held: Not sufficient notice. The rule reads "* * * Counsel tendering the transcript or statement shall give opposing counsel reasonable written notice of the time and place of tendering it and a reasonable opportunity to examine the original or a true copy of it." Since the rule plainly requires counsel to give the notice it is immaterial that the judge gave appellee's counsel a reasonable opportunity to examine the narrative of the evidence, Appeal dismissed.

P L E A D I N G  A N D  P R A C T I C E  -- Adequacy of Damages

P suffered a quite severe whiplash injury to his neck and back when D negligently ran into the rear of P's car while P was stopped for a red light. He suffered a wage loss of $872, a hospital bill of $649, a doctor bill of $318 making a total of about $1840. He suffered great pain for many weeks and while now probably cured he will be more susceptible to injury in the future. The jury awarded him $2500 which the trial judge set aside as clearly inadequate. At the next trial the jury awarded $8,000. What result on appeal?

Held: First verdict re-instated and judgment entered thereon. $2500 was not grossly inadequate. It even gave him over $600 for pain and possible future discomfort! The damages are not subject to exact measurement. There is no evidence that the verdict was the result of passion, prejudice, corruption, or mistake. It does not shock the conscience. Hence all proceedings subsequent to the erroneous setting aside of the verdict should be treated as null and void.

P L E A D I N G  A N D  P R A C T I C E  -- Constitutional Law

P obtained a judgment against D in 1932. At that time the judgment could be kept alive by the issuance of successive writs of execution(fieri facias) within the statutory period, but in 1948 the law(Va.348) was changed so that judgments, past as well as future, could only be kept alive by soiree facias or action within 20 years from the date of the judgment(5 years when against the personal representative of a decedent). P continued to attempt to keep the 1932 judgment alive after 1948 by the old procedure on the ground that the legislature could not deprive him of his vested rights so far as judgments obtained before 1948 were concerned.

Held: Against P. How judgments are enforced is a mere matter of procedure. No one has any vested rights in procedural rules as long as a reasonable time is given to protect his procedural rights. An ordinary act of the legislature does not become effective until 90 days after adjournment and the purpose of the 90 days is to give everyone a chance to learn about the change and govern himself accordingly. Hence the executions issued after the 1948 law took effect were inoperative for the purpose desired.
PLEADING AND PRACTICE--Mandamus

The State Highway Department took possession of 30 feet of P's land mistakenly thinking that it had title thereto. P brought mandamus to compel the Commonwealth to condemn the land. The Highway Commissioner defended on the merits. The latter now claims that mandamus was not the proper remedy.

Held: While this contention is correct since the extraordinary remedy of mandamus does not lie when there is an ordinary remedy (such as by declaratory judgment or motion for judgment in ejectment) available, this is a purely procedural matter, and when the defendant acquiesced in the mandamus proceedings and had the same opportunity there to develop his case as he would have had if a technically correct proceeding had been brought defendant has waived his rights and the error is cured.

PLEADING AND PRACTICE--Criminal Procedure Former Jeopardy

D was tried before a police magistrate on a charge of reckless driving. He was found guilty as charged. The magistrate then wrote on the back of the warrant "reduced to fail to give right of way". D appealed to the Circuit Court of the City of Hampton where he had a trial de novo. He was again convicted of reckless driving. By Va.§19-154 and 19-158 no plea is necessary in a misdemeanor case. D was granted a writ of error. He now contends that a conviction before the magistrate of a "failure to yield right of way" was an acquittal of the charge of reckless driving, and hence the Circuit Court should have dismissed the case against him as he could not be tried for an offense of which he had been acquitted.

Held: D is wrong for two reasons. First, he failed to plead the special defense of former jeopardy in the Circuit Court. While he did not have to plead, a failure to plead is not a special plea, and when he made no such plea he waived any such defense. He cannot make such a plea above when he failed to make it below. Secondly, he was not acquitted of the charge of reckless driving. Failure to yield right of way when the lives of others were endangered is a specification of the type of reckless driving for which he was convicted. "The question on appeal is not whether the judgment of the trial justice is correct; but whether the accused is guilty of the offense charged."

PLEADING AND PRACTICE

I. In the case of P v D the court directed a verdict for P. It later decided that it should not have done this, and granted D a new trial. If the court was correct in the first place, is P entitled to a writ of error?

Held: No. Writs of error lie only to final judgments. There has not been any final judgment as yet.

II. Assume that P made out a good case and D a poor one. What action must the court take before directing a verdict for P?

Held: By Code §8-218 a verdict should not be directed unless the court has first stricken the evidence introduced by the party against whom the verdict is to be directed.

PLEADING AND PRACTICE

P brought ejectment to enforce the power of termination provisions in a deed whereby he had conveyed a site for a church to the trustees of the G Church. He alleged in his motion for judgment that since 1958 said real estate had not been used as a place of worship by the members of the church, and that said real estate is now in the possession of a congregation whose beliefs are foreign to those of the G Church, both of which violated the conditions of the deed. Defendants asked for a bill of particulars with reference to the latter allegation only. The bill of particulars, when filed, failed to support P's contentions so summary judgment was entered for defendants.

Held: Error. The bill of particulars need not state a cause of action. The first allegation was still to be disposed of, and no issue has yet been joined on it. No summary judgment should be entered where any material fact is genuinely in dispute. If the bill of particulars was insufficient, the court should require a sufficient statement rather than entering judgment on the insufficient one.
Complainants, who were beneficiaries under a second deed of trust executed by the X Corporation on land owned by it in N County, bought the land for $25,000 when the first deed of trust was foreclosed. According to complainants the trustee of the first deed of trust is about to make an immediate settlement under an accounting that is improper and excessive, and that if this were done numerous suits would have to be brought to recover the improper payments from the persons so paid some of whom were probably insolvent. Complainants seek to enjoin the settlement. They brought this suit in N County though none of the defendants resided therein.

Held: (1) Equity has jurisdiction to enjoin an improper settlement of accounts when complainants have no adequate remedy at law. The fact that the legislature has provided another remedy by setting up a commissioner of accounts before whom objections may be made does not oust equity of its inherent jurisdiction since that statute does not expressly deprive courts of equity of jurisdiction. If equity once obtains jurisdiction it keeps jurisdiction notwithstanding the fact that other bodies may also be given jurisdiction unless the legislature expressly deprives courts of equity of their old jurisdiction. (2) Since the land was situated in N County, that county was a proper venue despite the fact that none of the defendants were residents of that county. The real estate in question was situated there and the trustees' accounts could only be settled in that jurisdiction.

Pleading and Practice--Final or Interlocutory?

Pursuant to contract D constructed a sewer. P, a Sanitation Authority, filed a bill in equity to require D to convey the sewer to P. The trial court adjudged that the ownership of the sewer line was in P, and directed D to execute a deed to P therefor. The decree provided that if D refused to execute the deed by a specified date, a special commissioner would be appointed to execute it. After more than four months had elapsed D appealed. P claimed that under Rule 5:4 and V#8-489 it was too late to appeal.

Held: Not too late. Rule 5:4 and V#8-489 set a time limit on appeals from a final decree and have no application to interlocutory decrees. The present decree adjudicated the principles of the case, so it is appealable, but since the case was maintained for possible further action of a discretionary nature by the court it was not a final decree.

Pleading and Practice--Rule of Court

D was sued by P, a 20 months old infant, who was struck by D's car while toddling across Ocean View Ave. unattended in fairly heavy traffic. The jury found for D and P appealed. During the trial improper instructions were given without objection and P failed to make a motion to strike D's evidence. Within 21 days after judgment was entered on the verdict P moved the court to set aside the verdict because of the erroneous instructions, and he also asked that the verdict be set aside as contrary to the evidence. He also failed to designate the instructions to be printed as part of the record which he considered erroneous, but such instructions appeared as addenda in the briefs.

Held: Under Rule 3:21 all judgments are in the breast of the court for 21 days, and since the first two matters set forth above were presented to the court within that period they were presented within time for the lower court's consideration and hence not waived. While P could have made a motion to strike the evidence, such a motion is optional, and in lieu thereof he may, if he wishes, wait and move that the verdict (if against him) be set aside as contrary to the evidence. Rule 5:1/4(6f) (which rule deals with the designation of the parts of the record to be printed on appeal) reads, "However, this court may, at the instance of counsel or of its own motion, consider other parts of the record" not printed. Since the instructions were in the briefs as addenda thereto and were erroneous it was proper to consider them even though they were not designated as parts of the record to be printed.

A owned a third undivided interest in Blackacre. She died testate, and after making some bequests, she provided that all the rest of her property should be used "as a fund to aid Salvation Army." Partition proceedings were instituted by the other owners but the Salvation Army was not made a party thereto. Blackacre was not susceptible to partition in kind. The Salvation Army petitioned the Court to be allowed to become a party defendant. The other parties to the partition suit demurred.

Held: Demurrer sustained. The Salvation Army was not a co-owner of the land nor did it have a lien thereon. Its only interest is one in a fund if there is such a fund) after debts, expenses of administration, taxes, and legacies have all been paid. It has no interest in Blackacre and hence is not a necessary party to the partition proceedings.

PLEADING AND PRACTICE Rule 5:1 #6(a) 202 Va. 260.

In the suit of P v D judgment was rendered in favor of P on June 2, 1959. Within 60 days thereof (July 31) D filed notice of appeal and assignment of errors. On the same date a narrative "statement of the facts" was presented to and signed by the trial judge which statement was filed in the office of the clerk of the trial court on August 5. On Sept. 9 D filed with the clerk a designation of the parts of the record he wished printed as per Rule 5:1, #6(a). He designated only the motion for judgment, the judgment order, the order overruling his motion to vacate or modify the judgment, his notice of appeal and assignment of errors. Twenty-five days later D asked that the record be transmitted to the clerk of the Supreme Court of Appeals. The assignment of errors relied upon was that the judgment was contrary to the law and the evidence. Note that neither the narrative statement nor any portion of the evidence was designated to be printed. After the designated portions of the record had been printed and while the case was being argued new counsel moved the Supreme Court of Appeals to permit the statement of facts to be printed and received as a portion of the record.

Held: Motion denied. Rule 5:1 #6(a) requires that a designation of the parts of the record to be printed be made not less than twenty days before the transmittal. "This is mandatory and jurisdictional. Compliance with it is necessary for the orderly, fair and expeditious administration of justice." Since there is no evidence in the record, the Supreme Court of Appeals has no way of telling whether the judgment below was contrary to the evidence so it must be affirmed as it is presumed to be right.

PLEADING AND PRACTICE Mandamus 202 Va. 335.

A, B, C and D contested an election for four county offices pursuant to the provisions of V#2H-419 et seq. A special three judge court is provided for, and no appeal lies. V#2H-434 provides that a complaint shall be filed in the clerk's office and a copy served as a notice is served under V#8-51 within ten days after the election, on the person whose election is contested. V#2H-436 provides that "In judging of such election the court shall proceed on the merits thereof and decide the same according to the constitution and laws." The copy of the complaint was served on A, B, C and D in the morning of the ninth day and the complaint was filed in the clerk's office on the afternoon of that day. The special court held that a copy of the complaint could not be served before the complaint itself was filed and dismissed the proceedings. What remedy, if any, have A, B, C and D?

Held: This is the type of case for which mandamus clearly lies. It was immaterial that the copy of the complaint was served before the complaint was filed. V#2H-436 requires a determination on the merits and not on a technicality. This is not granting the writ of mandamus to control discretion but to force the special three judge court to exercise the discretion that the members thereof alone can exercise. Since by statute, no appeal lies there is no other remedy. Writ granted.
PLEADING AND PRACTICE--Statute of Limitations 592 Va. 543.

Note: Before reading this case summary, read 195 Va. 327 as summarized on page 573A of these notes as the instant case relies on that case and follows it.

P took out sprinkler damage insurance in 1954 through D, an agent of X Insurance Co. D told P that he would be protected from any loss by water escaping from the sprinkler system. However, the policy contained an express exclusion if the water escaped as a result of a hurricane. Later in 1954 Hurricane Hazel blew off the roof of P's building and activated the sprinkler system causing great damage. P sued D for these damages on the theory that he negligently misrepresented the terms of the policy. This action was instituted more than four years after the damage.

Held: Barred by the one year statute of limitations because this action would not survive, and there is no other statute of limitations applicable. Va. 6-24 and 64-135.

Since the property injury to D was an indirect one it would not survive. Had it been a direct injury to property the five year statute would have been applicable. But here D did not cause the hurricane which was the direct cause of the sprinkler leakage.


P was entitled to certain rights under the Virginia Uninsured Motorists Law against his insurance company, D. Before this policy expired the legislature modified the Uninsured Motorists Law by requiring process to be served on the plaintiffs' insurance companies as though they were defendants whenever suit was brought against uninsured motorists. After this modification of the law became effective P was damaged by an uninsured motorist and brought suit against him. D actually knew of the case and sent one of its lawyers to the trial as an observer. P recovered judgment against the uninsured motorist, and, not being able to collect it, sued D who relied on the defense that it had not been served as if it were a defendant.

Held: Defense is valid. The provisions of the statute are mandatory. P has not been deprived of any vested rights he had under his policy as the changes made in the law are mere matters of procedure. The fact that D had actual notice of the proceedings and had an observer in court is not a waiver of service of process. To be a waiver, it would have been necessary for it to have taken part in the proceedings. Presence and observation alone are not enough.


A fire insurance policy was not worded as per the actual contract due to fault of Insurer. A loss occurred and Insured in good faith brought an action at law on the policy as it should have read. This action was commenced within the 12 months allowed by the policy. When the case came on for trial the court told Insured if he wanted to collect at law, he would have to bring his case on the policy as it was actually written, and that if he didn't want to do that, he should ask for reformation in equity. So Insured dropped the law case and proceeded in equity. When he did this, the twelve month period had expired. Insurer claimed that the suit was barred.

Held: Not barred. Where the Insurer was to blame for the defects in the policy, and there has been no decision on the merits, the equity case for reformation is, in reality, a continuation of the original case, and since that case was instituted in time, proceedings were commenced within the 12 months as required.
The judge of the Circuit Court of Franklin County gave an erroneous instruction to the jury. The jury rendered a verdict for Plaintiff in accordance with the erroneous instruction. Defendant moved the Court to set aside the verdict as being contrary to law. The Court saw its error, and rendered judgment for the defendant. Plaintiff now claims that an erroneous instruction is binding on the trial court and is the law of that case and that defendant's only remedy is an appeal. Is Plaintiff correct?

Held: No. While attorneys are not permitted to argue before a jury that the instructions are wrong, that principle has no application to the trial judge. As soon as he realizes that he has erred he should correct his mistake.

PLEADING AND PRACTICE--Evidence--Rule 1:8

P was injured when she slipped on some grapes on the floor of an A&P store. The attorney for the defendant called its manager as a witness and asked him "during the year preceding P's fall how many people fell in your store on any debris?" P's attorney then said, "Your Honor, I object, I don't see what relevancy there is to the issue. There is no doubt P fell." The court overruled the objection and the trial proceeded without any further action on P's part with reference to the admissibility of such evidence. On appeal P now claims the evidence was erroneously admitted.

Held: Unless P not only gave his grounds of objection, but also, when these grounds were overruled, said "I except" or "I wish to save the point" or something similar, he is deemed to have acquiesced in the court's ruling. In the instant case P did not object to the ruling of the court, but only to the proffer of the testimony. Hence he has failed to satisfy Rule 1:8 which requires that the ground of objection to the ruling of the court be stated with reasonable certainty.

PLEADING AND PRACTICE--Mention of Amount Sued for in Instructions. 121 S.E.2d 379

If P sues D (say for $50,000) is an instruction telling the jury that in no event shall they find damages in excess of $50,000 proper? The Supreme Court of Appeals states that there is a conflict of authority on this point, and that trial courts in this State differ among themselves.

Held: This should not be done (except where the amount of recovery is limited by statute as is presently done in death by wrongful act cases). Since the instructions come from the court the jury is apt to attach too much importance to a plaintiff's extravagant claim. Rather the jury should be told that they should restrict recovery, if any, to the amount claimed in the pleadings. Some states do not even allow this, and award a remittitur in the event the verdict exceeds the amount sued for.

PLEADING AND PRACTICE Venue

X while driving a car negligently injured P. X was hurt, too, and died from his injuries. D qualified in Montgomery county as X's personal representative. Subsequently D moved to Roanoke and P sued D in Roanoke. D filed a plea in abatement on the ground that the suit should have been instituted in the county where D qualified. The statutes read "#8-38. Venue generally.--Any action at law or suit in equity, except where it is otherwise especially provided, may be brought in any county or corporation:"

"(1) Wherein any of the defendants may reside;"

"(5) If it be a suit * * * or action against a personal representative * * * or other fiduciary, in the county or corporation wherein the will was admitted to probate, or such fiduciary qualified."

P contended that the venue statutes above was cumulative and hence he could sue either in Montgomery County or in Roanoke. D contended that (5) above "otherwise especially provided" and hence that Montgomery County was the only proper County under #8-38 although both sides admitted that under V#8-39 the action was maintainable in the county or city in which the cause of action arose.
Held: Plea in abatement sustained. "In the case of an administrator of an estate of a deceased person, the most convenient and familiar jurisdiction is, logically and legally, that in which the administrator qualifies, since it is a fortiori the place of last residence of the deceased, in whose place and stead, for the purpose of actions or suits against the estate, the administrator stands, and is at the same time the source of the administrator's authority. His official residence for purposes of venue, is in that county or city."

"We are of the opinion that it was the plain legislative intent that §8-38(1) should apply to an action or suit against the defendant solely in his individual capacity, and that in enacting Va. §8-38(5) the legislature has otherwise especially provided for the venue of an action or suit against an administrator in his official capacity."


The second paragraph of Rule 3:2 has been amended (effective Jan. 1, 1962) by adding thereto the underlined words below so that the second paragraph now reads:

"A writ returnable to rules under any statute shall be returnable in the clerk's office to any day within the time allowed by statute; and, if the time within which any writ shall be returnable is not provided by statute, then such writ shall be returnable within ninety days after its date."

PLEADING AND PRACTICE--Reopening case after resting.

P sued D for personal injuries suffered by P when he came into contact with a live uninsulated wire left on his premises when D dismantled a compressor. P proved that he was injured, but through an oversight, failed to show that D had any connection with the wire. After P had rested his case D moved to strike his evidence on the ground that P had failed to show that D was responsible for the wire. P then requested that he be allowed to re-open the case. The Court refused the request and P excepted.

Held: Exception sustained. While the re-opening of a case after the party has rested is within the sound discretion of the court, this discretion must be exercised in a reasonable manner and not arbitrarily. If the re-opening will result in undue delay or in surprise to the other side the court need not re-open. But here P's witnesses were present and D was surprised, not by the fact that P wished to re-open, but by the fact that he had overlooked presenting such evidence. It was an abuse of discretion for the court to refuse the request to reopen for a mere inadvertent error under the above circumstances.

PLEADING AND PRACTICE--Summary Judgment.

S, a fugitive from justice, wished to buy a second hand car from X, a dealer in cars. He did not tell X he was a fugitive from justice nor was he asked. X showed him a car and S said he would take it. He further stated that he did not have sufficient money on him and asked permission to drive the car to a friend's house where he would borrow the balance needed. S left the car he had been driving with X. This car had been obtained by S by a trick. S negligently injured P who obtained a judgment against him which was uncollectible. P then sued D who was X's insurance carrier. P relied on the omnibus clause in X's insurance policy. The evidence was in conflict as to whether or not S obtained the use of the car fraudulently from X. The trial court granted D's motion for summary judgment.

Held: Reversed and remanded. The evidence should be viewed as favorably as possible for the person against whom summary judgment was entered. When so viewed there was a jury question as to whether or not S secured the car fraudulently.

Note 1: S was under no duty to volunteer the information that he was a fugitive from justice. Note 2: If S did procure the use of the car by fraud, then fraud vitiated consent and S became a converter and D would not be liable.
Mandamus

The State Highway Department and D both claimed ownership of a piece of land needed for highway purposes. D filed an original petition for a writ of mandamus in the Supreme Court of Appeals to compel the State Highway Commissioner to institute condemnation proceedings for the taking of his property.

Held: Mandamus denied. Mandamus will not lie to determine the title to realty. The Supreme Court of Appeals does not have original jurisdiction to try land titles. Besides P has an ordinary remedy at law namely a declaratory judgment, and an extraordinary remedy will not lie where there is an adequate ordinary one.

PLEADING AND PRACTICE--Alternative Pleading

D agreed to be responsible for the delivery of deeds to land made by P, a real estate development company, to the purchasers of land, and to account for the proceeds whether they were paid to him or to the X Corporation which was P's sales agent. The deeds in question were sent to D, c/o the X Corporation. The money received therefor was not paid to P who does not know whether this dereliction was the X Corporation's or D's. P alleged that the money was received either by the X Corporation or by D. The latter demurred on the ground that the facts should be stated directly and positively and not in the alternative.

Held: Demurrer overruled. While the general rules as claimed by D there is an exception to that rule when the plaintiff does not know whether the one alternative or the other is the true situation and the defendant would be liable in either event. The above case clearly falls within this exception.

PLEADING AND PRACTICE--Variance

P sought a declaratory judgment to the effect that D owed him one half of the amount of certain notes. D counterclaimed alleging that P who was a joint payee of the notes had obtained the status of joint payee by fraud. D prayed that the Court cancel P's name as a joint payee. Disputed questions were submitted to a jury and leave was given to the trial judge to enter whatever judgment he should think proper. The evidence offered by D did not show fraud, but it did show damages to D as a result of P's breach of contract to allow D a certain drawing account while D was employed by P. No objection to this evidence was offered. The trial judge entered judgment for D.

Held: For D. Failure to object to D's evidence was a waiver of the variance. If timely objection had been made D could have amended. P cannot deprive D of the right to amend by remaining silent thereby defeating the ends of justice.

PLEADING AND PRACTICE

(1) When P appealed on the ground that the judgment below was contrary to the law and the evidence, he designated only those parts of the record for printing that were favorable to him. He omitted all cross examination of his witnesses. Rule 5:1, sub-section 6 states that as much evidence shall be designated as is "necessary and material to allow the court to determine the issue involved." Should P's appeal be dismissed?

Held: No. If D was not satisfied with P's designation the Rule permits D to designate any omitted evidence he thought material and if he had this opportunity and failed to take advantage of it, he cannot be heard to complain that P's designation was insufficient.

(2) In the above case A and B were counsel for P, and C was counsel for D. The Rules provide that if all counsel request it, the record may be transmitted in less than 20 days to the clerk of the Supreme Court of Appeals. A and C requested it, but B did not. The record and the designations of the parties were sent up ahead of time. Shouls the appeal be dismissed for this reason?

Held: No. "All counsel" does not mean every lawyer involved, but counsel on each side. A signed on one side for all counsel on that side, and C signed for the other side.
PLEADING AND PRACTICE—Reference to Amount Sued For

In 202 Va. at p. 932 it was held that instructions given by the court should not mention the amount sued for, because, "Coming from the court itself it is likely to give the jury the impression that the amount sued for is significant." In the instant case plaintiff's counsel made several references to the amount sued for. Is this ground for reversal?

Held: No. It is illogical and absurd to inform the jury that plaintiff cannot recover for more than he is asking, and yet not let the jury know for how much he is asking. Coming from the attorney, it has far less weight than if it came from the court. Defendant is entitled to an instruction that the amount being sued for has no bearing on the amount, if any, that should be awarded to plaintiff.

PLEADING AND PRACTICE—Petition for Perpetuation of Testimony

Va.8-317 provides a simple way in which to perpetuate the testimony of witnesses. Under the provisions the person desiring to perpetuate the testimony files a petition with a commissioner in chancery of a court wherein, if there were a formal bill in equity to perpetuate the testimony, such bill might be filed. The testimony is taken and placed with the clerk of the court by which the commissioner was appointed. The court, on motion of any party in interest, shall, if it appears that proper and sufficient grounds therefor exist, enter a decree or order directing that the testimony so taken be perpetuated and preserved.

P, who was in a position to bring suit at once, filed such a petition with the proper commissioner in chancery. D, who would have been responsible for the payment of any judgment obtained against its insured sought to enjoin P from any further proceedings with reference to the petition, and the injunction was granted. P appealed.

Held: Affirmed. The injunction was properly issued. The statutory proceeding outlined above can only be taken if there are grounds for a bill to perpetuate testimony. One of these grounds is inability of the party wishing to perpetuate testimony to procure an action at once in which such matters may be inquired into. Va.8-317 is not meant to be used for purposes of discovery or to aid the petitioner in the preparation of his case, but only as a substitute for the common law formal bill in equity to perpetuate testimony when and if such a bill would lie.

PLEADING AND PRACTICE—Appellate Procedure

In this case it was held that Va.6-469 and Rule 5:4 are jurisdictional, and that under them the record in an appeal must be filed with the Clerk or Justice of the Supreme Court of Appeals within four months from the date of final judgment, that it was not enough that the petition for appeal was filed within that time, and that the fault for not producing the record was that of the clerk of the trial court. The clerk cannot change the law by neglecting his duties. Motion to dismiss the writ of error sustained.

PLEADING AND PRACTICE—Discovery—Federal Procedure

P insured his truck against loss by fire with D. There was such a loss at a place beyond a 50 mile radius from where the truck was principally garaged. There was a bona fide dispute as to the amount of the loss and as to whether or not a rider limiting insurer's coverage to use within fifty miles was in effect at the time of the loss. In its answer and grounds of defense D denied any liability, and especially denied liability for the sum claimed which included loss of the contents of the burned truck. After the pre-trial conference P, pursuant to Va.8-111.1, requested D to admit by not later than May 29, 1961 (1) that the 50 miles rider limitation had never been sent to P and, (2) that there was no dispute about the $7,000 damages claimed by P. This request was ignored, so the trial court entered summary judgment for P. Va.8-111.1 provides that each of the matters of which an admission is requested shall be deemed admitted unless the party to whom the request is directed serves upon the party requesting the admission either a sworn statement denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully admit or deny those matters or that the matters requested are privileged or irrelevant. This section of the Code was copied verbatim from Section 36 of the Federal Rules of Civil Procedure. Was P entitled to summary judgment?
Matter was referred to a commissioner who reported that the marriage was void and August 1, missions. The matter was referred to a commissioner who reported that the marriage was void and never married since the marriage violated our fundamental public policy against miscegenation as set out in V/20-21. After the time for an appeal had gone by, W sued H for a divorce on the ground of desertion. H did not plead "res adjudicata". The matter was referred to a commissioner who reported that the marriage was void and had already been so declared in the prior suit. W filed exceptions to the report on the theory that the marriage was valid because of the full faith and credit clause of the United States Constitution and she vouched the record in the former suit in support of her contentions.

Held: (1) Whether or not the marriage is valid in Virginia has already been litigated. It is the same issue and the same parties. It is immaterial that there are additional issues. (2) Res adjudicata need not be affirmatively pleaded where that fact is shown, as here, on the face of the pleadings of the party against whom that principle is to be applied.

PLEADING AND PRACTICE--Statute of Limitations 203 Va.880

P bought a deep freeze refrigerator from D for $450 and paid for it by check on August 1, 1951. A week later he inadvertently sent D a second check for the same amount. This check was drawn on the same bank. A few months later both checks were returned to P by the bank along with some $10 other cancelled checks. P then looked over to see if there were any forgeries but did not notice that two of these checks were for the deep freeze refrigerator. Nine years later P discovered what had happened and demanded that D pay him $450. D relied on the statute of limitations. Is this a good defense?

Held: Yes. V/20-11 provides that "The right to recover money paid under fraud or mistake shall be deemed to accrue both at law and in equity, at the time such fraud or mistake is discovered, or by the exercise of due diligence ought to have been discovered. The burden was on P to prove that he acted with due diligence within the period of the statute--three years on a contract express or implied and not in writing. Here the facts clearly show that he did not use due diligence. He should have, as a matter of law, caught the mistake when he examined his returned cancelled checks. He failed to offer any plausible explanation for not having done so. Hence the statute has long since run.

PLEADING AND PRACTICE--Rule 5:1, Section 10 203 Va.946

In the suit of P v. D the trial court found for P. Fifty eight days later D submitted a "Statement of Testimony" in narrative form to the judge for his signature after duly notifying P who objected to it on the ground that it was not accurate or complete. P did not submit his version of the testimony. The trial judge refused to sign the statement. As a result the Supreme Court of Appeals found it impossible to pass on the merits of the case.

Held: Reversed and remanded. Under Rule 5:1, section 10 P should have submitted his version in writing, and then the judge should have resolved any differences thr' consultation with counsel. If the judge cannot do this because of lapse of time or forgetfulness, he should grant a new trial, so that he can certify to the testimony. Otherwise the losing party would forfeit his right thr' no fault on his part to have the case decided on its merits by the Supreme Court of Appeals on perfection of a proper appeal.
PLEADING AND PRACTICE Unauthorized View by Juror

J's car, driven by D, struck P, a ten year old girl, while she was riding a bicycle in an intersection. There was a conflict in the evidence as to whether O, before entering the intersection, was riding in the street, or on the sidewalk. J, one of the jurors, made a solo 6:30 a.m. visit to the scene of the accident, and a sketch showing a certain tree that had been referred to in the evidence. This sketch also showed cars parked on the street that interfered with visibility. He also experimented to see in what distance he could stop his car under circumstances that had been described in the evidence. He showed this sketch to the other jurymen and told them of his findings. When the trial judge found this out he summoned all the jurors and asked them if J's actions had influenced their verdict for the defendant. Despite the fact that their replies showed that they might have been so influenced, the judge refused to grant a new trial.

Held: While an unauthorized view by a juror is improper, it is not ground for a new trial unless the verdict was affected thereby, and while the determination of this question lies within the sound discretion of the trial court, there was an abuse of such discretion in the instant case since the evidence clearly showed that at least J, and probably the rest of the jurors, had been influenced by J's actions. All evidence should be given in open court so that there can be cross examination and an opportunity to make it part of the record. Reversed and remanded.

PLEADING AND PRACTICE Ruling on Demurrer as a Final Order

P's land all lay to the north of D's railway. By W#56-16 if D's railway passed through P's land D was under a duty to construct a certain private roadway across the tracks, but there is no such duty if it merely adjoins P's land. P, in his petition, which was otherwise valid, alleged that D's railway passed through P's land. D demurred to the petition. The demurrer was properly overruled. After more than 21 days had passed since the entry of the order overruling the demurrer, D filed exceptions to a commissioners' report on the ground that the evidence clearly showed that its railroad did not pass through P's land and hence his petition should be dismissed on the merits. The trial judge held that the order overruling the demurrer had become final and refused to dismiss the petition.

Held: Error. "An order merely sustaining or overruling a demurrer---is not final." In order to be final within the meaning of W#8-462 it must go further and dismiss the case. The exceptions to the commissioners' report should have been sustained. It is not enough to allege a good case. The allegations must also be proved. Reversed and dismissed.

PLEADING AND PRACTICE--Evidence

1. If a responsive pleading in equity is designated "Answer and Cross Claim" defendant cannot treat it as a plea, and, insist on a jury trial on the theory that it is a plea.

2. Since a plea in equity raises a single issue of fact which operates as a bar to complainant's bill, a cross claim which asserts a counterclaim cannot be a plea.

3. If a cross claim relies on breach of an oral warranty made in connection with the sale of a truck, and the oral warranty was superseded by a written warranty, there can be no recovery on the superseded oral warranty, nor on an implied warranty of fitness since the cross claimant did not rely on the latter, and the parole evidence rule prevents the showing of the former (unless a suit in equity for reformation).

PLEADING--Jurisdictional Amount--Vennie Unemployment Comp. Cases.

P, whose last job was in Washington, D.C., but who lived in Virginia, was laid off. He sought unemployment compensation in the amount of $215. A deputy of the Commission disallowed his claim. An appeal to an appeals examiner was unsuccessful. An appeal to the full Commission resulted in a denial on the ground that P had not been available for work during the period for which he claimed compensation. P then appealed to the Corporation Court of the City of Alexandria which found that he had been available for work and reversed the Commission. The Commission appealed to the Supreme Court of Appeals. P urged that $300 was not involved and hence that Court
had no jurisdiction. The Commission claimed that the Corporation Court had had no
jurisdiction since the statute provides that the action must be brought in the county
or city in which the claimant last worked.

Held: (1) As to jurisdictional amount, it was held as per P's contention in 177 Va.
at p.258 because since that time Va.'s statute was amended to read, "*** the Supreme Court of
Appeals shall have jurisdiction to review such decisions regardless of the amount
involved." (2) As to venue the statute means "where P was last employed IN VIRGINIA" where his Virginia work record is available. In the instant case that was not in Alexandria but since the Commission failed to file a plea in abatement the right to
have the matter passed on by a proper court has been waived. (3) It was also held
that whether P was last available for work was a question of fact on which question
the decision of the Commission was final if based on evidence. The Supreme Court of
Appeals concluded that the evidence was such that reasonable men could have differed
and hence the decision of the Commission was final on that point.

PLEADING AND PRACTICE

P sued D who was visiting in Florida from September 5 to November 5. Service was
had on October 20th by tacking same to D's front door (since no one could be found
at D's usual place of abode) pursuant to Va.'s venue statute.

Held: This was proper service since D had not changed his residence but was only
temporarily away.

When the above case came to trial P introduced his evidence. D then moved to
strike P's evidence on the ground that it failed to show any negligence on D's part.
The motion was overruled. D then introduced evidence of his own. On appeal D now
claims that the trial court erred in overruling his motion to strike P's evidence.

Held: This contention is invalid. When D introduced evidence of his own, he
waived his right to have the case considered only on P's evidence. It must now be
considered on the whole record and not on P's evidence alone.

PLEADING AND PRACTICE May Jury Take Pleadings to Jury Room?

P sued D for negligently causing her injuries. They were members of a car pool.
Each member of the pool used her car for a week to go to work some 27 miles away.
The motion for judgment contained allegations of extremely serious injuries most of
which were not proved. At the conclusion of the presentation of the evidence the
Court gave instructions to the jury, and told them to write their verdict upon the
motion for judgment. D's attorney objected to the Jury's taking the motion for
judgment to the jury room and asked why the verdict couldn't be written on a piece
of paper. The Court replied, "They are entitled to read the pleadings. I hate to be
made a fool of. What are the pleadings for if the jury can't read them? Do you want
me to read them to them right here?" D's attorney replied, "No sir. I object to
them being sent into the jury room." The Court then said, "You want to hide something
from them?" D's attorney objected and excepted.

Held: Reversed and remanded. The pleadings contained unproved allegations. The
jury could reasonably suppose that the Court thought these allegations perfectly
valid for he has told them they could take them to the jury room and read them.
"Under the circumstances of this case the pleadings were improperly permitted to be
taken by the jury to their room."

Note: It was also held that persons riding in a car pool are not "guests without
payment", and hence are owed a duty of ordinary care by the driver.

PLEADING AND PRACTICE Res adjudicata Insurance

H and W were husband and wife. While W was driving H's car she became involved in
an accident with B, the driver of another car. W sued B and B sued W for personal
injuries. The attorney for H's Insurance Company, without H's consent, compromised
the case brought by B by paying B $1000. The pending case of B v. W was dismissed
agreed. Despite all this, W pressed her claim against B who relied on the defense
of res adjudicata.

Held for W. The attorney for H's Insurance Company had a right to settle the claim
of B against W, but he had no right to compromises W's rights against B, if any,
Failure to File Timely Responsive Pleading  

D was served properly not later than February 15, 1961. He did nothing until March 2, 1961 when he filed a petition for removal of the case to the federal courts. On Sept. 26, 1961 the Federal court remanded the case to the State court. On October 9, 1961 the state court on the motion of the plaintiff, P, entered its order awarding judgment by default, and appointing a date for hearing evidence and fixing the amount of damages. D did nothing whatever until October 18, 1961 when he moved the court to set aside the default judgment. D was not given any notice of the date on which the court would hear the evidence with reference to the amount of damages. The court refused to hear the case on its merits. What errors, if any, was the trial court committed?

Held: None. When D violated Rule 3:5 he was in default and by the express language of 3:19 he was not entitled to any further notice. While D could have moved for an extension of the 21 day period provided for by Rule 3:5 as per Rule 3:13 even though the 21 day period had expired he failed to do so. "D's efforts to remove the case to the Federal court cannot restore to him a right already lost to file pleadings in the State court."

"Rules 3:5 and 3:19 were adopted in the interest of expediting the maturing and hearing of cases. A defendant is warned when he is served with process as to the time within which he must make his response. He may have an extension of that time if he makes proper application and shows reasonable cause therefor. Otherwise the Rules are to be applied according to their terms."

Jurisdiction and Venue  

P sued D for injuries received in an automobile accident. There was nothing on the face of the pleadings to indicate that the trial court did not have jurisdiction nor did D file any plea in abatement within the required 21 day period which under Rule 3:6 is not to be extended in any case. W/ 6-133 reads, "Where the motion for judgment or bill shows on its face proper matter for the jurisdiction of the Court (as it did in this case) but exception for want of such jurisdiction shall be allowed unless it be taken by plea in abatement." The evidence showed that at the time of the injury D was transporting P home from work, that the employer paid D for such transportation, and that the employer came under the Workmen's Compensation Act. D sought to have the case dismissed for lack of jurisdiction. The trial court refused to dismiss it because no motion in abatement had been or now could be filed.

Held: Reversed and dismissed. W/6-133 and Rule 3:6 apply only to jurisdiction in the sense of venue. Where a court lacks jurisdiction to hear and decide the subject matter of a case it should be dismissed as soon as this fact is called to the court's attention in any manner, or by the court on its own initiative, even on appeal when the question of jurisdiction was not raised below. In this case P's only remedy is under the Workmen's Compensation Act since the accident was an industrial one occurring during and arising out of the employment. Thus the Industrial Commission has exclusive jurisdiction of the subject matter in controversy.
In 203 Va.2d6 Nephews contended that their maiden Aunt was incompetent to make a will, and hence they inherited her land as her heirs. It was brought out in that case that Aunt had conveyed her real estate to Nephews, and that after a falling out she demanded a reconveyance. The matter was compromised as follows: Nephews re-converted in return for Aunt's promissory note to will them the land. A little later Aunt demanded a release from this promise and one was given her. Nephews lost the will contest case. They later (this case) filed a bill in equity for specific performance of the Aunt's promise to will the land to them claiming that the release of this promise was void. Defendants claim that the whole thing was settled for all time in the 203 Va.2d6 case, and the Chancellor so held.

Held: Not res judicata. Under Va.66-74 "the sole issue is whether the paper offered for probate is or is not the will of the decedent. When this question is decided the function of the proceeding is exhausted and the court should not decide other questions not connected with that issue." Whether or not the release of their Aunt by the Nephews from her agreement to will the land to her Nephews was valid or not, had no bearing on her competency to make a will, and hence the matter of the validity of the release had not been passed on. Whether Nephews are estopped by the assumption of different positions has not been passed on either. Reversed and remanded.

PLEADING AND PRACTICE Torts Apportionment of Damages 204 Va.353.

A, while in the employment of B, and while acting in the scope of his employment committed an assault and battery on C. She sued A and B for both compensatory and punitive damages. The jury returned a verdict as follows: "Compensatory against B for the sum of $1,500. Compensatory and punitive against A for $5500".

Held: Reversed and remanded. The jury had no right to apportion the compensatory damages as between A and B. Besides it is impossible to tell from the verdict whether the jury meant a total of $1,500 compensatory damages plus $1,000 punitive damages, or whether it meant a total of $10,000. Note: An employer is not liable in Virginia for punitive damages unless he ordered, participated in personally, or ratified the wrongful act of his employee.

PLEADING AND PRACTICE Appeal from Interlocutory Decrees 204 Va.399.

H and W, husband and wife, entered into a contract with S, a son of H by a prior marriage, whereby S received stock in a corporation and land for a great deal less than they were worth. H and W then went to Florida. Soon thereafter H died in a mental institution in Florida. W qualified in Florida as H's executors and A qualified in Virginia as an ancillary administrator. A commenced a suit in equity in Virginia against S to avoid the contract for lack of capacity on H's part to make such a contract. S filed a special plea alleging that A was not the real party in interest and asking that W be joined. The Chancellor refused the request since W was a non-resident. S appealed and the appeal was granted.

Held: The appeal must be dismissed as having been improvidently awarded. The decree was an interlocutory one not adjudicating the principles of the case within the intent of Va.66-462(2)(c) and hence non-appealable. (No interlocutory decrees are appealable except as allowed by statute). When S's special plea was overruled he was given an opportunity to plead to the merits. The phrase "adjudicating the principles of the cause" means "The principles which affect the subject matter of the litigation and the rules by which the rights of the parties are to be finally determined."

PLEADING AND PRACTICE Interest on Unliquidated Claim 204 Va.443

L performed legal services for C over a period of years without any agreement as to the amount of his fee. L claimed $3,000 and C claimed $500 were proper amounts. L sued C. Expert witnesses testified in favor of L that $3,000 was a reasonable sum. The Court submitted the matter to the jury under proper instructions, and it returned a verdict in favor of L for $1,500 with interest from July 24, 1943, the date of the last services performed. The Court approved the verdict for $1,500 principal, but overturned it with respect to interest on the ground that no interest is allow-
Held: (1) The jury was not bound to return a verdict for $3,000 because all the experts testified that $3,000 was a reasonable sum. Since the jury was properly instructed and $1,500 was not clearly too much or too little, the Court acted correctly when it sustained that portion of the verdict. But (2), it acted erroneously with respect to the interest and in the teeth of V8-223 which reads in part as follows, "In any action whether on contract or for tort, the jury may allow interest on the sum found by the verdict, or any part thereof, and fix the period at which the interest shall commence." Note that the statute does not state that the jury has such power only when the damages are liquidated. In fact in most tort cases, they are unliquidated. It certainly was not an abuse of discretion to fix the period from which interest would start at the time the last work was performed.

PLEADING AND PRACTICE Tendered within 60 days and Signed within 70 days. 204 Va. 533.

Final judgment in this case was entered on June 25, 1962. On July 25 plaintiff filed with the clerk of the trial court her notice of appeal and assignments of error. On August 27 counsel for defendant accepted service of a notice that the transcript of the evidence and other incidents of the trial would be presented to the trial court for certification on August 28. When the trial judge signed the transcript on August 30, he changed the language from "tendered and signed within 60 days from the entry of final judgment" to "tendered and signed (by him) within 70 days after final judgment".

Held: The record shows on its face that the mandatory provisions of Rules 5:1, #3(c) and 5:1,#3(f) were not complied with as the transcript was not tendered to the trial judge within 60 days from the entry of final judgment as required thereby. Writ of Error dismissed.
PLEADING AND PRACTICE Waiver of defense

The State Highways Commissioner instituted eminent domain proceedings to condemn certain land owned by P. At the hearing before the condemnation commissioners P sought to prove that the State Highways Commissioner had had more than one appraisal made of his property. He served interrogatories on the Commissioner in which he sought answers as to how many appraisals had been made, the amount of these appraisals, and who had made them. The Commissioner moved to quash the interrogatories.

Held: Motion to quash granted. Interrogatories may be used to compel an adversary to disclose under oath facts essential to the protection of the rights of his opponent which facts his opponent might otherwise be unable to produce. Neither of these requirements exist in this case. The sum at which P's property has been appraised is an opinion of its value—not a fact as to its value; and P is perfectly free to call experts of his own to testify as to the value of his property. The number of appraisals made and who made them are irrelevant on the question of the fair value of the property.

II. Rule 3:23(c) provides for discovery by order of the court of the names and addresses of witnesses. Held: The Rules of Court have no application to eminent domain procedure.

III. The trial court refused to admit evidence that more than one appraisal had been made. Held: No error. To permit such evidence would be to open the door to conjecture and confusion as all the commissioners would be told would be that another appraiser had made a different appraisal which was probably higher.
P sought a writ of mandamus against the State Highway Commissioner to compel him to institute condemnation proceedings as a result of alleged damage to P's cinder block building some 240 feet away from a recently constructed underpass. A number of cracks developed in this building. P claims that these cracks were caused by pile driving or by continuous pumping operations which lowered the water level under his building or, possibly, by some of the sand or silt thereunder being carried away by the water that was pumped out. There was some evidence that the cracks started before the excavation was commenced.

Held: Mandamus was properly refused. What caused the cracks is not known. Guess work and conjecture are no substitutes for evidence. "It is essential to the issuance of a writ of mandamus that the legal right of the plaintiff or the relator to the performance of the particular act, sought to be compelled, be clear, specific and complete."

PLEADING AND PRACTICE Transfer to Equity Side

D agreed to pay P $103,333 as a commission if he sold Blackacre for a certain price. P alleged in his pleadings at law that he had found a purchaser able and willing to pay the price agreed upon, and that he was entitled to his commission. This thus appeared to be an ordinary action at law. D in his grounds of defense stated that the original agreement had been superseded by a signed written contract to the effect that if P were successful D would convey his interest in Whiteacre to P instead of paying him his commission in money. P had signed this agreement and then sent it to D for his signature. D had signed it but failed to notify P of that fact so that P did not know of the existence of this agreement until after his suit for his commission had been instituted. Over objection the trial court allowed P to transfer his law suit to the equity side of the court as now being one for specific performance of a contract to sell land. V#8-138 reads in part, "Whenever it shall appear that a plaintiff has proceeded at law when he should have proceeded in equity (or vice versa) the court shall direct a transfer to the proper forum, and shall order such change in, or amendment of the pleadings as shall be necessary to make them conform to the proper practice." D contends that this statute applies only to the institution of the suit, and not to its later stages, and claims that he will be deprived of his right to a jury trial.

Held: D is wrong on both of his contentions. The statute is a remedial one and should be interpreted liberally to fulfill its purpose of saving time and expense. As soon as it became apparent that this was a bill for specific performance it was the duty of the court to transfer it to the proper side thereof on request. And, if on D's affidavit it appears that the case will be rendered doubtful by conflicting evidence, D may ask for a trial of the issue out of chancery, and thus submit the question to a jury as per V#8-214.

PLEADING AND PRACTICE Criminal Procedure

D was indicted, and tried by the Court with his consent, that of the judge, and that of the commonwealth's Attorney pursuant to Section 8 of the State Constitution. This section requires that the consent of the Commonwealth's Attorney be entered of record. D was convicted and sentenced.

Held: The record referred to is the court's order book and hence a notation written on the back of the indictment is not a compliance with the constitutional mandate. Prisoner released from the penitentiary to the custody of the trial court to be dealt with as the Commonwealth's Attorney may be advised.

PLEADING AND PRACTICE Appeal and Error (Rule 5:1 #6(f))

Appellant objected to the refusal of the Court to give certain instructions. These instructions were printed in the briefs on appeal, but were not designated for printing in the record as required by Rule 5:1 #6(f).

Held: Since they had not been designated for printing in the record they should not be considered by the Supreme Court of Appeals. The case of Gabbard v. Knight was held not applicable, "It is true that the instructions in that case were not in the printed record, but there we said the case was submitted to the jury on erroneous principles of law and we would consider the instructions furnished to us
PLEADING AND PRACTICE  Declaratory Judgments  205 Va.227
P, a taxpayer, of the City of Fairfax, believed that a certain ordinance with reference to the powers of the Board of Zoning Appeals is invalid. He sought and obtained a declaratory judgment to that effect. At that time there was no specific case pending. The City appealed.
Held: Reversed and dismissed. If the litigation was not brought with reference to some specific case there was no actual controversy and the trial court had no jurisdiction to render an advisory opinion based solely on speculation and theory.

F was arrested when he was caught in the act of breaking into an automobile and stealing therefrom. A proper search of his premises revealed other stolen property. He confessed to various larcenies and robberies and signed the confessions. He was an illiterate man who could not read or write other than his name. He was indicted for various offenses and Attorney X, a competent lawyer, was appointed to defend him as F was without funds. X spent less than an hour in the preparation of the case, did not ask for a continuance to enable himself to better prepare the case, did not interview the police officers or the persons whose property was taken. F was convicted and sentenced to serve many years. He now challenges the legality of the conviction.
Held: Under these circumstances F was denied the right of "effective legal assistance" which is guaranteed to him by both the Virginia and United States Constitutions. Prisoner ordered returned to the custody of the trial court for retrial.

PLEADING AND PRACTICE  Rule 3:9--Cross Claims against other defendants  205 Va.242
The City of R let out a contract to A for the construction of a lateral sewer along X Street. A sub-contracted to B. After B had completed his work and filled in the ditch R placed crushed rock on top, rolled it, and put asphalt on top of the crushed rock and rolled it. After a hard rain the fill in the ditch settled in a certain place by almost a foot. P was injured when the wheel of his car went into the depression which was not lighted or guarded in any manner. P sued R, A and B. Rule 3:9 reads in part, "A defendant may, at his option, plead as a cross-claim any cause of action that he has against one or more other defendants growing out of or any matter pleaded in the notice of motion for judgment." The City of R sought to file cross claims against A and B. Should it be allowed to do so?
Held: No. R's claim is by way of indemnity. It has no possible claim for indemnity until it has paid P. It cannot force P to wait for an adjudication of R's claim against it until R's rights, if any, against A and B are determined. R's claim for indemnity must be litigated in a later suit.

PLEADING AND PRACTICE  Liability Insurance Companies as parties  205 Va.295
Guest (C) was injured as the result of the gross negligence of Host (H) and the disputed negligence of another (A). H's insurance Co. (HI) paid $15,000. The propriety of this payment is not questioned. H then sued A and A's insurance company (AI) in equity for $7,500 contribution. AI contended (1) that A had not been negligent; (2) that its name should be stricken as a party defendant; (3) that the caption of the suit should be R for the use of HI v. A. The court at the request of one of the parties transferred the case from the equity side to the law side of the Court.
Held: (1) Whether or not A was negligent under the facts of the case was a question upon which reasonable people might differ. In such a case the matter is tradition- ally passed on by a jury. While an action for contribution was originally in equity such actions can now be brought either in law or in equity. It was not an abuse of discretion to transfer the case to the law side of the Court where the question of negligence could be heard by a jury under proper instructions in the usual way. (2) AI's name should be stricken as a party defendant. The action for contribution is
against A. AI does not come into the picture as a defendant unless H obtains a judgment against A which AI refuses to pay. (3) Since the entire recovery, if any, belongs to HI and it is the real party in interest as the plaintiff the style of the suit should be changed to H for the use of HI v. A.

PLEADING AND PRACTICE Timeliness of motion for non-suit 205 Va.516.

P as administrator sued D under the death by wrongful act statute. She contended that while D was driving a school bus loaded with children he drove far on the left side as her deceased husband, H, was approaching in the opposite direction with a load of lumber, that in doing so H was forced off the road into a deep ditch and killed when the lumber shifted. D denied liability and claimed that the accident was due to H's negligence. After P's evidence was in D moved to strike it on the ground that if failed to prove any negligence on D's part. J, the trial judge, then said that P was a poor widow with four little children but that he didn't decide the case on sympathy, whereupon P's attorney requested J to postpone his ruling on the motion to strike until he could study the evidence. J indicated that was unnecessary as he had already heard the evidence. J asked P's attorney how he could ever decide the case if he kept interrupting, whereupon P's attorney moved the court for a non-suit. J ruled that the motion for a non-suit was too late, and then sustained the motion to strike P's evidence.

Held: Error. The motion for a nonsuit was not too late. Under WSH-220 such a motion cannot be made after the court has sustained a motion to strike. An indication by the trial judge that he is probably going to grant a motion to strike is not yet a ruling on the motion to strike. Hence the motion for a nonsuit was made in time (but it certainly was just in the nick of time).

PLEADING AND PRACTICE 205 Va.579

P bought a tractor from D on the conditional sales plan. D warranted that he would repair or replace defective parts within certain time and mileage limitations. P thought that D had broken the warranties and that as a proximate result of such breach he had suffered more damage than the balance he owed, so he stopped making any further payments whereupon D repossessed. P then sued D (1) for damages for breach of warranty, and (2) for damages for wrongful repossession. D demurred on the ground that P could not join a contract and a tort cause of action.

Held: Demurrer sustained. Causes of action in tort and in contract cannot be joined (except actions for breach of warranty and deceit as they historically have a common origin), and this despite the fact that if one is sued in tort or in contract he may counterclaim for either.

PLEADING AND PRACTICE Domestic Relations Rule 2:18 205 Va.634

In a re-opened divorce case H petitioned the Court to reduce his support payments to his minor children from $255 to $175 per month. W ignored the proceeding. On Sept. 4, 1963 an order was entered granting H's prayer, but no draft of this order was endorsed by W's counsel nor was he or W notified of the time and place of the presentation for entry. W's counsel notified H's counsel on Sept. 20th that he would move the court to vacate the order as having been improvidently entered since Rule 2:18 requires drafts of orders and decrees to be endorsed by counsel of record or notice to be given of the time and place of presentation for entry. This motion was overruled on Nov. 6, 1963. An appeal was taken therefrom later than allowed after Sept. 4 but within the required time from Nov. 6.

Held: The order of Sept. 4 was void since Rule 2:18 had not been complied with, and the rights of infants were involved. The time allowed for appeal should be figured from Nov. 6th when the chancellor refused to vacate the void order. A void decree or order is a nullity and may on proper application be vacated at any time.
P, the City of Richmond, sued D, the C&P Telephone Co., for $128,000 due P by virtue of a 30 year franchise ordinance under which D agreed to pay P 3% of its gross receipts from local telephone service. This amount was clearly due P. The franchise ordinance was not under seal but it was recognized by D in an instrument to which D affixed its corporate seal. The $128,000 for which P was suing was 3% of D's gross receipts for local service from Jan. 1, 1962 to May 12, 1962 on which latter date the 30 year franchise expired. During this 30 years P had erroneously charged D some $854,000 rentals for use of the streets by D for its poles, wires and conduits. D attempted to avoid payment of the $128,000 it owed by relying on common law recoupment of the $854,000 rentals it paid through error (The 3% franchise tax was in lieu of rentals). P contended that common law recoupment could not be used against a sealed obligation and that the statute of limitations had ran on any right to recover most of the rental payments.

Held: (1) While common law recoupment cannot be used against a claim arising from a sealed contract, the franchise ordinance contract was not under seal and recognition of the existence of such a contract by an instrument under seal did not make the contract so recognized a contract under seal. (2) The statute of limitations will not bar matters of recoupment (which must arise out of the same transaction—the franchise in this case) as long as the suit against which recoupment is desired has been timely instituted. Here P has instituted its suit promptly. (3) In common law recoupment there can be no recovery of any excess. So the final result is that neither P nor D is entitled to anything. (All that work for nothing!)

X owned 506 acres of land which was subject: (1) to two deeds of trust, (2) to $242,000 mechanics' liens on the improvements and on as much of the land as was necessary to the reasonable enjoyment thereof, and (3) to P's subsequent judgment against X. A compromise agreement between the holders of the mechanics' liens was effected by the terms of which the land was to be sold to Y for $135,000 subject to the deeds of trust conditioned on the chancellor's approval thereof. After the chancellor ascertained that the sum due the mechanics' lien holders was more than the value of X's equity in the land the chancellor entered a decree confirming the sale to Y and extinguishing P's lien forever. P was not made a party to the mechanics' lien suit, but one of X's creditors wrote P to the effect that the mechanics' lien holders were requesting a decree as per the one that was entered, and if he had any objection thereto he should make them known to the chancellor on Sept. 8, 1961 on which day the matter would be presented to him. P made no appearance on that date, and did not seek to set aside the final decree of the chancellor as above set forth until after the expiration of twelve months from its confirmation. Va.2d 673 provides that if a sale of property be made under a decree of court and is confirmed, the title of the purchaser shall not be disturbed, unless within twelve months of the confirmation, the sale is set aside by the trial court, or an appeal is allowed.

Have P's rights, if any, been extinguished by the chancellor's decree and the passing of more than 12 months from the confirmation of the sale to Y?

Held: No, they have not been extinguished. He has not had due notice. The letter from one of X's creditors was that person's voluntary act. It was not directed or authorized by the court. It could not give the court jurisdiction over P, "Judgments without service of process in a manner not authorized by law, are void judgments, and may be so treated in any proceeding, direct or collateral." Hence the decree, in so far as P was concerned, is void. Va.2d 673 (supra) has no application to void decrees, and hence it is immaterial that more than 12 months have passed since the confirmation of the sale without its having been set aside or an appeal allowed.
PLEADING AND PRACTICE--One Account or Six--Res Adjudicata-- 206 Va.57

P was a fuel oil dealer. He sold oil to D for D's residence. D's place of business and to four rental properties. At D's request separate accounts were kept as to each of the above units, but when bills were rendered the accounts were totaled. Payments were allocated among these accounts by P's accountant. D refused to pay for some of the oil delivered, and P sued D in the Municipal Court in separate actions for balance due on each of the six accounts. Five of these actions were removed by D to the Hustings Court. The other one was for an amount too small to permit removal; judgment was rendered for P on this account, and the judgment became final before the other actions were tried. At the trial in the Hustings Court D moved for a separate trial on each of the accounts and the motion was granted and trial was had on record. number 5903 and judgment thereon was rendered for P despite a plea of res adjudicata. The other four cases were consolidated and judgment therein was rendered for P despite a plea of res adjudicata. D contended there was one running account, and that a cause of action on the one account could not be split. P contended there were six separate accounts. The Court submitted this issue to a jury, and it found that there were six separate accounts. D was granted a writ of error.

Held: For P. While it is true that a defendant may not be harrassed twice for the same debt, this rule is one made for his benefit, and can be waived by him. In the instant case D requested separate accounts, tax considerations made separate accounts desirable, and D himself requested separate trials on each of the accounts, and a jury has decided the issue of one or six accounts in favor of P.

PLEADING AND PRACTICE Mandamus 206 Va.159.

The P Railroad Co. filed a petition against A County and the State Highway Commissioner praying for the issuance of a writ of mandamus under the courts original jurisdiction to compel the defendants to institute condemnation proceedings against it for damage done and contemplated as a result of the county's diversion of a stream and the highway's proposed construction of certain interchanges. P contends that as a result of these acts it will have to expand $165,000 to enlarge its culvert flow under its tracks.

Held: Mandamus denied. There are complicated and disputed facts which the Supreme Court of Appeals is not equipped to ascertain. Nor will mandamus lie where there is an adequate remedy at law. The County can be sued for any damages caused by it. P can also proceed under Va$8-578 et seq to obtain a declaratory judgment as to the amount of damages caused or probably to be caused by the County and by the State.

PLEADING AND PRACTICE--Statute of Limitations 206 Va.539.

P, a resident of North Carolina, was involved in an automobile accident with D, a resident of Virginia, in Botetourt County on May 30, 1959. Five months later D moved from the state and became a resident of Washington, D.C. On August 22, 1963 P instituted a suit based on this accident in the Circuit Court of Botetourt County and caused process to be served on D under the non-resident motorist statute (8-67.1) D filed a special plea of the statute of limitations on the ground that P had not instituted suit within two years after his cause of action had accrued as required by Code 8-21. P's reply alleged that Code 8-33 tolled the running of the statute as long as D resided outside of the state of Virginia. Code 8-33 provides in part: "When any such right as is mentioned in this chapter shall accrue against a person who had before resided in this State, if such person shall, by departing without the same*** or by any other indirect way or means obstruct the prosecution of such right, the time that such obstruction may have continued shall not be computed as any part of the time within which such right might or ought to have been prosecuted..."(Italics by the Court).

Held: Judgment for defendant affirmed. The purposes of provisions tolling the running of the statute of limitations during the absence or nonresidence of the defendant is to prevent the defendant from defeating the plaintiff's claim by merely absenting himself from the state or by establishing residence elsewhere for the period of limitation. However (quoting from 17 ALR 2d p.516) "Where provision is made by statute for substituted service of process upon a state official in cases arising out of motor accidents within the state, the majority of the courts have
hold that such a provision has the effect of nullifying any statute suspending the period of limitations." To hold that the statute of limitations does not run when substituted service of process is available would allow suits to be postponed indefinitely and permit a plaintiff to await a propitious time when defense witnesses would be unavailable, thereby depriving a defendant of any defense he may have as well as preventing him from knowing until years have passed that he is charged with negligence. Such delay could well lead to the equivalent of fraud.

PLEADING AND PRACTICE—Lack of in personam jurisdiction

H and W were husband and wife. In 1922 W instituted suit against H and a final decree was entered in 1924 awarding W a divorce, child support and alimony. In April 1961 W instituted the present action to recover alimony payments for the period May 1941 to date. H's personal representative moved to dismiss the proceeding on the ground that the decree of divorce was void on its face for lack of jurisdiction of the court to enter a judgment in personam, in that it appeared on the face of the decree that the only process against H was an order of publication. W admits that the record does not show that H was personally served with process or that he had made a general appearance but argues that there is a presumption in favor of the jurisdiction of that court to enter the judgment complained of because it "did not, and would not, enter a decree which would be other: the right and proper, which presumption attests the honesty and intelligence of the court rendering same."

The trial court granted H's personal representative motion.

Held: Judgment for Husband's personal representative affirmed. It is true that a presumption is liberally indulged in favor of a court of competent jurisdiction that the proper party is before the court. There is, however, no place for presumption where the want of jurisdiction appears affirmatively on the face of the proceedings. The record is presumed to speak the truth and can be tried by inspection only; extrinsic evidence not being allowed to impeach the veracity of the record. In this case, lack of jurisdiction to enter an in personam judgment affirmatively appears on the record. Where that fact so appears, presumptions cannot be indulged in to supply the lack of averments respecting the jurisdiction.

PLEADING AND PRACTICE—Request for Admissions

In an action for damages for wrongful payment of insurance proceeds the ultimate question was who the decedent's wife was at the time of his death. Before the case came to trial P served the D insurance company with a request for admissions which contained forty statements of fact. D's reply to a number of these statements was: "The fact requested to be admitted is not within the knowledge of the defendant." Code 8-111.1 provides in part that each of the matters of which an admission is requested shall be deemed admitted unless the party served specifically denies or sets forth in detail the reasons why he cannot truthfully admit or deny these matters.

P's motion to strike these answers of D was denied.

Held: Judgment affirmed. (1) The decisions are split as to whether a party should be required to admit or deny facts which are not within his knowledge. The better rule, and the one followed in the federal courts (Code 8-111.1 is identical to Rule 36 F.R.C.P.), is that the party is required to answer "if the means of information are reasonably within his power." However, in this case the court was "convinced that it would have worked an undue hardship upon defendant to have required it to obtain the information it needed in order to admit or deny the requests. The means of information were not reasonably within its power." (2) As to the statements that decedent never filed a suit for divorce against P and vice versa, it is manifest that, if D had been required to admit the truth of these statements, it would have admitted the ultimate fact in issue. The intention of the legislature in creating 8-111.1 was to create a procedure to force admissions of fact about which there is no real dispute in order to expedite the trial and not to obtain admissions of controverted facts.
Defendant's truck was stopped in the inside or passing lane of a dual-lane highway after dark, waiting to make a turn, when X's car struck it in the rear, killing X and injuring plaintiff, his wife. According to defendant's version, the running lights and turn signals were functioning properly before, at, and after the accident. Plaintiff was asleep at the time of the accident but testified that no lights were visible on the rear of the truck when she awoke shortly after the crash. Both parties introduced positive corroborative testimony on the question of whether the lights were on shortly after the crash. The trial court sustained defendant's motion to strike plaintiff's evidence.

Held: Judgment for defendant reversed. The evidence on a motion to strike is to be considered very much as on a demurrer to the evidence. All inferences which a jury might fairly draw from plaintiff's evidence must be drawn in plaintiff's favor, unless they are strained, forced, or contrary to reason. It is a general principal of law that a subsequent condition is evidential of an earlier one and the principle has been spoken of by some as a presumption. Thus when there is evidence that the lights on a motor vehicle were not burning immediately after an accident, this evidence is competent as tending to show that the lights were not burning at the time of the accident. At least, it is evidence constituting more than a scintilla and it was error to strike plaintiff's evidence. Note: It was also held that a statute requiring trailers to have reflectors, passed in 1960, was applicable to trailers manufactured before that date.

Requirements of Rule 5:1 of the Supreme Court of Appeals, that oral testimony and other incidents of trial, after becoming a part of the record, shall be presented to the trial judge within 60 days and signed by him within 70 days after final judgment are mandatory and jurisdictional, and failure to comply with them is fatal to appeal.

Rule 5:1 sec.3(f) (dealing with the presentation of transcripts to judges) provides in part that "Counsel tendering the transcript or statement shall give opposing counsel reasonable written notice of the time and place of tendering it and a reasonable opportunity to examine the original or true copy of it." On Oct. 15, D's counsel notified P's counsel that he intended to present a statement of the evidence and incidents of their trial to the judge on Oct. 20. On Oct. 19, P's counsel requested and received a copy of the statement. In the afternoon of the 19th both counsel went over the statement and agreed to certain corrections and additions. At the hearing on Oct. 20, P's counsel objected to the judge's certification because he had not been given a reasonable opportunity to examine the statement. P's counsel suggested numerous changes, and the judge ordered that the statement be amended as suggested by him. The revised statement was signed the following day.

Held: Affirmed. What constitutes a reasonable opportunity to examine a narrative of the evidence to be tendered the trial judge must be determined by the facts of each case. In the instant case the statement consisted of only twelve pages. It was amended to meet the suggested changes of P's counsel. He conceded that it was factually correct. Under the facts of this case, P's counsel was given a reasonable opportunity to examine the statement.
In an action to recover rental from D as a surety of C, the corporate lessee, P alleges in his complaint that D's signature at the end of the lease without reference to the capacity in which he signed makes him a surety of C. D demurs, has he admitted by this demurrer that he signed as a surety of C?

No, the allegation amounts to a legal conclusion, the correctness of which is not admitted by a demurrer.

P v. Rowland

P, a tenant, sued D for injuries received in a fall through rotten porch on leased premises. P raised fact question in deposition as to whether or not she had exclusive possession of porch or held it in common with co-tenants upstairs, lower court entered summary judgment for D.

Held: For P—reversed and remanded. P's deposition raising question of fact as to whether or not she had exclusive possession of porch was jury question. Once a question of trial nature is raised, summary judgment cannot be entered.

P, who was both executrix and sole distributee under the will of decedent, brought an action as executrix for a sum allegedly owed decedent by D for nursery work done on D's property. D moved to quash on the ground that P, as executrix, had no interest in the claim because she had made a final settlement of her accounts before the Commissioner of Accounts. P's motion that she individually be substituted as plaintiff was denied.

Held: Error. According to the general rule, so long as the cause of action remains the same, a plaintiff may amend his action so as to change the capacity in which he suits from representative to individual. Here the cause of action would have remained the same; D was the real party in interest as the sole distributee of any recovery; D was before the court and would suffer no prejudice from the requested change.

Note: P also had a right to maintain the suit in her representative capacity, as the powers of a personal representative do not end automatically upon final settlement of accounts, but continue indefinitely. This rule is unique to Virginia.

In an action arising out of a motor vehicle accident defendant defaulted by failing to file responsive pleadings within the statutory time period. In the trial on the quantum of damages. The trial judge limited the defense counsel's participation to cross examination of plaintiffs witnesses. Was this correct under Rule 3.19 Rules of Court?

No, in a case where unliquidated damages are sought, a defendant in default may not only cross-examine plaintiffs witnesses, but may also introduce his own witnesses and evidence in mitigation of damages.

W v. Wimbrow

In a divorce action the trial judge prevented W from introducing into evidence a 3 year old bank statement showing her husband's worth at $277,000 when H said his current worth was $20,000. W appeals.

Held: For W. The bank statement was not privileged information and was pertinent to H's present worth in that W's counsel should have been permitted to ask H what dispositions had been made of the assets listed in the financial statement.

P brought suit for construction of a lease. A commissioner in chancery heard the testimony and found largely for the lessee, P. D appealed. P now seeks to have the appeal dismissed because D did not give P adequate written notice and time to examine the transcript prior to being certified by the trial judge for appeal. The commissioner had certified the record to the judge one day prior saying it contained "depositions of witnesses sworn before me".
Held for D the lessor. Though under the Virginia rules 5:1 & 3(f) the judge's signature is final. Here the signature of the trial judge for appeal was not required. The commissioner heard the depositions and could certify them to the clerk without further action by the trial judge who had not heard the testimony.

PLEADING AND PRACTICE 159 S.E.2d 623.

D was convicted of first degree murder. The testimony showed that the victim's death occurred in the course of a robbery in which defendant participated as a principal in the second degree. D's counsel offered jury instructions that every murder is presumed to be in the second degree and the state has the burden of establishing the elements of first degree murder. These instructions were refused.

Held for Commonwealth. The facts did not support a finding of second degree murder. Under the evidence the jury could only have properly returned a verdict of guilty or not guilty of first degree murder.

PLEADING & PRACTICE 158 S.E.2d 663

(Frover C.) Brown v. Commonwealth

Facts: Defendant charged and convicted with incest relating to sexual intercourse with his 21-year-old daughter. Defendant objected to the attempted use of his wife by the state as a prosecution witness and his objection was sustained. However, defendant did not move for a mistrial. At the close of the trial defendant's counsel moved for a mistrial based on the calling of the wife which forced the defendant to object and put him in a bad light in the jury's eyes.

Held: Conviction affirmed—this conduct was grounds for a mistrial, but not unless the motion was made immediately. The Court of Appeals said the objection was waived if not made immediately.
Heid for D the lessor. Though under the Virginia rules 5:1 & 3(f) the judge's signature is final. Here the signature of the trial judge for appeal was not required. The commissioner heard the depositions and could certify them to the clerk without further action by the trial judge who had not heard the testimony.
PLEADING AND PRACTICE Federal Procedure

X of the District of Columbia wished to sue Y of Virginia in a Federal district court on the ground of diversity of citizenship. An act of Congress 28 U.S.C. 1832 provides that the word "State" as used in that section includes the territories and the District of Columbia. It was argued that Congress could not make the District a State by legislative fiat.

Held: (4 judges dissenting) that the act is valid. Congress has the power to allow a citizen of the District to bring diversity suits as a reasonable exercise of its power, conferred by Article I, to legislate for the District of Columbia.

PLEADING AND PRACTICE

There was a terrific gas explosion in the basement of a building owned by M., P., a employee of X who operated a beauty shop in the building was killed. M.'s personal representative sued M. and also the Gas Company. V# 8-96 reads in part, "Now parties defendant may be added upon the affidavit and motion of any defendant where it appears that such parties are or may be liable to such plaintiff for all or part of plaintiff claim." M. moved the court to add X as X had gas fixtures from which gas might have escaped, and also to add the City as the City maintained a gas inspection force. The trial court refused to add these parties when M.'s personal representative objected thereto and this writ of error was allowed. What result?

Held: Affirmed. Plaintiff cannot be made to sue parties he does not want to sue. Even the Federal Rules (See Rule 14 in Q. 59 on p. 8 of Federal Procedure) do not go that far. To hold so would be to convert joint and several liability into something else and change other statutes by implication. Issues as to the liability of the City and of the employer would vastly complicate M.'s personal representative's suit or even overshadow it. The statute is extremely fragmentary—only a skeleton rule governing third party practice. Under these circumstances the court concluded that the word "may" in the statute did not mean "must", but that such parties should be added only if the trial court thought it best. NOTE: Rule 3:9:1 abolishes third party practice at law stating "no defendant shall be permitted to bring in a new party."

PLEADING AND PRACTICE Criminal Procedure

D was indicted for breaking into the C Sales Co., Inc. with intent to commit larceny and for larceny of a car therein all in one count. The Court allowed the indictment to be amended by inserting the following words before C Sales Co., "Ford Garage Building belonging to". The jury found D guilty and sentenced him to three years in the penitentiary for breaking and entering in the night time (a statutory felony) and to three years for larceny of the car. Discuss points involved.

Held: (1) The amendment was proper. V# 19-150 provides that a defective indictment may be amended at any time before defendant pleads if the amendment does not change the character of the offense charged. (2) The verdict is bad. The settled law in Virginia is that if two offenses are charged in one count the jury can convict of either one or the other but not of both where the matter charged is one continuous affair. If, however, there are two separate counts then the accused can be convicted of each.

PLEADING AND PRACTICE Bill of Review

B and S were brother and sister and co-owners of a single family dwelling. S filed a bill in equity for partition alleging that she was able and willing to take the property for herself paying B for his interest, and that B was not able and willing to take the property for himself paying her for her interest. B filed an answer praying that the property be sold at public auction and denying that he was not able and willing to take the property himself. At this point B lost interest in the case paid no attention to the depositions that S took and discharged his attorney. The court referred the matter to a Commissioner in Chancery who found the value of the property to be $3500. The court entered decree in which it stated that B was not able and
willing to purchase the property, that S was, and that S should pay B $1,750 and
should receive a deed from the commissioner in chancery of B's interest. This decree
was entered July 30, 1947. On Sept. 3, 1947 defendant B came to life and filed a petition
for a rehearing. The chancellor refused to entertain such a petition on the ground
that the decree was a final one no longer in the breast of the court, but treated
the petition to rehear as a bill of review. Was this proper?
Held: Yes. A petition to rehear comes too late after a decree has become final. In
such a case it is proper to treat a petition to rehear as a petition for a bill of
review.

In the above case could the trial court allow the bill of review on the ground that
the evidence failed to support the conclusion of fact set forth in the decree that
the brother was not able to buy the property?
Held: No. Except in the case of after discovered evidence a bill of review lies
only for error of law apparent on the face of the record. In this case there is
nothing on the face of the decree to show that the conclusion of fact set forth above
was an error of law. If the errors complained of be errors of judgment in the de-
termination of facts such errors can be corrected only by appeal.

PLEADING AND PRACTICE  Equity Pleading  190 Va. 380.

P had a judgment against D which he claimed was a lien on certain realty and filed
bill in equity to enforce the lien. D had transferred some of this land before the
judgment had been obtained but P claimed these transfers were fraudulent. P's counsel
without having presented any evidence, tendered and asked the court to enter a decree
referring the case to a commissioner with directions to report, among other things,
"what real estate was transferred by the defendant without any consideration as set
out in the bill of complaint." The trial court refused to enter such a decree. Was
this error?
Held: No. "An order of reference is not to be awarded to enable a plaintiff to
make out his case. It should not be made for the purpose of furnishing evidence in
support of the allegations of the bill, nor until he has the right to demand it." Before
P is entitled to an order of reference he must show by depositions or by
evidence ore tenus that there was fraud or lack of consideration so it might first
be determined by the court whether the properties were in fact subject to the lien
of the judgment. P was not entitled to shift to the court's commissioner the burden
of taking evidence
PLEADING AND PRACTICE Contribution and Subrogation 190 Va. 851.
Due to the joint negligence of P and D, X was seriously injured. P properly
compromised the case for $10,000 and paid same to X. P carried liability insurance
and X, the insurer, reimbursed P. After more than a year from the date of the injury but
within a year from the date of the payment P sued D for the use of I for $5,000
contribution. It was contended, (1) that the statute of limitations had run. Held: No.
The statute of limitations did not start to run until P had paid more than his share of
the $10,000, and since contribution is founded on a contract implied in law the
period is three years. (2) It was contended that since an insurance Co., was not a
tortfeasor the statute allowing contribution in torts and negligence will not
involve general contribution had no application. Held: This contention is also unsound. Virginia
has always been one of the most liberal states in allowing subrogation and an
insurance carrier who pays liability insurance to one joint tortfeasor is entitled in
equity and good conscience to be subrogated to his right of contribution. Besides
such a right is a chace in action which can be expressly assigned to the insurance
carrier under our assignment statute 5763(new 8-94).

H and W were husband and wife. W died and devised Blackacre to H until his death or
remarriage, and then to P when he becomes 25 years of age. H remarried before P
became 25 years of age. P sought and secured a declaratory judgment to the effect that
he, P, was entitled to the rents and profits although he was not yet 25, and H
vacated the premises. Then P sued H for the reasonable value of the rentals for the
period from his remarriage to his vacation of the premises. H contended the matter
was res adjudicata and that he could not be twice vexed for the same thing.
Held: Contention unsound. The declaratory judgment case decided the abstract
rights of the parties. It did not decide our purport to decide the amount due P for
the occupation of Blackacre, or to grant any creative relief. Hence the issues were
not the issue in the two cases. It was the purpose of the Declaratory Judgment Act
to give additional remedies to supplement rather than supersede ordinary causes of
action. So P may properly institute an action on quasi-contractual principles to
recover sums due him by H for the use of P's property.

PLEADING AND PRACTICE Final or Interlocutory Equity Pleading 190 Va. 887.
C, a contractor who had erected a building for D filed a bill in equity to enforce
a mechanics lien in the sum of $9,000. D allowed the case to go by default. The court
decreed on August 9th that C recover of D $9,000, that the case be referred to a
master commissioner who was directed to ascertain and report the liens and the order
of their priority on D's land and building. Shortly thereafter the master commission
filed his report in which no exceptions were taken, and on Sept. 21, 1948 a decree was
entered confirming this report and ordering the property to be sold to satisfy the
liens thereon. At the next term of court D filed a petition alleging that since the
entry of the decree mentioned above he had discovered that there were serious de-
fects in the construction of the building and the use of improper materials, and that
such defects could not have been discovered by the exercise of due diligence. It be-
came material to decide whether or not the above defects were final decrees or
interlocutory decrees. Which are they?
Held: They are interlocutory decrees and hence subject to petition for rehearing. A
final decree written in which the principle subject, gives all
the relief that was contended,---and leaves nothing to be done in the cause save to
superintend ministerially the execution of the decree. While that portion of
the decree fixing D's personal liabibility in final that was not the source of equitable
jurisdiction which source was the right to foreclose the lien in equity. The collateral
relief sought by the lien creditor, C, could not be accomplished until the property
had been sold, the sale confirmed and the proceeds distributed. Thus a further decree
was necessary for the accomplishment of the suit, and this required judicial as
distinguished from ministerial action by the court.
PLEADING AND PRACTICE-Challenging Jurors 557(nov)572(old) 190 Va.997.

Plaintiff sued defendant for damages arising out of an auto collision and recovered a $1500 verdict. On appeal the judgment was reversed because of improper instructions and a new trial granted. Upon the second trial plaintiff was awarded a verdict of $2,000. Several days thereafter defendant and his counsel discovered for the first time that one of the jurors on the second trial had also served as a juror on the first trial. They assign this as reversible error. Before trial the defense attorney had asked all jurors if they had expressed any opinion in the case and was told no. The record which was available to counsel disclosed the previous service of the juror, but no one discovered it until after the trial. Should a new trial be granted?

Held: No. It is too late after the verdict to object to the competency of a juror unless one is able to show that cause for challenge existed and that in the exercise of due diligence that cause could not have been discovered before the jury was sworn and also that he has been injured. In the instant case neither of these two essentials was shown. Defendant cannot say that he has been prejudiced by the juror's having served again merely because he did not hang the jury in defendant's favor.

The question asked the jurors normally would indicate a probe for possible partiality rather than the possibility of one of them having rendered a previous jury verdict. V/48-202 reads, "No irregularity in--the exposing of jurors shall be sufficient to set aside a verdict unless the party making the objection was injured by the irregularity or unless an objection specifically pointing out such irregularities was made before the swearing of the jury;--".

PLEADING AND PRACTICE-Amendment of Notice of Motion 190 Va.1016.

Plaintiff alleged in his notice of motion that he was totally disabled as a result of an accident on August 26, 1949, and that defendant insurance company had failed to make monthly payments to him thereafter as it was obligated to do under plaintiff's contract of insurance with defendant. Defendant filed plans of the general issue, release, and accord and satisfaction. At the beginning of the trial, during the examination of the first witness, the court allowed plaintiff to amend his notice of motion so as to allege that the date of commencement of his total disability was August 15 instead of August 25. Plaintiff's explanation of the original error was that his railroad foreman had carried him on the payroll until the later date, so plaintiff had thought of that, rather than the date of the accident, as being the date of his disability. Defendant objected to the amendment, but refused to take advantage of an offer of continuance made by both plaintiff and the court. There was some question as to when the accident actually did occur. Should the amendment have been allowed?

Held: Yes. Both case and statute law allow substantial amendments in the pleadings for the promotion of justice. The amendment was germane to a material fact in controversy, the date of the accident which caused the disability. The change was allowed before any but a small amount of evidence had been submitted. It was still possible for defendant to introduce evidence that the new date was wrong, and defendant was offered a continuance to prepare his case but refused it on the grounds it would be of no benefit to him. Statutes involved are V/98-119, 3-217, and 5-532.

PLEADING AND PRACTICE-Forfeiture of Property Used to Promote Lottery 190 Va.1029.

Quidley and Clanton were convicted in Police Court of promoting a "numbers racket" in the City of Norfolk. Several days later the Commonwealth's Attorney filed an information against a Hudson sedan in which the pair had been driving at the time of arrest and $163.54 in federal currency which was in their pockets at the time, asking condemnation and forfeiture of the property to the State. Quidley and Clanton answered, alleging that the Hudson was not gambling paraphernalia as contemplated by the forfeiture statute, and that there was no evidence to connect the money in their pockets with their numbers activities. At the time of arrest $137.58, over $20 of it in change, was found in Quidley's pockets. Further evidence was made that under V/19-222, which prohibits prosecution under more than one statute or ordinance where
an act is simultaneously a violation of more than one statute or ordinance, the present suit was barred by the Police Court conviction. Also appearing in the proceedings was Associates Discount Corporation, which claimed that it had a valid lien on the car in the amount of $786.83, that it had no knowledge of the use to which the car had been put, and that its lien should be satisfied before the state condemned the car.

Held: (1) Code 19-232 is applicable only to criminal proceedings. The proceeding to forfeit property is wholly in rem. It is a civil case, not a criminal proceeding.

(2) The statute (V/18-302 allows forfeiture to the state of "all personal property of any kind or character, used in connection with the promotion, operation, conduct or any lottery." Clearly it covers both a car used by those collecting numbers slips and the money used by them in making collections and paying winners.

(3) Quigley offered no explanation for his having over $100 in his possession, much of it in change. The trial judge could find that the money was used in making collections.

(4) The ignorance of one having an interest in the property that it is being used for illegal purposes is, under the Virginia statute, no defense to the forfeiture proceedings. There is no merit to the Honors contention that its lien should be satisfied before the State should be allowed to condemn the car.

The test of liability is the guilty act of the one having charge of the property.

PLEADING and PRACTICE-Taxation-Relief from Invalid Assessment 191 Va. 52.

Plaintiff and five other landowners objected to the validity of a tax assessed to cover cost of garbage collection in the county. Allegeing that eleven thousand other taxpayers were similarly situated, they filed a bill in equity to enjoin collection of the tax, basing equity jurisdiction upon avoidance of a multiplicity of suits.

Held: Equity has no jurisdiction because V/58-1353 provides that no suit to restrain the assessment or collection of any tax shall be maintained in any court in the Commonwealth except where there is no adequate remedy at law. Plaintiffs here had at least three remedies at law: (1) Under V/58-1145 through 58-1151 of the Tax Code they could have applied to a court of law for an order of execution restraining the tax collector from collecting any erroneous assessment and directing him to return any amount already paid. (2) Under V/58-341 of the Tax Code, any six landowners of the county could have forced the Commonwealth's Attorney to contest the validity of the assessment in the circuit court. (3) They could have paid the tax and sued on common law principles for recovery of the amount paid. Thus equity has no jurisdiction to enjoin assessment or collection of a state or local tax in Virginia.

PLEADING AND PRACTICE Decrees pro confesso 191 Va. 59.

The bill of complaint in a general creditor's suit in equity alleged that "from what he (plaintiff) has heard or is led to believe" defendant owed an interest in a Lynchburg mercantile concern. Defendant failed to answer the bill, and it was taken for confessed as to him and the cause referred to a commissioner to ascertain the extent of defendant's estate. Later the proceedings were suspended at the request of defendant to enable him to settle with his creditors. After five years passed with no further action being taken in the suit, it was dismissed from the docket under the five year rule. In the present suit over the ownership of the Lynchburg concern, it is contended by plaintiffs, the former co-defendants in the previous suit, that the decree pro confesso is conclusive of the question of ownership interest in the mercantile establishment.

Held: The decree pro confesso here is not conclusive. The bill only alleged that on information and belief the interest was as stated. The fact that the cause was referred to the commissioner shows that the latter was not treated as settled. Not only that, but if the decree pro confesso had put the matter to rest, it would have been between plaintiff and defendant, and not between co-defendants and the defendant.
Virginia is not enforcing the criminal law of another state where the Commissioner of Motor Vehicles revokes the driver's license of a Virginia resident who has been convicted of drunken driving in a Maryland court. Purpose of the Virginia statute making revocation mandatory in such a case is to protect Virginia citizens in their use of the highways.

The court on appeal will not consider petitioner's contention that the Maryland conviction was void for lack of jurisdiction where the certificate of exceptions says only that petitioner was held for 39 hours without arraignment or the opportunity for medical examination but does not show evidence of any kind to support that contention. Petitioner should have objected to exclusion of his evidence in the lower court and had the evidence incorporated into the record. As it is, there is nothing to show what type of evidence he had, if any, or whether it was legal or admissible. If there were errors in the Maryland proceedings petitioner should have appealed.

Defendant corporation was chartered in Massachusetts to manufacture and sell office equipment. Its plants and offices were in New York and Massachusetts. It sold its products to independent retail concerns, 16 of them in Virginia, f.o.b. factory. It supplied its dealers with advertising material and information, but in no way financed them or directed the retail sales. Several times a year each dealer would be visited by an agent of defendant corporation, who would help in forming displays and putting on demonstrations. While one of these agents was in Norfolk and engaged in a showroom demonstration, he was served with process by plaintiff.

Held: Service of process must be quashed since the agent was not served in a county or city where he resided, or where his place of business was, or where the principal office of the corporation was located. The foreign corporation was not doing business in Virginia so as to have subjected itself to the laws of this State.

P sued D (du Pont) for $666,961 damages due to defective paint used by P for the purpose of finishing radio cabinets which paint made the cabinets unmerchantable. There was one count for breach of warranty, one count alleging fraud, and one count alleging negligence. D demurred on the ground that there was misjoinder. D contended that P must elect to sue either in contract or in tort.

Held: Demurrer overruled in spite of expressions (dicta) in two Virginia cases that an election must be made (166 Va. 314 and 181 Va. 390). Historically an action for breach of warranty grew out of deceit, and in Virginia, the distinction between common law forms of action has largely disappeared since the adoption of our notice of motion statute.

P sued D who discharged her lawyer just before trial. The judge gave her a continuance. She neglected to engage another lawyer until shortly before the new date for trial and also secured a statement from her doctor that she was under his care and that he deemed it inadvisable for her to appear in court. The new lawyer asked for a second continuance which was refused. Was this error?

Held: No. The granting of a continuance is within the discretion of the trial judge. Discharge of counsel or failure to obtain counsel in time is not absolute ground for a continuance. Otherwise defendant would postpone trial indefinitely by changing counsel. The doctor's certificate is too equivocal. Besides, even if it is inadvisable for her to appear in court, her testimony can be given by deposition.
PLEADING AND PRACTICE 560A. 192 Va. 8

P sued D for fraudulently representing to her that a marriage to him would be valid when he well knew that said marriage was fraudulent, and alleged that said marriage was subsequently held to be invalid. D demurred because (1) it is not alleged that P was innocent; (2) it is not alleged that marriage was void rather than merely voidable (3) no facts are stated but only the pleader's conclusions. The trial court sustained the demurrer. Was this correct?

 Held: No. The notice of motion above is a good example of how not to do it, but it does notify D of the nature of the claim. P should have been allowed to amend, or D should have asked for a bill of particulars. Rule 3:18 then governs the procedure.

PLEADING AND PRACTICE 192 Va. 47

D ran over B, a nine year old boy, and killed him. P sued D, and also his father, F. D had his own home and owned the car, but P claimed that D was F's agent. Shortly afterwards, and before suit was started, D, who was in the army, was sent to France. F engaged A as an attorney and A asked for a number of continuances. When D returned he made no objection to what had happened, but after the lapse of a considerable period of time he moved that the case be dismissed on the ground that he had never been served with process. This motion was granted. Was this error.

 Held: Yes. A general appearance by counsel is a waiver of service of process if the appearance was authorized. Such an appearance is prima facie authorized and this prima facie authorization has not been rebutted. F did not testify that he had no authority from D to engage A as counsel for each, D's failure promptly to make a motion for the withdrawal of A's allegedly unauthorized appearance is evidence of authorization. The court will not assume that A, an attorney of integrity and experience, was a rank interloper who wrongfully acted for D.

PLEADING AND PRACTICE Appeals 192 Va. 60.

F owned an undivided one third interest in Blackmore. If he died without issue his interest was to go equally to X and Y who were the other co-tenants in fee. X died without issue and his widow, W, claimed dower. X and Y denied that she was entitled to dower and filed a bill for partition. The trial court held that she was entitled to dower whereupon X and Y appealed. Since no decree had yet been entered in the partition suit should the appeal be dismissed on the ground that an appeal lies only in the case of a final decree?

 Held: No. Under Va. 62 an appeal lies to certain interlocutory decrees. One of these is a decree adjudicating the principles of a cause, and when the court decreed that W was entitled to dower it adjudicated the principles of the cause between X and Y on the one part and W on the other. (The other interlocutory decrees that can be appealed are decrees dissolving an injunction, or requiring money to be paid, or possession of property to be changed).

PLEADING AND PRACTICE 192 Va. 200

D was convicted of a felony. He appealed. The Attorney General moved to dismiss the writ of error on the ground that the defendant did not file his notice of appeal and assignment of error within sixty days after final judgment.

The Supreme Court of Appeals states:

In addition to seeing that the record in the trial court is completed, appellant, in order to perfect his appeal, must take the following steps: (1) within sixty days after final judgment deliver to or serve on opposing counsel a copy of his notice of appeal and assignments of error, and file the original with the clerk; (2) after the record is made up, file with the clerk a designation of the parts of the record he desires printed; (3) after twenty days from the time he has filed his designation for printing the record he must notify the clerk to transmit the record in time for it to be delivered to the clerk of the Supreme Court, or one of the justices, within four
months from the date of final judgment; (4) he must deliver to opposing counsel a copy of his petition for appeal and file the original with the clerk of this court, or the justice to whom the record has been transmitted, within the four months' period; and (5) pay the filing fee of $1.50 to the clerk of the Supreme Court.

The precise question presented is whether the provision requiring the appellant to file his notice of appeal and assignments of error within sixty days from date of final judgment is mandatory or directory.

HOLD: This provision is mandatory in criminal appeals as well as in civil cases. Its purpose is to give appellee opportunity,(1) to examine the record and assure himself of its correctness before it leaves the clerk's office of the trial court;(2) to file in civil cases, assignments of cross error;(3) to designate for printing that part of the record he deems material to support the ruling of the trial court;(4) to prepare a brief in opposition to the granting of an appeal. If no notice of appeal and assignments of error are filed within sixty days the prevailing party then knows that the case is ended. Writ of error dismissed.

PLEADING AND PRACTICE

Mrs. D was prosecuted for a crime. The Commonwealth failed to call R, a material witness. In the closing argument Mrs. D's attorney made much of this fact, and suggested that the reason that R was not called was that if R had testified his testimony would have been unfavorable. The attorney for the Commonwealth replied that Mrs. D had not called her husband as a witness and that the shoe fits both facts. The trial judge then stopped the proceedings and called for a conference out of the hearing of the jury. He pointed out that W/S-283 had been violated in that the failure of defendant's husband to testify in her favor had been commented upon. He asked defendant's counsel if he wished an instruction to the effect that the jury should disregard the argument. The reply was in the negative on the ground that such an instruction would only emphasize the improper remarks. The judge refused to grant a mistrial. The evidence clearly showed Mrs. D's guilt and there was no evidence that she was prejudiced in any way.

HOLD: Conviction affirmed. The improper remarks are not ground for reversal because of the statute of defects(W/S-287), "No judgment shall be reversed for any error committed on the trial where it plainly appears from the record and the evidence that the parties have had a fair trial on the merits and substantial justice has been reached."

PLEADING AND PRACTICE

Compare these two cases:

Case 1 (191 Va. 731) Section 6(d) of Rule 5:1 requires, (1) that the judgment appealed from,(2) the trial court's opinion, if any,(3) and the assignments of error that have already been made within the required time all be designated for printing by the appellant, and Section 8 of said rule requires the clerk of the Supreme Court of Appeals to cause them to be printed. The designation by counsel of the above for printing is for the convenience of the clerk. These parts of the record must be printed whether designated or not. Designation of these parts is merely a ministerial act. The rule is directory only. Hence the failure of appellant to make the above designations is not necessary fatal. See 192 Va. 331-332.

Case 2-(The instant case) Section 6(a) of Rule 5:1 provides that counsel for appellant shall file with the clerk of the court from which an appeal is taken not less than 20 days before the record is transmitted a designation of the parts of the record that he wishes printed. Appellant neglected to do this. Should his appeal be dismissed?

HOLD: Yes. The portion of the record that is to be printed involves discretion that can be exercised only by the appellant. It is not a mere ministerial act (as in Case 1 above). Until appellant designates the part of the record to be printed the clerk of the trial court has no authority to transmit the record to the Supreme Court. This provision is clearly mandatory. To ignore this 20 day requirement would create untold turmoil and confusion.
The maximum penalty for perjury is 10 years. D was indicted for perjury and pleaded guilty. The court referred the matter of punishment to a probation officer who made a detailed report which recommended the maximum penalty. The court, without notifying her attorney and in her absence, sentenced her to ten years. What errors, if any, were committed?

Error 1. The case should not have been referred to a probation officer. It is only when the penalty might be more than 10 years that such reference should be made. V53-278.1

Error 2. The probation officer has no right to recommend a penalty.

Error 3. It was reversible error not to give counsel the right to cross-examine the probation officer and to introduce evidence in rebuttal.

Possible Error 4. The accused should have been present when sentenced. There is a conflict of authority on this point and the Court found it unnecessary to pass on it in this case.

H as owner entered into a contract with L as general contractor to build a large number of houses. L sublet the plumbing and gas fixture work to C who put in inferior gas fixtures. As a result there was a bad gas leak in one of the houses and an explosion resulted. The gas fixtures put in did not meet contract specifications. H sued L and C. After pleadings had been filed H moved the court to dismiss C, which motion was granted. Later on in the case L moved to make C again a party defendant. This motion was denied. Was this error?

Held: No. It was not an abuse of discretion of the trial judge to refuse to add C as a party. Many complications would arise if he were added at this stage. To what extent, if at all, would C be affected by what took place after he was dropped and before he was added?

Note: Third party practice has not been as successful as had been hoped even in the English and Federal Courts where the judges have more control over the trial than they have in Virginia. Rule 312.1, effective Oct. 1, 1951, reads, "Third party practice is abolished and no defendant shall be permitted to bring in a new party."
D was employed by P, the Southwest Virginia Hospitals, Inc. and the hospitals individually to effect and manage a hospital insurance plan. D was very successful, and P thought D was making too much money. As a result the parties fell out. P terminated the contract and sought equitable relief which involved an accounting. In order to determine how the accounting should be made it was first necessary to interpret the contract. The trial court interpreted the contract as per D's contentions and ordered P to pay D some $54,000 at the rate of some $900 per month for 60 months, and its decree also provided that if P failed to pay D as above set forth then execution should issue at D's request. The court also referred several other matters to a commissioner in chancery who was to take additional evidence thereon and report to the court at a later date. Some eighty days after the above decree was entered, but before the commissioner had made his report P appealed. D moved that the appeal be dismissed because P had not filed his notice of appeal and assignments of error within 60 days after the entry of the decree as required by Rule 5:4.

Held: Motion denied. Rule 5:4 applies only to final judgments and decrees. Since the decree above was interlocutory (as other issues were yet to be decided), and adjudicated the principles of the cause it was appealable as one of the exceptions to the rule that only final decrees can be appealed. VA 463-462(2)(c). "Where an interlocutory decree is appealable as adjudicating the principles of the cause, the aggrieved party is not limited to the period for perfecting an appeal from a final decree, but may appeal any time until final decree is entered and the time for an appeal therefrom has elapsed."

Note 1. It was also held that P's failure to put up a proper suspending bond, or in fact, any such bond did not bar his appeal. (The only effect of such a failure is that the prevailing party below can go ahead to get his relief just as if no appeal had been taken.)

Note 2. It was also held that that portion of the decree allowing D to have execution on future defaults was erroneous. The officer issuing the execution is not the proper party to determine whether or not there has been a default. The court should have reserved leave to D to apply to it from time to time, for relief, if necessary to cover payments of installments thereafter falling due.

**PL&PR. Plea of autrefois convict—"three term statute"**

D, a Negro, was indicted by an all-white grand jury chosen in violation of D's constitutional right. He was not tried until after 2 regular terms of the Circuit Court had gone by. When tried he urged the invalidity of the indictment. The trial judge put the point down for later argument, and the trial proceeded. D was convicted, when the point was argued after the conviction D's contention was sustained and the conviction set aside. Whereupon a properly chosen grand jury re-indicted D and after two more regular terms of the Circuit Court had gone by he was again convicted. D pleaded autrefois convict and also that he was discharged since three regular terms of the circuit court in which his case was pending had gone by without a trial. (V/19-165)

Held: For the Commonwealth. Since the first proceedings against D were void and set aside he has not been in jeopardy. The law as laid down in *Patton v. Mississippi*, 332 U.S.463 expressly states that that holding does not mean that a guilty defendant must go free, "For indictments can be returned and convictions can be obtained by juries selected as the Constitution commands." The fallacy in D's other contention is that he is attempting to add the elapsed time on the original quashed indictment to the elapsed time since the new indictment. This cannot be done and hence V/19-165 has no application. The two indictments were separate and distinct.
PL. & PR.  Power of Court to make its own rules  193 Va.221.

The Court of Law and Chancery of the City of Norfolk adopted the following rule
(facts changed slightly) governing practice in suits for divorce:

"ORDER ESTABLISHING RULE OF PRACTICE TO BE OBSERVED IN DIVORCE SUITS AND SUITS FOR
ANNULMENT OF MARRIAGE, ENTERED APRIL 11, 1949.

"In order to safeguard the public interest against litigants who may seek divorces
or annulements of marriage in cases in which such litigants have not acquired the
necessary residence and domicile as required by Section 5105 of the Code of Virginia,
or where the grounds of venue as required by said Section do not exist, and to
to better determine whether there be legal cause for divorce or annulment in any given
case the following rule of practice in this court is hereby established:

"All such suits, by appropriate decree, may be referred to one of the Commissioners
in Chancery of this court to ascertain and report (1) the facts relative to whether
the necessary grounds of jurisdiction and venue exist; (2) the facts relative to
whether the divorce or annulment should be granted or refused, and (3) in like manner
upon other matters raised by the pleadings and the evidence.

"All of the evidence in such cases shall be taken and transcribed before such
Commissioner who shall have authority to direct the Clerk of this Court to issue sub-
poenas for witnesses and to make such investigation as may be proper and necessary
to accomplish the purpose of this rule.

"The complainant shall pay the cost for issuance and service of such subpoenas and t
shall also pay to said Commissioner in advance of such hearing a fee of Twenty-Five
Dollars to be taxed as part of the cost."

It was contended that a court could not adopt its own private rule nor delegate
its judicial functions to a commissioner in Chancery.

Held: (1) "The general rule is that a court of general jurisdiction may adopt a
rule of practice provided the subject is not regulated, or adequately provided for,
by general law. Such a rule must be reasonable, must not contravene the Constitution
or statutes, or affect substantive law." The rule promulgated above meets all these
requirements. It helps to ascertain the facts speedily, tends to prevent fraudulent
divorces, and protects the interests of the Commonwealth.

(2) There is no delegation of judicial authority. The commissioner in chancery is
an officer of the court and under its control.

PL. & Pr.  Bill of Review  193 Va.320

(a) Fill in the blanks, "A bill of review does not lie to review or correct errors
of judgment in the determination of _1_. If there be error in this particular,
after a final decree, it can be corrected only by _2_. But if
error of _law_ be apparent from an _3_ in the cause, and a
_A_ has been entered, a proper case for a bill of review is _prime facie_
presented." 1 facts; 2 an appellate court; 3 inspection of the record; 4 final
decree. P.325.

(b) "There are only two grounds on which a bill of review may be filed, viz:
(1) _1_ or _2_, or
(2) _1_ or _2_. P.326.

(c) P filed a partition suit against D who suffered a decree to be entered against
him by default on Dec.20,1950. On Jan.30,1951 D came to life and filed a petition
for rehearing for error of law apparent on the face of the record. The court reopened
the case and found for D. Was this error?

Held: No. The decree of Dec.20,1950 became final 21 days after its entry. While the
case cannot be reopened by a petition to rehear after the decree has become final the
petition to rehear if it points out the errors of law apparent on the face of the
record can be treated as a bill of review which lies to a final decree for such errors.
H and W, husband and wife, owned a house and lot as joint tenants without survivorship. H died intestate. There were three children. W contracted to sell the land to D who agreed to pay off a first deed of trust at the rate of $26 per month, and to pay $650 when W gave him a warranty deed. D took possession of the whole and kept up the $26 payments. Ten years later after the death of W the children filed a bill of complaint for partition claiming that D had no interest in the property. D failed to defend, and the Commissioner found that the value of the use of the property to D far exceeded the $26 per month he had been paying, and that the contract between W and D was void for lack of mutuality as W's children could not be forced to convey their half interest since they were not parties to the contract. The Commissioner's report was approved by the court and a final decree so far as D was concerned was entered. Sixty days after the entry of the final decree D obtained counsel. What, if anything, can be done?

Held: It is proper for D to proceed by a bill of review for error of law apparent on the face of the record. At the very least D may claim all of W's rights in her half of the property, and he cannot be deprived of that half just because he cannot get the other half. D is under no duty to pay the $650 until a warranty deed is given and hence is not in default. The heirs of W took her interest subject to the contract she had made with D.

PL. & PR. Rule 5:1.3(e) 193 Va. 390

P sued D for damages suffered in an automobile accident. The verdict of the jury for P was received by the court on July 7, and defendant moved to set it aside, assigning reasons therefor. The motion was taken under advisement and continued for argument which was heard on October 26 at which time the court overruled the motion and pronounced judgment upon the verdict. No order was entered on this day, a controversy arising between counsel as to the contents of the order to be entered carrying into effect the court's oral pronouncement. Each counsel submitted a draft of an order (judgment) On Nov. 4. Thereupon the court drew its own order, resolving the differences between the parties, autographed the same October 26, 1950, endorsed it and mailed the original to the clerk and copies to counsel. Was final judgment entered on October 26 or on Nov. 4th? If on the former date the transcript of the testimony and other incidents of the trial was not tendered to the judge within sixty days from the time when judgment was entered. Rule 5:1.3(e).

Held: November 4th. There is a difference between the rendition of a judgment and the entry of a judgment. In this case the judgment was rendered on Oct. 26 but it was not entered until Nov. 4th. Entries must pro tanto cannot be given retroactive effect which would result in cutting down plaintiff's time for applying for a writ of error.

PL. & PR. Criminal Law and Procedure 193 Va. 449

Code 19-232 provides that if the same act be a violation of two or more statutes * * * conviction under one of the statutes shall be a bar to a prosecution under the others. D was driving recklessly while drunk. Can he be convicted of both reckless and drunken driving?

Held: Yes. The offenses are not identical. A drunken man might conceivably drive carefully, and sober man sometimes drive recklessly.

In this case D was taken before a justice of the peace immediately after his arrest. Is the justice of the peace a competent witness in the circuit court to testify as to his drunken condition? Held: Yes. He is not testifying as to statements made by the accused but as to what he saw regarding his condition. Moreover our present statute (19-241) prohibits trial justices from testifying as to statements and the former prohibition against justices of the peace so testifying no longer appears in the statute.
Crininal Procedure--Const.Law.

D was convicted of involuntary manslaughter and sentenced to a year in jail and a fine. The jail sentence was suspended and D was placed on his good behavior (not on formal probation) for the year. Within a year he violated the condition of the suspension three times but these violations did not come to the court's attention until after the expiration of the year. Has the court jurisdiction to revoke the suspension?

Held: Yes. The court may prescribe the time and the conditions of this probation. If it prescribes the time, i.e., the period of probation, the court may under section 53-275 revoke the suspension and the probation only within the probation period. If no such probation period has been prescribed, the court may revoke the suspension at any time within the maximum period for which the defendant might originally have been imprisoned.

PL. & PR. Criminal Procedure

D was on trial for illegally selling a half pint of whiskey at a certain time and place. Her attorney put W on the stand to testify she was at another place at that time. The judge then said, "I'm not going to allow this evidence that D was in Richmond; it has nothing to do with this case." The attorney remonstrated and said he thought it was most pertinent. The judge then, without any explanation, reversed himself and let the evidence in. The attorney, however, wished the court to declare a mistrial, but the motion was overruled. Should a mistrial have been declared?

Held: Yes. The jurors might well have inferred that the presiding judge did not think the testimony material, or, if material, that it was not entitled to credence. These jurors might have inferred also that the presiding judge was of opinion that the accused was guilty. It was the jury's duty and not the judge's to pass on the credibility of the evidence and he should have scrupulously abstained from conduct usurping the jury's function and indicating bias against the accused. The very least he could have done was to explain to the jury that he had made a mistake and that they should disregard his remarks.

PL. & PR. Necessity of Stating Grounds of Defense

P sued D for a debt without any indication that he was suing him other than as a principal debtor. P's evidence, however, indicated that if D was liable at all he was liable as guarantor. D then attempted to rely on the defense of the statute of frauds although no such defense was set forth in D's grounds of defense. See Rules 3:5 and 3:7. Can he do so?

Held: Yes. Rules 3:5 and 3:7 are applicable only where the notice of motion indicates the necessity or propriety of such a plea. In this case there was nothing on the record to suggest that the statute of frauds would be involved until plaintiff introduced his evidence. As D pointed out, if P had attempted to show that Pace (the real principal debtor) was D's agent, it could as well have been argued that D should have pleaded non-agency before being allowed to deny it.

PL. & PR.-- Criminal Procedure--Const.Law.

X, a Negro, was tried and convicted of murder of a white man. The case was reversed and remanded by the Supreme Court of Appeals. On the retrial of the case, X, for the first time defended on the ground that the grand jury which indicted him was improperly selected, that is, he wished to withdraw his plea of not guilty and to plead new in abatement to the indictment.

Held: By failing to object on that ground at the first trial the matter was waived. One cannot be permitted to gamble on the outcome and lose, and then get a new trial. A plea of not guilty was a plea to the merits, and it has always been the law that one cannot plead in abatement after pleading to the merits, and even assuming that it was discretionary with the trial court to grant defendant's request it certainly was not an abuse of discretion to refuse to do so. "When a new trial is awarded the case is in the same situation as when the first trial began, that is to say, all the proceedings subsequent to the joinder of issue on the plea having been set aside, the Commonwealth and the defendant are at issue on the plea of not guilty."
PLEADING AND PRACTICE

D promised to deed a house and lot to P for $8500 as soon as D, or a certain real estate agent, could find another place suitable for D. Months went by and D continued to remain in the house. P filed a bill in equity alleging that D was making no attempt to find other quarters and was not acting in good faith.

Held: These are mere conclusions of the pleader. It is not alleged that the agent has found a suitable place for D to go, nor are there any averments of the circumstances as to D's alleged inaction and bad faith.

PLEADING AND PRACTICE

P sued D in equity when D was almost 21 years of age. D's guardian ad litem filed an answer. When D became 21 the Court allowed him to withdraw the answer and enter a demurrer instead. P's bill showed on its face that if she ever had a cause of action it arose when she was 16 years of age, that she is now 29, and that the party she charged with a gross fraud was her father who died a year or so ago. Discuss points involved.

1. Though a demurrer and an answer may be filed at the same time a demurrer cannot be filed after an answer has been filed. (2) But the court, for good cause, may allow the answer to be withdrawn and then permit a demurrer to be filed. Rule 2:23 reads, "The time for filing pleadings may be extended by the court in its discretion, and such extension may be granted though the time fixed has already expired; ***" (3) The moment an infant becomes of age he has control of the suit and he may disregard the answer set up for him by his guardian ad litem before a decree or judgment has been rendered. (4) Here P's bill shows on its face that she is barred by her laches as she had 8 years after reaching her majority to ascertain the facts and she has deliberately waited until the principal witness against her has died, so D's demurrer should be sustained.

PLEADING AND PRACTICE

CONSTITUTIONAL LAW

X hired union men to do a job. They went out on strike so X then hired non-union men. X's place of business was then peaceably picketed by one picket who carried the usual unfair sign. The purpose of the picketing was to notify all union sympathizers of the fact of alleged unfairness and to bring pressure other than physical on those hiring non-union men to change over to union men. X applied to the law and Equities Court of Richmond for an injunction against picketing which the Judge refused.

(1) May a single Justice of the Supreme Court grant an injunction? Yes. Va. #2-618 reads, "When a circuit or corporation court, or city court having chancery jurisdiction, or a judge thereof, shall refuse to award an injunction or having awarded a temporary injunction, dissolves, or refuses to enlarge the same, a copy of the proceedings in court, *** may be presented to a judge of the Supreme Court of Appeals, who may thereupon either award an injunction, or reinstate the injunction dissolved, or enlarge the injunction. Note: If a judge of the Supreme Court of Appeals awards the injunction it is entered as a decree of the trial court and an appeal lies to the whole Supreme Court of Appeals.

(2) It was held in the above case that no injunction should have issued since the purpose of the picketing was not illegal and the Constitutions of both State and Nation allow freedom of speech. 191 Va. 272. (abstracted in section on constitutional law) followed.
pleading and practice 

pleading and practice--depositions. 568a. 1214 va. 284
w filed a bill of complaint for a divorce against h. the fifth paragraph of the bill stated that depositions would be taken at a certain time and place stated therein. no further notice of the time and place was given h, and he failed to appear at the said time and place. are the depositions taken at that time and place in behalf of w admissible?

held: no. quoting from headnotes, "the purpose of the required notice to an adversary of the taking of depositions is to give him the opportunity to appear and cross-examine the witness, if he so desires. to accomplish its purpose a notice—should be clear and explicit. a notice which is confusing and misleading is not 'reasonable' and does not meet the requirements of v#8-307." since the purpose of the bill of complaint was different namely to inform the defendant and the court of the nature of the case, a notice to take depositions incorporated in the bill is in conflict with the terms of the subpoena, for it notifies the defendant to be present at a time and place and for a different purpose from that stated in the subpoena and is apt to confuse and mislead, or to be overlooked and is hence not the reasonable notice required by the code. note: if at the time of commencing suit the plaintiff desires to give notice that depositions will be taken at a certain time and place, this should be done by a clear and explicit notice embodied in a separate instrument and served on the defendant.

pleading and practice--federal procedure 199 f2d 720.
p sued d in a virginia state court for false imprisonment and malicious prosecution. d removed the case to the federal district court. the judge thereof required p to elect the one action or the other. was this correct?

held: no. rule 8(e)(2) provides that a party may state as many separate claims as he has, regardless of consistency, and whether based on legal or equitable grounds, or both. and rule 8 1(c) provides that the rules shall apply to civil actions removed to the district courts from the state courts.

note: burks(4th ed)p.254 states that in virginia slander, an action for insulting words, libel, malicious prosecution, false imprisonment and abuse of process may be united in one action.

pleading and practice--parties insurance 194 va. 367.
p left his car at d's garage to be repaired. the car was destroyed by a fire which might or might not have been due to d's negligence as reasonable people could have differed in view of the evidence introduced at the trial. p was insured and the insurance company paid p. d moved the court to place upon the notice of motion for judgment after the name of p the following, "who sues for himself and the insurance company as their interests may appear." this motion was granted over the protest of p.

held: error. this is in effect telling the jury that p has already been paid, and that they should not shift the loss from a rich insurance company who was paid a premium to bear it to their neighbor, d, whose business has just been wiped out by a fire. the cause of action by p against d has not been assigned to the insurance company. the assignment statute allowing an assignee to sue in his own name was not passed for the benefit of defendants. moreover the judge's action violated the spirit of v#8-96 which reads in part as follows: "nothing in this section shall be construed to permit the joinder, or addition as a new party, of any insurance company on account of the issuance to any party to a cause of any policy or contract of liability insurance for the benefit of or that will inure (to) the benefit of any party to the cause." if d really believes that p may not account to the insurance co. he can make the above motion after verdict when it will not affect the jury.

pleading and practice--demurrer as a final judgment 194 va. 394.
p instituted an action at law against d who demurred to the motion for judgment. d's demurrer was sustained as evidenced by an order entered on march 29, 1951 simply stating that it was adjudged and ordered that the demurrer be sustained, "to which action of the court the plaintiff excepts." on may 21th p asked for leave to amend
his motion for judgment which request was refused on the ground that the court was without jurisdiction to allow an amendment after the expiration of 21 days of the entry of judgment. Did the Court have jurisdiction to allow the amendment?

Held: Yes. "This court has consistently held that an order merely sustaining or overruling a demurrer is not final. An order sustaining such a demurrer, in order to be final within the meaning of Code, sec.6-162 must go further and dismiss the case." Instant case reversed and remanded. Rule 3:13 reads, "In granting leave to amend the court may make such provision for notice thereof and opportunity to make response as the court may deem reasonable and proper." "The trial court in the exercise of its discretion, may permit a litigant to amend his motion for judgment, and impose such terms and conditions as may be reasonable and proper, and if the litigant fails to comply with the conditions within the time specified, he is barred from further prosecution of the same case, against the same parties."

PLEADING & PRACTICE

The C&P Telephone Co. sought to enjoin the City of Newport News from collecting a 3\% gross receipts tax. It prayed the court that in the event that equitable relief was not given on the ground that there was an adequate remedy at law that the case be transferred to the law side of the court. The court dismissed the case because there was an adequate remedy at law. Was this error?

Held: Yes. "W S 13 provides that 'no case shall be dismissed simply because it was brought on the wrong side of the court', but that when a plaintiff has proceeded in equity when he should have proceeded at law, or the other way about, the court shall direct a transfer to the proper forum."

PLEADING & PRACTICE Res Adjudicata

When X died he was survived by A; A's daughter, B; and by C. B claimed that X and A had contracted a valid common law marriage in Washington, D.C. in early 1902 and that she was the legitimate child of X. C claimed that B was illegitimate, and that she, C, went through a marriage ceremony with X in late 1902 and had lived with him as his wife until X's death in 1948 and that she was his widow and sole heir at law. When X married C no objection was made by A who has since married a number of times without ever divorcing X. After X was killed in 1948 in an automobile accident C qualified as his personal representative and settled the claim under the death by wrongful act statute for $1200. After settlement of the claim B sued C, and C only, for her part of the $1200. The trial court instructed the jury that B was not entitled to any judgment in her favor unless they found she was the legitimate daughter of X. The jury found in her favor and gave her $1 and costs. B is now claiming to be X's heir and as such entitled to X's realty. She says that it is res adjudicata that she is legitimate.

Held: It is not res adjudicata. For a judgment to be res adjudicata it must be a valid judgment. To be a valid judgment the complaint must state a cause of action and all necessary parties must be joined. Since in Virginia in death by wrongful act cases the jury have an absolute discretion as to how their award shall be distributed among members of the same class there is no assurance whatever that the jury, if there had been one, would not have given the whole sum to the widow. Thus B's case was bad on its face as founded on mere speculation. Moreover, if B's theory is correct A would be X's widow, and A was a necessary party. Since she was not joined in the action the judgment in B's favor was a nullity and hence not res adjudicata.

PLEADING & PRACTICE

In a bill for an injunction, alleged that he was the owner of a certain tract of land and that D was cutting valuable timber therefrom. Is the bill demurrable?

Held: Yes. It is not sufficiently merely to allege ownership. P should also set forth his title. "Where he claims under a paper title he should generally exhibit his title papers, or copies thereof, or such of them at least as will make out a prima facie case of title."
PLEADING & PRACTICE Statute of Limitations Wills Contracts 194 Va.641.
U and N were uncle and niece. In 1945 U told N that if she would take care of him for the rest of his life he would leave her everything and gave her a validly executed will leaving everything to her. U died on May 16, 1948 and N had the will in her favor probated. Later N discovered a later will, but this will had been revoked by U by cutting out his name and the names of the witnesses. Court proceedings resulted and it was held that the second will revoked the first will although inoperative as a will for other purposes, that the destruction of the revoking will did not revive the original will, and that U had died intestate. On May 21, 1951 N sued U's administrator for damages for breach of contract. The defense was the three year statute of limitations.

Held: The defense is not valid. Under the doctrine of anticipatory repudiation N had an action against U during his lifetime because of U's absolute repudiation. She could have sued then, or waited until his death. VA-31 reads, "The period of one year from the death of any party shall be excluded from the computation of time within which, by the operation of any statute or rule of law, it may be necessary to commence any proceedings to preserve or prevent the loss of any right or remedy." This in effect changes the three year statute to a four year one where one of the parties dies.

PLEADING AND PRACTICE Damages 194 Va.70b.
P sued D for the tort of criminal conversation. The jury, though properly instructed, returned a verdict for P for $10,000 "as punitive damages only." The judge suggested to the foreman that the last four words should be crossed out. The foreman obliged and without further deliberation each member of the jury acquiesced in the change. D contends that there can be no verdict awarding punitive damages unless there were compensatory damages and since the jury found punitive damages only, it is really a verdict in favor.

Held: D is only half right. It was error for the trial court to strike out the last four words as that was a change in substance rather than mere form. Acquiescence by the jurors without deliberation did not cure the defect. But the verdict for P for $10,000 punitive damages only, can not be interpreted as a verdict for D. Rather it indicates that the jury misunderstood the instructions. Ordinarily, then, the case would be reversed and remanded, but since neither side wished another trial it was affirmed by mutual consent.

PLEADING AND PRACTICE 194 Va.709.
X was injured in an automobile accident due to the negligence of D. A few months thereafter X died from a heart attack not connected with the injury. In the meantime X had started suit against D. After X's death P qualified as her personal representative and revived the suit. P claims that the jury can award damages for pain and suffering since he is prosecuting X's suit and X could have recovered such damages.

Held: No. VA-268 passed in 1950 reads, "No cause for injuries to person or property shall be lost because of the death of the person liable for the injury. No cause of action for injuries to person or property shall be lost because of the death of the person in whose favor the cause of action existed, provided, however, in such action no recovery can be had for mental anguish, pain or suffering." This language may be inconsistent with VA-640 but if it is, the later statute (the one quoted) prevails. In death by wrongful act cases there can be no recovery for pain and suffering of the deceased, and it would be illogical to allow it where the administrator sued defendant on a revived action, and not allow it where the administrator sued on the original cause of action.
In a negligence case in which the evidence as to P's contributory negligence was conflicting, the jury found for P in the sum of $2,000 which was fair compensation for the injuries received. P was only 16 and had brought suit as if he were an adult. D contends the whole proceeding are void. Is he right?

Held: No. While an infant should sue by next friend, Va. 8-47 reads in part: "No judgment or decree shall be arrested or reversed: (1) For the appearance of either party, being under the age of twenty-one years, by attorney, if the verdict, where there is one, or the judgment or decree, be for him, and not to his prejudice." Note that if the judgment had been against him it would have been a nullity, and if the damages had been grossly inadequate in a clear case it would have been to his prejudice.

PLEADING AND PRACTICE Federal Jurisdiction and Procedure 194 Va. 572
D in violation of federal statutes against certain unfair labor practices by threats of force prevented P's employees who were members of the AF of L from continuing to work for P. D stated that P was in United Mine Workers' territory and that the men would have to join an affiliated union or else. The threats took place in Kentucky. P is a Virginia Corporation engaged in the construction business. P sued D in Richmond in a State Court on common law principles. Has the court jurisdiction?

Held: Yes. The federal statutes provide remedies but they are not exclusive. P may ignore such statutes and sue on common law principles. Maliciously interfering with P's contractual relations with the AF of L and with the coal companies for which he was doing construction work constituted a tort for which both compensatory and punitive damages could be recovered under the laws of Kentucky. It was also held that the Supreme Court of Appeals could strike out an unproved item of compensatory damages in the sum of $116,000 for injury to P's business reputation, and, as modified, give judgment for P without requiring the case for a new trial on the question of damages.

PLEADING AND PRACTICE Venue and Jurisdiction 194 Va. 911
D, a defendant and sheriff of F County, had given the bond required by statute, which bond ran in favor of the Commonwealth, and the S Surety Co., Inc. of Baltimore was surety thereon. D resided in F County. He broke the conditions of his bond in W County to the injury of P, the breach being contractual in nature. Va. 8-716 provides a remedy by motion on official bonds but states that suit may be brought in "the court to which any bond taken by an officer, or given by an sheriff, is required to be returned, filed, or recorded," in our case F County. P sued D and S in W County in the Commonwealth's name to wit, "Commonwealth of Virginia, Ex Rel. D and S for the benefit of P." D was properly served in F County, and filed a plea in abatement (as did S whose statutory agent was served) contending that the only venue was the statutory one of F County.

Held: (1) The plea in abatement is bad. Va. 8-716 is cumulative and gives an additional venue. Since the cause of action arose in W County, that was a proper venue, (2) but since this is not one of the cases in which process will issue out as far as D is concerned, the service on D was a nullity and the Circuit Court of W County acquired no jurisdiction over D. A distinction was drawn in the case of actions on official bonds as follows: (a) Where the bond is taken by an officer pursuant to statutory authority (as where he takes an indemnifying bond), that is one of the four cases in which process may issue out of the county or city in which the action is brought. See Va. 8-47 (1). (b) But where a bond is given as required by statute for the faithful performance of the duties of the office, this section has no application. Note (1): Since S was a corporation, process properly can be served out of W County to be served on S's statutory agent. Note (2): Where the service of process on a defendant is invalid, no formal plea is required, and the court should itself raise the objection, if observed. Note (3): But if a corporation is a defendant on a note and S is an indorser, and Plaintiff sues defendant and S in A County where the Corporation has its principal office, process will issue out of A County and can be served on S in F County where S resides (as in this case there are other grounds of venue than that the cause of action arose in A County). 146 Va. 215, 135 S.E. 823.
PLEADING AND PRACTICE  Rule 5:1, Sec.4, and Rule 1:8  195 Va.269.

Within sixty days after final judgment defendant filed with the clerk his notice of appeal and assignments of error as follows: "Because the trial court erred in giving to the jury in writing, improper instructions on motion of the Commonwealth." The only objection to the ruling of the trial court is stated thus: "Defendant objected and excepted to the action in giving the instructions (specifying them)."

Held: The writ of error should be dismissed. The assignments of error must specifically point out the errors relied on or identify the instructions allegedly erroneously given. Rule 5:1, Sec.4. Furthermore Rule 1:8 require that the reasons for objections be stated with reasonable certainty. Counsel must "lay his finger on the error." It is not enough to invite the court to delve into the record and winnow the chaff from the wheat.

PLEADING AND PRACTICE--Meaning of "conviction".  195 Va.353.

Va.16:46.1 requires revocation of the driver's license of any person twice convicted within a twelve months' period of violating any speed law. D was once convicted and later on in the twelve months' period was arrested for speeding. He gave bond and forfeited it rather than stand trial. Should his license be revoked?

Held: Yes. The legislature did not intend to leave the violator of speed laws such an easy way out. The act is constitutional as it is a reasonable regulation of one's privilege to drive a car on the highways.

PLEADING AND PRACTICE--Not a quotient verdict  195 Va.468.

In eminent domain proceedings three commissioners favored a sum of around $5,000 and two commissioners favored a sum around $12,000. It was then suggested that each man put down the sum he favored, that these amounts be added, that the total be divided by five, and the amount obtained thereby then be considered. There was no agreement made in advance that that amount would necessarily be the amount of the award, although such sum was eventually awarded.

Held: The award is not invalid as a quotient verdict. Had they all agreed in advance to accept it without further consideration then it would have been void. It is only natural for people to have different opinions on values and when they do, there must be some compromise, and if the compromise is based on reason it is immaterial that some figure more or less arbitrarily taken, was used as a starting point for the arguments.

PLEADING AND PRACTICE  195 Va.678.

Case 1. P sued D, a foreign corporation, for damages for breach of contract. He did not allege or prove that D had ever done business in Virginia, or that D had ever designated anyone to be his agent in Virginia. Process was served on the Secretary of the Commonwealth. D moved to quash the process for lack of jurisdiction. P contended that all pleas in abatement must be sworn to, and hence the oral motion should be overruled.

Held: A motion to dismiss or want of jurisdiction (as distinguished from want of venue) is not a plea in abatement and hence need not be sworn to. While such an objection could have been made by a plea in abatement, it need not be. Indeed the court of its own motion could have dismissed the case.

Case 2. P sued D, a foreign corporation, for damages for breach of contract. There was proof that the corporation a year or two before the institution of this action had been doing business in Virginia but that it had closed its offices in this State before this action was started. There was no proof that D had ever appointed the Secretary of the Commonwealth as its statutory agent. Process was served on that party. On these facts the trial court dismissed the case on motion for lack of jurisdiction.

Held: Error. A motion to dismiss for lack of jurisdiction, like a plea in abatement is not sufficient unless it negatives every ground of jurisdiction enumerated in the statutes. Under Va.113-21/ a foreign corporation that does business in this State by that very act is deemed to have appointed the Secretary of the Commonwealth his agent.
to receive process. While there was no jurisdiction under V#13-211 or 13-214 since no agent had been appointed, there was jurisdiction under V#13-217 supra, and this ground of jurisdiction had not been negatived. "The provision of V#13-217 for the service of process is a condition upon which it is allowed to do business, accepted by it when it enters the State and engages in business without domesticateing or appointing a statutory agent. It should not thereafter, by the simple expedient of closing its office and leaving this jurisdiction, be allowed to withdraw that assent so as to defeat an action which grew out of business done here."

PLEADING AND PRACTICE

In an equity case none of the testimony was presented to the trial court for certification within the time allowed by law and hence did not become a part of the record and could not be considered an appeal. However numerous exhibits offered in evidence when the testimony was being heard were marked for identification and initialed by the judge. Rule 5:1 #3(d) provides that when so marked and initialed the exhibit becomes part of the record. Defendant wishes to rely on the exhibits in the Supreme Court of Appeals.

Held: "It cannot do so in spite of the language of Rule 5(supra). Evidential value cannot be given to that which constitutes only a part of the evidence. "The oral testimony not made a part of the record may have weakened or totally destroyed the evidential value of any or all of the exhibits now relied upon by the appellants. If a litigant without consent of other interested parties, were allowed to present his cause in this court upon only a part of the evidence, the inevitable result would be that the merits of the case would be determined on appeal upon evidence materially different from that considered by the trial court. That cannot be permitted."

PLEADING AND PRACTICE Statute of Limitations 195 Va.827.

A sub-contractor in 1943 put in a defective union in a gas pipe which led into a house which was being built by D, a contractor, for P who accepted the house in 1944. Because of the defect(1)the union broke, (2)gas followed the pipeline beneath the building, (3)collected in the basement, and (4)was ignited by a flame or spark causing an explosion in 1948 which destroyed the house. P sued D claiming that the statute of limitations was five years and that it did not start to run until the defect was discovered as a result of the explosion.

Held: (1) The wrong resulted in consequential or indirect damage to property rather than a direct injury thereto, and hence would not survive at common law. Therefore the statute of limitations is one year. This is to be contrasted with 185 Va.718 where E relied on a false statement that a furnace was of sufficient capacity to heat the house as the wrong in that case was a direct damage to E's property. (2) The statute of limitations starts to run as soon as the wrong is done regardless of the difficulty of ascertaining that fact unless defendant fraudulently conceals facts; and not from the time it is ascertained that damage has been sustained. The fraud must be actual and not constructive. In the instant case there was no actual fraud on D's part as D had only constructive notice of the defect when D told P in 1944 that all work had been properly done. This representation was made not for the purpose of concealing a fraud, but for the purpose of collecting the balance D actually thought was due him. Statutes of limitations are statutes of repose and that purpose would be defeated if one might be held liable many years later. (Note: The court did not commit itself as to underground trespasses. It merely stated that there was no trespass in this case.)


Mrs. P while driving her husband's car was in an accident with X who sued her in a civil and police court for $252 damages done his car. Mrs. P counterclaimed for $207 damages done her husband's car. The trial judge refused to dismiss the counterclaim but denied recovery to either party on the ground that each was negligent. That is X lost his suit against Mrs. P because he was negligent, and Mrs. P lost her suit
on the counterclaim because she was negligent. Later Mrs. P brought an action for $70,000 against X for personal injuries incurred in the accident. X contends that it has already been adjudicated that she was negligent and hence recovery should be denied.

Held: On rehearing (196 Va.322) Contention upheld. A gratuitous bailee can sue a third party for injuries done the bailed property. Hence we had the same parties and the same issues and the matter is res adjudicata. (Two judges dissented on the ground that the ballment issue was not made at the trial, and one cannot raise a new issue for the first time on appeal)

PLEADING AND PRACTICE—Equity

A bill in equity was filed for the reformation of a fire insurance policy. Defendant answered. The parties agreed that the principal controversy was whether or not defendant was guilty of fraud or other inequitable conduct and that matter was submitted to a jury "pursuant to Code 8-213" which provided that in a case of a plea in equity the parties are entitled to a jury trial as a matter of right. The evidence showed no fraud but it did show a mutual mistake. Nevertheless the jury found for complainant and the trial court refused to set the verdict aside. Defendant appealed.

Held: Va.2-13 applies only to a plea, and not to an answer. Hence the verdict of the jury in this case would at best be advisory only. Since there was no evidence to support the verdict it should have been disregarded. But this error is harmless as reformation should have been granted on the ground of mutual mistake of fact.

PLEADING AND PRACTICE C by his will directed that his executors create several trust funds out of his total estate and gave them the power to sell his realty for this purpose. The executors claim that K holds an undivided 49/100 interest in the Grand Caverns as a resulting trustee for C and brought this suit to establish such a trust. The executors did not make C's devisees parties. K demurred on the ground that at C's death title to the real estate passed to his devisees and that this suit could only be maintained by them. What ruling?

Held: Demurrer overruled. K's claim overlooks the fact that the executors were expressly given the power to sell the realty. In such a case the executors take the title to reallty for the purpose indicated and are the proper parties plaintiff.

PLEADING AND PRACTICE Creditors Rights Mechanics Lien

P, a sub-contractor, furnished C, a contractor, with ready mixed concrete for M from June 23 to August 3. There was evidence that if the bill had been paid by August 25 there would have been a discount of 25 cents per cubic yard. The memorandum claiming the lien was duly filed and suit was instituted to enforce the lien on the following February 21st. The statute (V/43-17) requires the suit to be instituted within six months after the whole debt becomes payable. Was the suit instituted in time?

Held: Yes. The debt becomes "payable" as soon as suit could be successfully instituted and when interest at the legal rate would commence if unpaid. Since there was a discount if paid before August 25th no interest would start to run and no action could be maintained before that date. The rule that the debt is payable when the last of a series of services rendered pursuant to contract is performed has no application if a longer time is allowed for payment as it was in the instant case.

PLEADING AND PRACTICE Contempt of Court

The Circuit Court of N. County ordered a Ferry Co. and the Pennsylvania Railroad Co. to continue ferry service. They refused to do and were fined for contempt of court. They appealed. What result?

Held: The Circuit Court had no jurisdiction to issue such an order. In the absence of statute the operator of a ferry can cease his operations. He may forfeit his
franchise if he does so, but he cannot be forced to continue. Since the Court had no authority to issue the order such order was absolutely void and hence could be violated with impunity. Note: If the Court had had jurisdiction, disobedience of its order would have been contempt of court even though it was later determined that the law violated was unconstitutional.

Pleading and Practice Invited Error Torts 196 Va.469.

P was driving his car. His wife was his passenger. D was driving at an excessive speed and ran into P's car as P was making a left turn. P's wife was killed. She was the mother of nine children. P qualified as her personal representative and recovered a verdict of $10,000 "payable to P, the personal representative." D's attorney suggested that the verdict be changed, if that was what the jury intended, to make the $10,000 payable to P. The jury were then told they could make it all payable to P, or all payable to any one of the children, or divide it up between them. The jury stated they wanted it all to go to P. The Court then asked the attorneys if that was all right with them, and they answered affirmatively. D now contends that P was guilty of contributory negligence, that at least there was a jury question on that point, that a beneficiary who was to blame in causing the death cannot share in the proceeds, and hence that the verdict is contrary to law.

Held: While a beneficiary whose negligence proximately contributes to the death of the deceased cannot take, D, in this case is now estopped to claim that D was guilty of such negligence. He himself, through his attorney, suggested to the jury that P be made the beneficiary and told the Court he had no objection to such a verdict. Having invited the error, if any, he cannot now take advantage thereof.

Pleading and Practice Pleas in abatement 196 Va.590.

D, a railroad, ordered a large amount of coal from P. Preliminary negotiations were in Wise County but the contract was accepted in Wilmington, N.C. The coal was to be delivered to D in coal mine in Wise County. D refused to send in orders from its office as it had done in the past. The principal office of D was in Richmond. P tendered coal to D in Wise County which was refused. D was served with process in Richmond, though sued in Wise County. D filed a plea in abatement which the trial court sustained and this appeal followed. Note the following points:

(1) Wise County is not the proper venue unless all or part of P's cause of action arose there. If this condition is satisfied then process will issue out because D is a corporation.

(2) The cause of action in case of breach of contract arises either where the contract is made or where it is breached. The contract in this case was made in Wilmington. It was also breached there when no orders were given. But it was also breached in Wise County when D refused to accept coal there. Hence part of the cause of action arose in Wise County and that county is a proper venue. Reversed and remanded. Note: Where defendant files a plea in abatement the burden of proof is on him to establish all the facts he alleges in said plea.

Pleading and Practice Inconsistent Positions 196 Va.549.

P sued D for $11,589 and for $9,533 alleged to be due on two separate construction contracts. D defended on the ground that the contract was illegal because P had contracted for work in excess of $20,000 in violation of §54-113 et seq. as he had no state license. P contended that the statute was inapplicable where there were separate jobs each under $20,000. D then withdrew his plea of illegality and added that the parties had made a compromise settlement. This compromise provided that D would pay P $11,500 within sixty days, and that if he failed to do so then judgment for the whole amount sued for should be entered. This agreement was entered of record. D failed to pay within the sixty days, and objected to the Court entering judgment for the full amount sued for because the original contracts were illegal.

Held: D cannot play fast and loose with the Court. Having withdrawn the plea of illegality, and entered a compromise agreement of record, he cannot now assume an inconsistent position. Were it otherwise there could not be orderliness, regularity, and expedition, all of which are required in order to do justice.
PLEADING AND PRACTICE  Judicial Sales 196 Va.551.
T was trustee under a deed of trust of the Hotel Jefferson in Clifton Forge. The owner died and his widow filed a bill in equity for the settlement of his estate. While this case was pending default was made in paying the debt secured by the deed of trust. T informally moved the court for permission to sell the property as per the terms of the deed of trust, and an order was entered authorizing him to do so. Everyone agreed to this procedure. The hotel was sold and brought $90,000. T's commission would be $4500 if this be regarded as a sale under an ordinary deed of trust but only $2100 if this be regarded as a judicial sale. To which commission is T entitled?
Held: $4500. It is not a judicial sale because the court appointed no commissioner to hold the sale, required no bond, and made no provision for its confirmation all of which are required in the case of a judicial sale. The order was to sell as per the terms of the deed of trust, so the sale is an ordinary sale by a trustee of a deed of trust after default and request by a creditor secured by the deed of trust to sell.

PLEADING AND PRACTICE  Res adjudicata 196 Va.597.
C maintained a barricade in a highway where it abruptly narrowed from four lanes to three. B drove his car into the barricade, lost control of his car, and went on into M's house damaging the house and himself. M sued B and C. M won as to B but lost as to C and the judgments became final. Then B sued C who entered a plea of res judicata. Is this a good plea?
Held: No, for three reasons. (1) The parties are not the same (2) The issues are not necessarily the same for even if C were negligent as to B this was not necessarily negligence as to M as questions of proximate cause and ambit of duty would be involved in the controversy between M and C that would not necessarily be involved as between M and B or between B and C. (3) Estoppel by judgment must be mutual to give rise to the defense of res judicata. There is no such mutuality here for if C were to sue B for damage done to the barricade the judgment in M v. B would be no bar as the parties and issues would be different. Note: The fact that neither B nor C filed a cross claim against the other when they were sued by M when either could have done so under Rule 3:9 was also persuasive that the issues were different.

PLEADING AND PRACTICE  Immunity from Civil Process 196 Va.651.
W drove his car from his home in Tennessee to testify in the case of Comm. v. D. at the request of the Commonwealth, W owed D $2,000 past due. D attached W's car (for which the $2,000 was due to D) and served him with process. The Uniform Act with reference to out-of-state witnesses (Va.19-242 et seq) was not followed. Should the service of process be quashed?
Held: Yes. Both the attachment and personal service on W should be quashed. The statute is in aid of the common law and does not prevent a simpler method where a witness will come voluntarily. The privilege from being served with process extends to the property of the witness reasonably necessary to his attendance as well as his person. "This immunity works no injustice to anyone, for unless the witness comes within the State, there would be no opportunity to serve process upon him". The courts of Tennessee are open to D if he wishes to sue W. The advantage to the Commonwealth is too important to yield to the personal advantage or disadvantage of individual suitors.

Pleading and Practice  Equity Pleading  Creditors Suit 196 Va.790 at 796.
Ten creditors appeared before a commissioner in chancery to prove their claims as per an order of reference from the chancellor. Nine of the ten claims were allowed. The owner of the disallowed claim appealed. There is not enough for all. Are the nine creditors whose claims were allowed necessary parties in the appellate proceedings?
Held: Yes as their rights may be adversely affected. Hence their counsel should ordinarily be served with copies of the notice of appeal and assignments of error, designation of parts of the record to be printed, and petitions of appeal as required by the rules of court. But where a receiver is contesting all claims in order to conserve funds available and the creditors acquiesce in his actions notice to the receiver or his counsel satisfies the requirement that such notice must be given "opposing counsel."
A, the grandmother of X, and B and C, the parents of X who was three years of age, formed a partnership and borrowed $4,000 of X's money. X attached A's personal property after the partnership had been dissolved but failed to furnish an attachment bond. Does the failure to furnish the bond end the case?

(1) No. While the attachment is dissolved, the case then proceeds as one at law.

On the above facts are A, B, and C jointly and severally liable?

(2) Probably yes as it was wrong for the parents of X who stood in a fiduciary relationship to use his money for themselves. Since A acquiesced in this wrong she, too, became a party to it. Tort liability of partners is ordinarily joint and several.

(3) In the instant case the parties all agreed to an instruction that liability was joint and several. They also agreed that the case should be tried without joining B and C. When A lost, she appealed on the ground that the case should be reversed because it was an action against an individual for a partnership liability. Held: After acquiescing in the way the case was presented below, she is now estopped. One cannot invite error, and then complain of the error. The instructions asked for and granted as asked for became the law of the case even if erroneous.

PLEADING AND PRACTICE

Rule 1:8

A and B are brothers and heirs of P, their father, who died intestate. A was a fugitive from justice and owed some $5,000 in debts in Virginia. B was administrator of P's estate. The share of each was worth about $26,000. A's creditors had attached his interest. A received $5,000 from B and used it to pay off the debts. A gave B a deed absolute on its face conveying to B all his interest in the estate. Later A filed a bill in equity for a decree to the effect that the deed was a mortgage.

When the evidence was taken by deposition A offered testimony the object of which was to invalidate the deed as having been given to one in a fiduciary capacity for a grossly inadequate consideration. B did not object in the trial court that A's evidence did not conform to the allegations of the bill but elected to meet A on the evidence introduced.

Held: This is a waiver, and he cannot now object to the variance. If he had objected below he could have compelled A to allege with more exactness the grounds of his claim. Having failed to do this, the objections he could have made below cannot now be considered. Rule 1:8.

PLEADING AND PRACTICE

196 Va.966,969.

P started a suit under the death by wrongful act statute two days before the statute of limitations would have run. He failed to prosecute the suit, and took a voluntary non-suit some six months later. He then started a new suit on the same day for the same thing. Is the second suit barred by the statute of limitations?

Held: Not barred. The express language of Va§6-63h excludes from the limitation the time that the first action was pending if that action "for any cause abates or is dismissed without determining the merits of said action". The statute does not use the word "nonsuit". Yet its dominant purpose is clearly disclosed.

Given the liberal construction to which it is entitled, that phrase evinces an intent to save to the plaintiff the time the first action was pending. The statute is a remedial one and should not be frittered away by any narrow construction.

PLEADING AND PRACTICE

196 Va.1951.

Detinue Change of Venue

P, who had been treasurer of A County, was running for re-election. He had received a letter from B, a banker, to the effect that a check was encosed in payment of Commissions for effecting certain loans. P turned this letter over to X. Shortly thereafter X and P fell out and X wrongfully gave the letter to D who was P's opponent. D prepared a circular in which he printed excerpts from the letter and in which he charged that P was misusing his power to put county money in certain banks in return for the banks giving him a commission on private transactions. P ran advertisements in the local newspapers to answer the charges, but lost the election. He made an affidavit to the effect that he could not get a fair trial in A County so the venue was changed to H County. The court (1) ordered that the letter be returned to P, (2) allowed $300 damages to reimburse him for the advertisements, and (3) dis-
allowed damages caused by his failure to be re-elected. Discuss points involved.

Held: (1) It was error to change the venue to H County on the mere sworn statement of a party that he could not get a fair trial in A County. Facts and proof thereof indicating must be presented; (2) The letter belonged to P and he is entitled to it; (3) and (4) The damages allowed in detinue for the wrongful detention of the property must result directly from the detention. In the instant case the damages resulted from the misuse of the letter (its publication) and not from the detention. If a thief steals your car, and later negligently runs into you the latter damages cannot be recovered in an action of detinue, but only in an independent action for negligence since they resulted not directly from the detention, but collaterally from the misuse of the property wrongfully detained.

PLEADING AND PRACTICE--Interrogatories--Short v. Long

Short attempted to pass Long's truck and a collision resulted. The evidence as to who was to blame was in conflict. Short sought by interrogatories to ascertain what quantity of alcoholic beverages Long had consumed during the eighteen hours immediately preceding the mishap and at what hours he had consumed them. He could have elicited the same information from a number of witnesses, but did not do so. Va.S.2d4 provides that in a case at law a party may file in the clerk's office interrogatories to any adverse party. The trial judge quashed the said interrogatories. Was this proper?

Held: Yes. The time covered was so long that the questions asked were irrelevant. Besides it is not an abuse of judicial discretion to refuse to allow interrogatories where the party wishing them has ample opportunity to inquire into such matters before and at the trial. Note also that the rule against self-incrimination might be applicable.

In this case the evidence indicated that Long had been damaged some $900. The jury only allowed him $400 on his cross-claim. Short contended that this was error and hence a new trial should be awarded.

Held: Even if it is error only Long can take advantage thereof as Short has not been injured thereby. And that, said the court, is the "long" and the "short" of it.

PLEADING AND PRACTICE

(1) In a complicated automobile collision case in which there were five lawyers, four cars, and five parties involved the jury was having difficulty in coming to an agreement. The trial judge talked to the jury telling them that the case had already taken much time and expense, that if they disagreed there would have to be another trial before another jury no more capable than the present one, and that while no jurymen was under a duty to surrender his conscience he hoped that they could come to some kind of reasonable conclusion.

(2) It also developed that one of the jury was a first cousin of one of the attorneys.

Held: As to (1) above that the judge's remarks were proper as stating the truth, and since he stated that no one was expected to surrender his conscience were unobjectionable. As to (2) relationship to an attorney is not a common law or statutory ground to challenge a juror for cause except in Georgia when the attorney has the case on a contingent basis. In the instant case the fee was not contingent, and besides the objection came too late.

PLEADING AND PRACTICE

Complainants filed a bill of complaint in 1952 to set aside a decree entered in 1919 on the ground that such decree was void, (a) because a proper party was not joined though none of complainants claimed through him, (b) because a deposition of an important witness was prematurely taken and admitted in evidence, (c) and because the allegations in the 1919 bill were false and perpetrated a fraud on the court.

Held: As to (a) Nonjoinder of a proper party will not authorize equitable relief from a decree to other defendants who were properly joined and served, as to (b) the only result of taking the deposition prematurely would be to make it inadmissible and if the result of this were to leave the decree unsupported by sufficient evidence
the remedy was by appeal; as(c) that the 1952 bill of complaint only alleges intrinsic fraud relating to matters expressly disposed of by the 1919 case, and that equity will only relieve for extrinsic fraud practiced on the court on collateral matters which prevented a fair submission to the court, and(d) that complainants were barred by their laches in that they waited 33 years until after numerous witnesses had died without alleging any reason for the long delay.

PLEADING AND PRACTICE Newly Discovered Evidence 89 S.E.2d 320, 197 Va.367.
P sued D for injuries to her back arising out of an automobile accident. At the trial she testified that she had never been in any other automobile accident (except a minor one about which she was not asked) and that she had never before hurt her back. She also testified in such a way as to show that D was negligent. After the trial an anonymous phone caller told D that P was a liar, and for him to contact X. D contacted X and found out from him that he had settled a case out of court for $800 as a result of P's claiming her back was badly hurt in an automobile accident in which X (who was uninsured) had been involved. Is D entitled to a new trial (P having obtained a verdict and judgment for $15,000) and proper affidavits having been filed?
Held: Yes. D could not have obtained this evidence before or during the trial by due diligence, it is material on the question of damages as some of her present disability may have been due in part to the former injuries, it is not merely cumulative, it bears on P's credibility as a principal witness, and probably would change the result of the case.

P was convicted of reckless driving in October 1953 before the mandatory requirement of revocation of a driver's license in case of two convictions of reckless driving within any 12 months period went into effect, and again in May 1954 when such a law was in effect. By statute Va.46-424 there is no appeal from a mandatory revocation by the Commissioner except for mistake of identity where the judgments of conviction are regular. P appealed to the proper Circuit Court on the ground that the act was ex post facto as applied to the 1953 conviction. The Commissioner demurred.
Held: Demurrer should have been sustained for by statute no appeal is allowed except on the question of identity. Hence the Circuit Court had no jurisdiction to determine any other matter.

PLEADING AND PRACTICE 197 Va.471
P was under contract to erect a smokestack at X's factory. He sublet this job to D. Because of D's negligence X's factory was injured, and so was the smokestack. As a result of court action P paid X for the damage done to X's factory and recovered the amount from D by way of re-imbursement. P is now suing D for the damage done to the smokestack and D claims that P had only one cause of action for all the damage done when the smokestack fell, that this cause of action cannot be split, and that having recovered on one portion thereof he cannot now vex him twice for the same thing.
Held: While the principle stated above is sound, it is not applicable to the facts of this case for P's causes of action (plural) were separate causes of action. The moment the smokestack was damaged P had a cause of action, but P's separate cause of action for re-imbursement for money paid X for damages done his factory did not arise until later after P had paid what, as between P and D, D should have paid.

PLEADING AND PRACTICE 197 Va.457
By his bill of complaint P sought to quiet title to his mineral rights in thirty acres of land, to require defendants to account to him for his share of profits obtained from mining said minerals, and for statutory penalties for mining within five feet of the boundaries of his land without his consent. No survey was filed and it is impossible from the allegations to ascertain the boundaries of the thirty acres. The demurrers of the defendants were sustained and P refused to amend.
Held: Affirmed on appeal. Defendants are entitled to know from P's bill of complaint just what he is complaining about. Unless the thirty acres is precisely located defendants have no way of knowing just what acts on their part are alleged to be
pleading and practice  pre-trial conference—summary judgment
197 va.589.
P billed D for poultry food sold by it to D. D claimed the food was defective, that he had lost some $1575 worth of poult's because of the defects and deducted that amount from a check sent to P marked, "payment in full." D notified P it was not accepting the check in full payment, and later had it certified, after which P notified D that its only purpose in certifying the check was to protect itself in case judgment was obtained. At a pre-trial conference the court, after seeing the letters and a photostat of the check rendered summary judgment for D on the ground that the check had been accepted in full payment.

held: error. The pre-trial conference and summary judgment provisions of the rules are designed to prevent clear cases from going to trial. But wherever there is a bona fide dispute about the facts the parties are entitled to a jury trial. Here there are at least two disputed facts. (1) whether or not the check was accepted in full payment pursuant to an express agreement, and (2) whether or not the poultry food was defective. Pre-trial conference is not a substitute for a jury trial where facts are in dispute.

pleading and practice
197 va.736.
P was injured in a collision with D, an infant. The jury viewed the scene with court and lawyers absent, and at the trial found for D. P moved for a new trial on the ground that the jury had improperly taken measurements and made time checks while at the scene of the view. He introduced an affidavit by his counsel that four of the jurors had made admissions to that effect. No hearing was had on the motion. The court, without notice to D's guardian ad litem, inquired of the officers in charge of the jury whether or not the alleged acts had been committed, and, receiving an affirmative reply, set aside the verdict and awarded a new trial. Was this proper?

held: no. D's guardian ad litem was entitled to notice so he could cross examine the officers. The affidavit of P's counsel was hearsay, which, while justifying the Court in making an inquiry, was inadmissible in evidence at such an inquiry. Case reversed and remanded so the motion for a new trial may be properly presented and argued.

pleading and practice
197 va.807.
D sold a building to P for $150,000 cash. D warranted that the freight elevator was in good condition when he knew it had been condemned by the municipal authorities. Three years later P sued D who relied on the defense of the one year statute of limitations.

held: the five year statute applies since damages to property or estate (even if the result of fraud) survive under Va/64-135. By Va/8-2h if no other time is stated the statute of limitations is five years on actions that survive and one year on actions that do not survive.

pleading and practice
197 va.
Appellant requested Supreme Court of Appeals to set aside finding of the trial court on the ground that it was not sustained by the evidence. In designating the parts of the record that should be printed she indicated only the portions thereof that were favorable to her.

held: this is a failure to comply with the rules as the court cannot tell whether such an assignment of error is good unless it has before it a transcript of all the evidence germane to the point.

held, also, that copying a portion of the evidence into one's brief is not an acceptable substitute for a designation of parts of record that should be printed.
P's car and D's car collided. The only fact in dispute was whether P or D was on the wrong side of the road. While the jury was recessed one F informed the jury that his insurance company carried the insurance for both P and D and he volunteered full information about attempted settlements. P's conduct was not known to the Court, D, or the Insurance Co. until after verdict in favor of P. When the presiding judge heard of the matter he summoned the jurors and F to appear before him. He finally held there was no prejudicial error.

Held: Reversed and remanded. "We are mindful of the rule that generally the testimony of jurors is inadmissible to impeach their verdict and that exceptions to the rule are rare. We, however, subscribe to the exception that private communications, possibly prejudicial, between jurors and third parties, are forbidden and invalidate the verdict." In this case any evidence of insurance was irrelevant. There is no presumption that the error was harmless. Note: It was also held that the argument that the insurance company should not profit from the wrong of its agent was fallacious as F had no authority to do what he did and his actions in so doing were outside the scope of his employment.

PLEADING AND PRACTICE  Mandamus Prohibition Pet in Abatement 198 Va. 100
The State Water Control Board filed a petition for mandamus against X of X County to force X to comply with certain anti-pollution orders. The petition was not filed in X County but in the Circuit Court of the City of Richmond. V/#8-12 reads in part, "Jurisdiction of writs of mandamus, except such as may be issued from the Supreme Court of Appeals, shall be in the circuit court of the county*** to which the writ relates." Defendants filed a timely plea in abatement and Petitioners demurred there to incorporating into the demurrer facts not apparent on the face of the pleadings. The Court sustained the demurrer and ordered X to reply to the merits. X then sought an original writ of prohibition from the Supreme Court of Appeals.

Held: (1) The word "Jurisdiction" in V/#8-12 is used in the sense of venue and not in the technical sense of jurisdiction. Hence the Richmond Court (being a court of general jurisdiction) had potential jurisdiction. This being so, the writ of prohibition should be dismissed. Prohibition cannot be used to test venue, or to correct error of a court having the power to adjudicate. (2) The demurrer to the plea in abatement should not have included facts not a part of the record for a demurrer lies only for error of law apparent from the record itself. (3) Even though the case has been tried on its merits, X may still insist on a decision as to whether or not the Richmond Court was proper venue since Sec. 3:6 of the rules reads in part, "A plea in abatement or motion to quash is not waived by the simultaneous or subsequent filing of other pleadings, nor by trial on the merits." (Emphasis added).

The final order of the court overruling plaintiff's notice to set aside the verdict and pronouncing judgment thereon was entered on March 17. On the following April 7, plaintiff filed with the clerk a paper, designated a motion to set aside the verdict because a witness summoned by defendants, but not called, had made improper remarks to members of the jury. Four days later he served notice on the defendant that he would present his motion to the court and ask for a hearing thereon.

Held: Under Rule 3:21 the judgment became final on April 7th (21 days after entry of final judgment). The mere filing of a motion with the clerk within the 21 day period does not extend the period. Since the trial judge did not vacate or modify the judgment within the 21 day period, it has become final, and the trial judge no longer has jurisdiction to deal with it further.

PLEADING AND PRACTICE 198 Va. 231.
D County constructed a sewer disposal plant across from P's Motel. He filed a claim with the board of supervisors for $35,000. This claim was disallowed in his absence. Under the Code written notice of its disallowance must be served upon him. Instead of serving such notice as per the terms of V/#8-51, it was mailed to his attorney who actually received it.
Held: By V/#8-53, if the notice is actually received, then it is immaterial that it
was not served as per the terms of V/#0-51. Held, also, that the deposit of a $50
check is not an appeal bond, since a check is not a bond. (An appeal bond is required
by statute where one appeals to a court of record from a decision of a county board
of supervisors. (Rule 5:1(11) has no application since that rule applies only to
appeals to the Supreme Court of Appeals.)

These cases state that instructions given to a jury without objection become the
law of that case whether right or wrong. It would follow that in affirming such a
case the Supreme Court of Appeals does not decide one way or another on the law
given in the instructions.

PLEADING AND PRACTICE 198 Va.274.
In this case Appellant's appeal was dismissed because;(1) the printed record includ-
ed the pleadings when no objections had been made thereto in violation of Rule 5:1
#6(e); (2) the printed record failed to include the opinion of the judge in violation
of Rule 5:1 #6(d); (3) only a small portion of the record that was germane to the
assignment of errors was printed when Rule 5:1 #6(f) states that "It will be assumed
that the printed record contains everything germane to the errors assigned." Sub-
stantial compliance with the rules of appellate procedure is necessary for the
orderly and expedient administration of justice.

PLEADING AND PRACTICE Parties 198 Va.277.
X owned Blackacre. He conveyed it to Y. Through an error the land books continued
to show that X was the owner and Blackacre continued to be assessed in X's name.
After some twenty years had gone by the city in which the land was located instituted
proceedings against X's devisee and parties unknown to foreclose its lien for taxes.
Y's successor in interest claims these proceedings were void on the ground that a
publication that X's devisee's land (describing it) is to be sold for taxes and not
otherwise identifying the parties unknown was not legal notice to him.
Held: Y's successor in interest is right. X had no interest in the land when he
died, and his devisee took no interest. The proceedings should have been against Y,
and Y's successor in interest, and they were necessary parties.

PLEADING AND PRACTICE 198 Va.288.
X was convicted of rape and sentenced to life imprisonment. Four years later he
sought his release on the ground that the record showed that he was convicted by a
jury of eleven. It can be shown by the testimony of a deputy clerk that a juror's
name (Emerson Macon) was inadvertently omitted. This is corroborated by papers filed
in the case by the clerk to aid him in the performance of his duties—in this case
a jury list and his minute book.
Three analyses were made in this case and a venerable Virginia rule in force over
130 years was expressly overruled to the horror of Justices Miller and Buchanan.
(1) The old rule. After a judgment is no longer in the breast of the court, the
record cannot be changed nunc pro tunc unless the basis for the change appears in the
record itself. The record of the court imports absolute verity. It should not be at
the mercy of the vagaries of others' memories and records.
(2) The Attorney-General did not ask the Supreme Court of Appeals to overrule this
principle, but merely to hold that memoranda made by the clerk for his use, and filed
in the case, are quasi records, i.e. records for some purposes, one of which should
be to correct errors nunc pro tunc in the record itself.
(3) But the Supreme Court of Appeals stated the old Virginia Rule was the minority
rule and was law in only seven states. It expressly overruled the old rule and held
in this case that any competent evidence even though outside of any record was ad-
missible for the purpose of recording what actually happened and for correcting
errors in the record nunc pro tunc when the evidence made it clear that the record
was wrong. It emphasized that no such order should ever be issued to make it appear
that the right thing was done at the right time when it was not actually so done.
PLEADING AND PRACTICE—Constitutional Law.

Section 6 of the Virginia Constitution reads, "In criminal cases, the accused may plead guilty; and, if the accused plead not guilty, with the 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 a waiver, or plea of guilty, the Court shall try the case." (Underlining added). D was tried for rape with the consent of the Court and of the Commonwealth's Attorney, but such consent was not entered of record. He was found guilty and sentenced to 30 years. The trial court later entered a nunc pro tunc order to cure the defect. Is the defect cured thereby?

Held: No. Entry of the consent of record was a condition precedent to the court's having jurisdiction. This case differs from 198 Va.288 in that in that case the panel was actually composed of twelve jurors and not of eleven as stated in the order while in this case there is no proof whatever that the consent was entered of record as required by the Virginia Constitution.


X was killed by D in Virginia. X's personal representative of Nevada sued D in Virginia. The case was properly dismissed because a foreign personal representative by statute has no standing in a Virginia court unless a Virginia appointed personal representative joins with him. In the meantime the one year statute of limitations had run. However our statute of limitations (§8-634) has a savings clause, "but if such action is brought within such period of one year after such person's death, and for any cause abates or is dismissed without determining the merits of such action, the time such action is pending shall not be counted as any part of such period of one year ***\(P\), of Virginia, then qualified as X's personal representative and sued D. (Statute of limitations in death cases now two years)

Held: The savings clause should be interpreted liberally as it is remedial in nature. The instant case is governed by this clause. The new action by \(P\) is for the same wrong, the issues are the same, and the parties are substantially the same. Since the new action was brought within a year, if the time the old action was pending is not counted, it is not barred by the statute of limitations.

PLEADING AND PRACTICE Statute of Limitations 198 Va.653.

A son lent his mother $4,000 with the understanding that she could pay it back at her convenience whenever she wished. Six years later the mother died. The son filed a claim for $4,000. The executor contended the statute of limitations had run.

Held: The statute has not run. There was no cause of action by the son against the mother until she wished to pay. Hence the statute had not even started to run at the time of her death. And since it was a loan and not a gift the son is entitled to collect.

PLEADING AND PRACTICE Golf Club filed a bill in equity against D seeking to enjoin D from collecting surface water in large quantities by means of a storm sewer and dumping it on Golf Club's property to its damage. The trial court enjoined D from discharging water from any premises it owned onto Golf Club's property but refused to award damages. D turned the storm sewer over to the public authorities and sold all the land to various individuals. The evidence as to the amount of damages was in sharp conflict.

What should the Supreme Court of Appeals do?

Held: The lower court committed error when it refused to allow damages. Since the damages are unliquidated they cannot be ascertained by the Supreme Court of Appeals. Nor can the case be transferred to the law side of the trial court so that there can be a common law jury, as that can only be done when the case is originally brought on the wrong side of the court, and this case was originally brought properly on the equity side. So the Supreme Court of Appeals remanded the case to the trial court for a new trial limited to the issue of damages and with directions to order an issue out of chancery and impanel a jury to determine the quantum of damages.
P, while a passenger in X's car, was injured when X's car and D's car collided at an intersection. P sued D who testified that his speedometer showed that he was going five miles an hour at the time of the accident, and that his view was obstructed by trees and bushes. D had the right of way. There was a verdict for D. The Court set the verdict aside and granted P a new trial. At the second trial D testified that his speedometer was broken sometime before the accident. On this trial there was a verdict for P for $20,000 which verdict the trial court refused to set aside. What result on appeal?

Held: Case reversed and dismissed. The Supreme Court of Appeals will examine alleged errors in the order in which they took place. It was reversible error to set aside the verdict rendered at the first trial for D's lack of negligence was found as a fact by the jury in that trial. All subsequent proceedings should be annulled so it is immaterial how D testified in later proceedings that should not have taken place.

PLEADING AND PRACTICE  Rule 3:23(d)  198 Va.700.

P was injured in an automobile wreck as a result of D's negligence and sued D for a large sum. She alleged that she had suffered serious brain injuries. D asked the Court to designate a competent disinterested physician to examine her. Should the Court grant such a request?

Held: No. While statutes authorize the Industrial Commission to follow such procedure in Workmen's Compensation cases, there is no such general statute. The matter is covered by Rule 3:23(d) in actions at law. Under this rule the Court may require the plaintiff to submit to a medical examination by a doctor of defendant's choice. Whether it will or not is within the discretion of the Court. The report of the examining doctor is for the guidance of the person who made the motion for the examination and the written report is not admissible in evidence unless offered by the party submitting to the examination. The doctor may testify as to his findings subject to cross examination. Disputed questions of fact are still for the jury and there is no presumption that the examiner's report is correct.

PLEADING AND PRACTICE

Is a sheriff's salary subject to set-off or garnishment? Va.5:4-l/9.2 provides that the salaries of county officers are subject to garnishment but Va.5:4-l/9.3 limits the application of the above section to offices created by the legislature and the localities.

Held: The first statute is not applicable as the office of sheriff is created by the State Constitution. Hence the common law applies and at common law the salaries of public officers of all kinds are exempt from garnishment for reasons of public policy. (That is, if a public officer was not sure of his salary he might not be willing to perform his duties.)

PL.&PR.--Necessity of jury verdict where plaintiff's evidence is stricken  198 Va.737.

In 171 Va.397, 199 S.E.519 the Court struck plaintiff's evidence because it clearly failed to prove his case. He then discharged the jury and entered judgment for the defendant. It was held on appeal that a jury verdict was indispensable. The case was remanded for a new trial.

Held in the instant case that the 1950 Rules of Court have changed the law, for under Rule 3:20 a summary judgment, in a proper case, may be given at any time after the parties are at issue. In moving to strike plaintiff's evidence the defendant is, in effect, asking for a summary judgment.


The A Co., Inc. was dissolved in 1950 and its business continued by the B Co., Inc. under the trade name of The A Co. P leased some trucks to it in the name of The A Co. and when it failed to pay the agreed rental instituted this action against The A Co. The trial court dismissed the case on the ground that there was no such legal person as The A Co. and refused permission to P to amend his pleading.

Held: Error. Rule 3:13 directs, "Leave to amend shall be liberally granted in furtherance of the ends of justice." Va.8-97 provides that no plea in abatement shall
be allowed for misnomer but correction shall be made by amendment on motion accompanied by an affidavit of the right name.


P was injured by D in a collision on Nov.23,1951. She became mentally ill on March 31,1952, recovered Feb.3,1954, and filed her motion for judgment on June 9, 1954. On June 30th D filed his grounds of defense none of which indicated he was going to rely on the statute of limitations. The court allowed D to amend under Rule 13 in May of 1955 so as to add that defense. W#8-24 provides for a one year statute of limitations on actions that do not survive and a five year one on actions that do survive unless some other period is stated. This statute is a very old one and was passed at a time when all personal action died with the person. In 1950 V/8-628.1 was enacted. It reads, "No cause of action for injuries to person or property shall be lost because of the death of the person liable for the injury. No cause of action for injuries to person or property shall be lost because of the death of the person in whose favor the cause of action existed, provided, however, in such action no recovery can be had for mental anguish, pain or suffering." Does this statute change the period of limitations from 1 year to 5 years?

Held: No. It was not the intent of the legislature to change the statutory period of limitations by indirection, but only to provide for the survival of the cause of action.

Note 1. If P was sui juris after the date of the collision her intervening insanity did not stop the running of the statute of limitations.

Note 2. Since 1950 the legislature has amended V#8-628.1 so that the statute of limitations in personal injury cases is now two years. It also now provides expressly that the statute shall not be construed to extend the time within which an action for any other tort shall be brought, nor to give the right to assign a claim for a tort not otherwise assignable.

PLEADING AND PRACTICE 199 Va.326.

P sued D for personal injuries. She filed her motion for judgment on May 14,1955 and process was served on D promptly. On June 2 D lodged in the clerk's office a written motion for a bill of particulars as to the nature and extent of her injuries, but no court order was then entered requiring P to file a bill of particulars or extending the time for D to file responsive pleadings. On the following October both of these matters were acted upon affirmatively by the Court. P claimed that she should have judgment by default because no responsive pleadings were filed within 21 days.

Held: A motion for a bill of particulars is not a responsive pleading and hence it is true that no responsive pleading was filed within 21 days, but under Rule 3:13 the time allowed for filing pleadings may be extended by the court in its discretion except in the case of pleas in abatement. Since the court in the instant case exercised its discretion and extended the time for the filing of D's responsive pleading P is not entitled to a default judgment.

PLEADING AND PRACTICE 199 Va.368.

A was awarded an appeal on March 7,1957. On March 15 the clerk of the Court of Appeals mailed A a letter notifying him of the estimated cost of printing the record and petition for appeal. W#8-462 provides that the estimated cost of printing shall be paid within 30 days of the date of notice, and, that if not so paid the appeal shall be dismissed. A paid on April 17th.

Held: Too late. Appeal dismissed. The provision in the Code is mandatory. It says "date of notice" and the notice was dated March 15. This does not mean date of receipt of the notice. Such a date would be too indefinite. In fact, in this case, A did not know when he received the notice.
PLEADING AND PRACTICE Statute of Limitations 199 Va. 444.

F and D were father and daughter and W was his second wife. D, when under 21 years of age, received an award of $5,000 damages as a result of an automobile accident. This money was paid to F as guardian for D. F borrowed $4,500 of this money at 4% interest from D giving her a note which was lost. F paid the interest to D regularly after her marriage, and wrote O, an officer of a trust company which was named as executor of his will, acknowledging the debt to O and telling O the date to which interest was paid. F died and the statute of limitations has run unless this acknowledgment of the debt to O started the period running over again as from that date.

Held: While a casual written acknowledgment to a stranger (as distinguished from a written one to the creditor himself) is not ordinarily sufficient to revive the obligation, here O is not a total stranger as the letter was written to O to influence his action, and a new promise on F's part to pay will be implied. Hence the debt was held to be a proper one and sufficiently proved.

PLEADING AND PRACTICE  In an automobile accident case in which D's car struck P, a pedestrian, as P was crossing a street, the court instructed the jury that if it believed from the evidence that D drove his car through the traffic red light, then this was negligence. There was no evidence offered to the effect that D had driven his car through a red light.

Held: Reversed and remanded. It is error to give an instruction based on a hypothesis not supported by any evidence. The jury should not be invited to return a verdict not based on evidence.

P filed a motion for judgment against D on Dec. 7, 1955. Process was duly served on D, and the purport thereof explained. No responsive pleading was filed and on April 10, 1956 a default judgment was entered. D appeared by counsel later on in the day and claimed he had had no notice of the suit and that he had a valid defense in that he did not own or control the property on which P was injured. D made an affidavit to this effect and moved that the original process be quashed. The evidence indicated that D was a man of intelligence and that he had been personally served. The court denied the motion.

Held: That under Rule 3:13 it is within the sound discretion of the court as to whether or not such a motion may be granted (except as to pleas in abatement). Since P has willfully or at least very negligently failed to file any responsive pleadings within the twenty one day period it was not an abuse of discretion to deny his motion.

PLEADING AND PRACTICE—Habeas Corpus 199 Va. 727.
P was tried and convicted of eight felonies and sentenced to serve two years for each one successively. While serving these sentences he attempted to escape and was sentenced to an additional year for such an attempt. He applied for a writ of habeas corpus on the ground that the eight sentences were void because of serious irregularities in his trial. It is admitted that the additional year for attempted escape is valid, but credit on that year is sought for the time served on the void sentences which is more than a year.

Held: Against P. If he is being validly held now habeas corpus will not lie. One cannot use habeas corpus as a substitute for a writ of error. It is immaterial whether or not the first sentences are valid or void as he is not now entitled to his freedom even if they would have been held void had they been properly attacked.