1960

Pleading and Practice

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PLEADING AND PRACTICE

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JUDICIAL DECISIONS

A. *Demurrer—Declaratory Judgment Action*

Generally, if a plaintiff's pleading in a declaratory judgment action alleges an actual or justiciable controversy it states a cause of action, and a demurrer will not be sustained.[1] Where, however, it is plain there is no basis for declaratory relief, as in *First Nat'l Trust & Sav. Bank v. Raphael*,[2] the demurrer is properly sustained and the action dismissed. In this case plaintiff sought a cancellation of an easement for light and air, and the lower court, deciding the easement was still in existence, sustained defendant's demurrer. Properly speaking, the real issue was the existence or nonexistence of the easement, and the Court's declaration to this effect was appropriate. Although the decision did not require such a declaration and permitted a demurrer, it is clear that the disposition in the lower court on the demurrer was treated as a decision on the merits.[3] Any necessary later additional relief to defendant would therefore be proper under section 8-581 of the Code which provides a method to enforce a "declaratory judgment, order or decree." In the present case it is altogether likely that other relief will be required, and an application of the general rule requiring a declaration gives a better basis for future relief than a dismissal on demurrer.

B. *Mandamus*

1. *Compelling Highway Commissioner To Condemn*

Mandamus was brought to compel the State Highway Commissioner to acquire by purchase or condemnation land being used for a highway. On appeal, in *May v. Whitlow*,[4] the Court stated that while mandamus was not technically a proper remedy to try the issue of ownership of the land, it held that the objection to mandamus should not be sustained since the real issue, that is, the right of appellees to compel the State Highway Commissioner to institute condemnation proceedings against them, was fully developed and decided.

It would have helped to prevent unnecessary procedural quibbles, such as

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1. See Yukon Pocahontas Coal Co. v. Ratliff, 175 Va. 366, 6 S.E.2d 303 (1940).
2. 201 Va. 718, 113 S.E.2d 683 (1960).
3. See *id.* at 722, S.E.2d at 687.
4. 201 Va. 533, 111 S.E.2d 804 (1960).

whether injunction and declaratory judgments are adequate remedies[5] here, if the Court had held mandamus to be an alternative procedure. The case would not then strain the earlier decisions cited by the Court permitting mandamus under special facts to compel the Highway Commissioner to institute condemnation proceedings. The practical approach of the lower court, allowing mandamus procedure, is to be preferred, and it is clear the Supreme Court of Appeals will be required in subsequent cases to extricate itself from the dilemma it has created by stating that mandamus is improper.

2. *Enforcing Ministerial Duties of Municipal Council*

In an action of mandamus[6] to compel the mayor and city council to establish another voting district under section 24-45, which provides, "there shall not be less than one election district for every one thousand voters or fractional part thereof above five hundred," the statute was held mandatory and the mayor and city council could be required by mandamus to establish another district or districts within a reasonable time if the evidence justified it. However, the Court could not direct the manner and details of establishing such voting districts, that being within the sound discretion of the city council.

While mandamus is most frequently directed to individuals, this case shows that there is nothing to prevent its use in a proper case against governmental units failing to perform their ministerial duties.

C. *Deed of Trust*

1. *Trustees' Commissions and Counsel Fees*

In *Bradley v. Canter*[7] trustees under a deed of trust were allowed the trustee's commission of five per cent of the sale price of the foreclosed property as provided by section 55-59(13), counsel fees for defending suits in which a federal court enjoined foreclosure of the deed of trust and appointed a receiver for the property, and counsel fees for defending proceedings to determine rights to proceeds from a foreclosure of the deed of trust. However the trustees were denied one-half commissions on each of the two foreclosure sales enjoined by the federal court. Although the deed of trust provided for one-half commissions if the property was advertised for sale and not sold, as here occurred, the Court interpreted this provision as applying to cases where there is a redemption of the land and one-half the amount of the debt would be a fair basis upon which to compute the commission.

5. See PHELPS, HANDBOOK OF THE VIRGINIA RULES OF PROCEDURE IN ACTIONS AT LAW 58 (1959), *citing* Rinehart & Dennis Co. v. McArthur, 123 Va. 556, 96 S.E. 829 (1918).

6. Andrews v. Shepherd, 201 Va. 412, 111 S.E.2d 279 (1959).

7. 201 Va. 747, 113 S.E.2d 878 (1960).

It is to be regretted that the Supreme Court of Appeals did not take this occasion to comment upon the position of counsel as a trustee on a deed of trust. By passing over the question the Court seems to give tacit approval to the widespread custom in the state to render various legal services in connection with deeds of trust for which a professional fee is charged and at the same time to act as trustee receiving the commission for this service. The question of whether counsel should act in both capacities seems to be an appropriate one for discussion and clear delineation.

2. *Federal Receivers' Fees as Expense of Sale*

In *Bradley v. Canter*[8] a federal receiver represented to a federal court that he could negotiate a sale of property subject to deeds of trust for a price sufficient to discharge the outstanding trusts and liens. The federal court enjoined the trustees from conducting the advertised foreclosure sale. Later it developed the receiver could not negotiate such a sale, and the injunction was dissolved. The Virginia lower court's decree recognized orders of the federal court directing payment of the receiver's fees and expenses from funds realized on foreclosure. This was reversed on appeal. It was held that a federal receiver's fee could not be made an expense of sale on foreclosure where the receiver's services were wholly unrelated to the trust and the sale. Moreover the federal order was subject to collateral attack, since the Court found that the federal court had no jurisdiction to enter an order impairing the existing liens of the deeds of trust.

This is a well-reasoned decision. The security of deeds of trust, the enforcement of which is basically local, should not be permitted to be impaired because of separate litigation affecting the debtor. It is difficult to see how a different result could have been reached without seriously affecting the contract and lien principles traditionally and properly applied to such cases.

D. *Venue*

1. *Proceeding To Determine Rights to Proceeds From Foreclosure of Deed of Trust*

Bradley v. Canter also involved proceedings to determine the respective rights of litigants[9] to proceeds paid into court from the sale of land, which required the determination by the trial court of the amount of liens against the land. The Court held that venue was properly laid in the county where the real estate was located because the proceeding was quasi in rem. It dealt with trust funds and the account was required to be filed in the county where

8. *Ibid.*

9. Trustees under a second deed of trust who bought the property at the foreclosure sale against trustees under the first deed of trust.

the real estate is located. In such a case personal service on the nonresident defendants was not required.

The basis of the decision is not clear. The Court does not refer to any specific venue statute and cites only authorities concerning equity jurisdiction. If the Court is saying that there are types of equity cases where the venue statutes are inadequate and venue is derived from traditional equity jurisdiction, it is very important for this to be set out without equivocation. The Court, very probably, did not intend to base venue upon the injunction since it was not the main relief sought, and this would seem to be a sensible view.[10] On the other hand, one is inclined to ask why, since section 55-59(13) provides "no purchaser [is] required to see to the application of the proceeds," the purchaser has standing in court to establish his claim in the form of a proceeding to determine the rights to proceeds from the foreclosure? Under this approach the injunction would seem the essence of the case. The Court will sooner or later have to answer the question of how much a case must be involved with an injunction for it to be determinative of venue.

2. *Action Against Committee of General Assembly*

The NAACP brought an action against an investigating committee of the General Assembly seeking a discovery of certain records in possession of the committee and an injunction against the committee proceeding further. On motion by the committee the cause was removed from the Law and Equity Court to the Circuit Court of the City of Richmond. On appeal[11] sections 8-38(9) and 8-40 were construed to limit any action against the Commonwealth to the Circuit Court of the City of Richmond.[12]

The Court in this case indulges in a little judicial legislation. There is no effort to "enjoin or otherwise suspend or affect any judgment or decree

10. However an excellent opportunity was afforded the Court to decide whether the provisions of § 8-611 or those of the general venue statutes of §§ 8-38, -39 apply. This question was left open in County School Bd. v. Snead, 198 Va. 100, 92 S.E.2d 497 (1956). Lile suggests the general venue provision only would apply, but a broader base for the many variations of the injunction problem would seem to be afforded by § 8-611 providing generally for jurisdiction in the county, etc., "in which the act or proceeding is to be done, or is doing, or apprehended." LILE'S EQUITY PLEADING AND PRACTICE § 340 (3d ed. 1952).

11. NAACP v. Committee, 201 Va. 890, 114 S.E.2d 721 (1960).

12. According to the Court, if a suit or action

> provided in § 8-38(9) is brought in any court, other than the Circuit Court of the City of Richmond, and proceeded to a final decision in such court, the "judgment or decree, so far as it may be against any of the public officers or public corporations mentioned in Paragraph (9), or against the Commonwealth, shall be void."

Id. at 900, 114 S.E.2d at 729.

on behalf of the Commonwealth," [13] and nothing in section 8-40 gives section 8-38(9) a more extensive operation than it has on its face. If the legislature had intended to provide that any action or suit against the Commonwealth had to be brought in the Circuit Court of the City of Richmond, it could have said so.

E. *Service of Process*

Three cases in the federal courts involved the recurring problem of the meaning of "doing business" within the state for the purpose of service of process on a corporation. The first,[14] an action for damages under the Jones Act[15] for injuries sustained by a seaman while in the employ of defendant corporation, arose while the statute on service of process still contained the phrase "in any action or proceeding against it growing out of such business." [16] The business done in Virginia consisted of three visits by the single ship owned by the corporation, one visit shortly after process in the present case had been served. Plaintiff's contract of employment was made outside the state and he was injured outside the state. Although the court said that the defendant was "doing business" in Virginia as of the date of service of process, it held that this action itself did not "grow out of such business" done in Virginia, and substituted service of process on the Secretary of the State was improper as to defendant.

In *World Carriers, Inc. v. Bright*[17] an action was brought against the employer by a seaman who had entered into a contract of employment within the state. The lower court held this to be sufficient "doing business" irrespective of whether there were other contacts within the state. On appeal the question of "doing business" was not reached by the court because the substituted process was had on an improper official of the state under the new statute.[18]

In the third case, *Sikes v. Rexall Drug Co.*,[19] defendant corporation had solicited orders throughout Virginia and shared advertising costs and certain sales arrangements. The only activity of the soliciting agents other than soliciting orders was assisting defendant corporation in the use of

13. See VA. CODE ANN. § 8-38(9) (Repl. Vol. 1957).

14. Silas v. Paroh S.S. Co., 175 F. Supp. 35 (E.D. Va. 1958), *rev'd on other grounds sub nom.* World Carriers, Inc. v. Bright, 276 F.2d 857 (4th Cir. 1960).

15. 46 U.S.C. § 688 (1958).

16. VA. CODE ANN. § 13.217 (1950), as amended, VA. CODE ANN. § 13.1-111 (Repl. Vol. 1956).

17. 276 F.2d 857 (4th Cir. 1960).

18. Service was on the Secretary of the Commonwealth instead of the clerk of the State Corporation Commission, as required by VA. CODE ANN. § 13.1-113 (Repl. Vol. 1956).

19. 176 F. Supp. 33 (W.D. Va. 1959).

advertising media, the display of products, and the payment of "push money." The court held under the revised Virginia statute[20] that such activities were hardly enough to meet the "solicitation plus" test in *International Harvester Co. v. Commonwealth*[21] and quashed the service of process which had been made on the clerk of the State Corporation Commission.

The following points should be observed about service of process: (1) The test now in Virginia is merely whether the corporation was "doing business" within the state, except where a single activity may be involved in which case the cause of action must then arise out of the act done in the state to satisfy due process. (2) The *Rexall* case is an open invitation to the Virginia Court to continue the interpretation of *Carnegie v. Art Metal Constr. Co.*[22] under the amended Virginia statute. This should not be done. (3) The *Rexall* case not only fails to observe the statutory change in Virginia, it also applies the wrong test under the present Supreme Court cases which have required only "minimal contacts."[23] It is to be hoped that when the question of the amended statute comes before the Supreme Court of Appeals of Virginia a more careful analysis of the problem will result in a decision which clearly equates the problem to federal due process.

F. *Equity Pleading*

Phipps v. Sutherland[24] reiterates the rule stated in *Lile's Equity Pleading and Practice*[25] to the effect that where the plaintiff's case depends in whole or in part on documents, they should be described according to their legal effect in the stating part of the plaintiff's bill. Further, they should be incorporated by reference into the bill and a copy, or the original, filed with the bill as an exhibit. Since the executions and returns were not exhibited with the bill as required, the Court construed the allegations that there were other executions, and returns thereon, as legal conclusions only, and affirmed the sustaining of the demurrer to plaintiff's bill.

Here, opportunity was given in the lower court for the amendment of

20. VA. CODE ANN. § 13.1-111 (Repl. Vol. 1956).

21. 234 U.S. 579 (1914). In *International Harvester* the Court said at 587: "[T]here was something more than mere solicitation . . . . [T]here was a continuous course of shipment of machines into Kentucky. There was authority to receive payment in money, check or draft, and to take notes payable at banks in Kentucky." The "solicitation plus" doctrine of *International Harvester* has been clearly repudiated. Caplin, *Doing Business*, 5 PRAC. LAW 72 (Oct. 1959).

22. 191 Va. 136, 60 S.E.2d 17 (1950).

23. See, *e.g.*, Hanson v. Denckla, 357 U.S. 235, 251 (1958); McGee v. International Life Ins. Co., 355 U.S. 220 (1957).

24. 201 Va. 448, 456, 111 S.E.2d 422, 428 (1959).

25. Section 106, at 65 (3d ed. 1952).

the bill after the demurrer was sustained on the ground that the allegations were merely conclusions. This normally should afford counsel ample opportunity for meeting the requirements of the rule.

G. *Grounds of Defense and Answer Filed Late*

In *Turner v. Burford Buick Corp.*[26] plaintiff objected to defendant's late filing of his answer on the ground that it was not filed within twenty-one days after service of the motion as required by Rule 3:5, but the trial court allowed it for "good cause shown." Since the record showed no abuse of the discretion permitted by Rule 3:13 for the extension of the time, the order of the lower court was upheld.

In *American Liberty Ins. Co. v. Breslerman*,[27] consolidated cases by insurance companies for declaratory judgments, the amended answer of the policy-holder defendant in one case, and his answer and amended answer in the other case, were by leave of court filed on the day of trial because the defendant was a nonresident and because both insurance companies had been enjoined by a New York court from proceeding with the declaratory judgments until one week before the day of the trial. On appeal it was held that the chancellor did not abuse his discretion under Rules 2:23 and 2:12. Further, since it was agreed by all the parties that the two cases would be consolidated and that the original answer filed in one of the cases would be treated as an answer in both cases, the insurance companies had waived any objection to the late filing of the answer.

H. *Burden of Proof*

1. *Vacancy of Premises Insured Against Fire*

Breslerman also held where an action is brought by an insurance company seeking a declaration of nonliability under a fire insurance policy because the premises were vacant at the time of the fire, the burden of proof was on the policyholder not only to show that the agent knew the property was vacant, but also to show the agent had this fact in mind at the time the policies were issued.[28] One might well question whether the burden of adducing further evidence placed on the policyholder here is not too great.

2. *Agency*

In *Turner v. Burford Buick Corp.*[29] the general sales manager of de-

26. 201 Va. 693, 112 S.E.2d 911 (1960).
27. 201 Va. 822, 113 S.E.2d 862 (1960).
28. *Ibid.*
29. 201 Va. 693, 112 S.E.2d 911 (1960).

fendant admitted that the defendant driver was an employee and was driving a company car. It was held that this made a prima facie case of agency and the burden was then on the master to prove that the agent was not acting within the scope of his employment when he committed the tort.[30] The approach of this case leads to less difficulty than one placing a greater burden on the plaintiff in such cases.

I. *Directed Verdict*

The trial court in *Turner* had instructed the jury that it must render a verdict for plaintiff against the defendant driver of the automobile upon the ground that the driver was guilty of negligence as a matter of law. No motion to strike the evidence was made. On appeal the Court held that even though the driver was guilty of negligence as a matter of law, the court could not direct a verdict for the plaintiff without a prior striking of defendant's evidence because of the requirements of section 8-218 of the Code which provides:

> 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 unless the trial judge shall have granted a motion to strike the evidence of the plaintiff or defendant, in which case the judge may direct a verdict in conformity with his ruling on the motion to strike.[31]

No fair appraisal of the rulings in the state with respect to the motion to strike the evidence shows any real difference between it and the motion for a directed verdict. The reasonable minds test used in Virginia for the motion to strike the evidence[32] is the one used by the great majority of courts in this country in directing verdicts.[33] Why, then, should the Court, which has been properly ignoring section 8-218 on the basis of the inherent power of the Court to assure rational fact determination, suddenly give the statute vitality when the recent amendment was simply intended to put into the legislation the fact that it had no vitality? The General Assembly should have repealed the statute, but its failure to do so does not change the fact that the purpose was to bring the statute into accord with the fact that courts in Virginia were directing verdicts.

Whether the defendant's negligence as a matter of law appeared as a result of a motion to strike, or as a result of the Court's observation, should

30. The Court held further that when such prima facie case is made out the declarations and admissions of the agent become admissible.

31. VA. CODE ANN. § 8-218 (Supp. 1960).

32. See, *e.g.*, Richardson v. Appalachian Elec. Power Co., 163 Va. 394, 175 S.E. 727 (1934).

33. See 9 WIGMORE, EVIDENCE § 2495 (3d ed. 1940).

make no difference. This matter is outside of section 8-218 because it poses a question for the court,[34] having a similar relationship to the proof that a demurrer has to the pleading.[35] If a question of law in a very traditional sense is not involved, how are we to explain the many cases where the decision is postponed until a motion to set aside the verdict is sustained or where the Supreme Court of Appeals itself acts on such questions of law and gives final judgment? [36] From what source comes this power, if not because a question of law is involved?

There may well be cases where the Court as a procedural matter will refuse to entertain the question in the absence of a motion to strike. It should not do so, however, where it has decided under the facts the defendant is guilty of negligence as a matter of law.

J. *Summary Judgment Improper Where Bill of Particulars Insufficient*

In *Marshall v. Dean*[37] plaintiff sought to eject defendants from land conveyed by him to a church because of a violation of restrictive covenants in the deed. The trial court sustained defendants' motion for summary judgment because the facts stated in plaintiff's bill of particulars were not sufficient to constitute a violation of the restrictive covenants or to support the violation as stated in plaintiff's motion for judgment. On appeal the Court held that even assuming the bill of particulars to be insufficient, the motion for summary judgment alleged a violation of the covenants. It is not necessarily the function of the bill of particulars, the Court said, to state a cause of action.[38]

In stating the relationship of the summary judgment to bills of particulars the Court very properly refused to permit the drastic summary judgment procedure as a means of enforcing an adequate bill of particulars.[39]

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34. "[W]here fair minded persons can draw but one inference from the facts, the question of contributory negligence is a question of law." Brown v. Damron, 197 Va. 309, 313, 89 S.E.2d 54, 56 (1955). "[W]here reasonable men can draw but one inference from the facts, negligence becomes a question of law." Nehi Bottling Co. v. Lambert, 196 Va. 949, 955, 86 S.E.2d 156, 159 (1955).

35. Often the ruling on demurrer is now postponed until proof because of the completeness of background with which the court can review the question on the proved facts as well as the pleaded facts. This shows a modern blend of the concepts involved.

36. See City of Virginia Beach v. Roman, 201 Va. 879, 114 S.E.2d 749 (1960); Gottlieb v. Andrus, 200 Va. 114, 104 S.E.2d 743 (1958).

37. 201 Va. 699, 112 S.E.2d 895 (1960).

38. If the defendants desired amplification or explanation of this specific allegation, they should have proceeded under Rule 3:18(d) which provides, after opportunity for an amended bill of particulars, for striking the pleading not properly amplified if the party is not informed fairly of the true nature of the claim or defense.

39. However, what would be the view of the Court if Rule 3:18(d) (see note 38

The application made by the Court of the rule in *Carwile v. Richmond Newspapers, Inc.*[40] seems appropriate. The Court in that case said that the summary judgment does not substitute a new method of trial where an issue of fact still exists, that it is "not intended as a substitute for a demurrer, a demurrer to the evidence or a motion to strike".[41] It is seen that the purposes of the summary judgment (absent a striking of the motion for judgment) are clearly unrelated to implementing a bill of particulars. However, in repeating the rule that summary judgment is not intended as a substitute for a demurrer, a demurrer to the evidence or a motion to strike, the Court in *Marshall* goes beyond the requirements of the case and states dicta which it is hoped will be more thoroughly considered in later cases where the point is directly in issue. With the motion to strike explicitly a part of Rule 3:20, there is no question now that the *Carwile* rule no longer applies to it.

Ostensibly to give teeth to the summary judgment rule, since it does not provide for testing the genuineness of the issue by affidavits, as is done in the federal courts, a new provision, Virginia Code section 8-111.1. was recently enacted. It provides for a procedure by which a party can obtain the admission of facts or the admission of the genuineness of documents after the commencement of an action. Under this statute the defendant in *Marshall* might have secured sufficient admissions of fact to have secured a summary judgment.

K. *Discovery—Records of Committee of General Assembly*

In a bill for discovery and for an injunction against a legislative committee securing information to assist in enacting laws,[42] the Court held that such committees acting within the bounds of their authority act as the legislature itself, and that the trial court correctly found it was without authority to compel the disclosure of the records under the circumstances.

The opinion held merely that "on the record presented" the lower court

supra) had been followed and the motion for judgment had been stricken? Could the Court then grant a motion for summary judgment? Under the words of the first sentence of the Rule it would seem since the parties never were at issue, no motion for summary judgment could properly be made.

If final judgment is desirable in such cases, instead of the less drastic procedure of § 8-111 of the Code, under which the Court can exclude evidence of any matter not described so plainly in the bill of particulars as to give notice, the simple thing to do would be to amend Rule 3:18(d) to provide a discretionary rule to this effect, rather than to bring it within the summary judgment rule. The matter is clearly related, however, to the summary judgment rule, for the plaintiff has demonstrated there is no genuine issue of fact.

40. 196 Va. 1, 82 S.E.2d 588 (1954).

41. *Id.* at 5, 82 S.E.2d at 591.

42. NAACP v. Committee, 201 Va. 890, 114 S.E.2d 721 (1960).

was without authority to compel a disclosure, and it is unfortunate that the syllabus went further and declared the records to be "privileged", giving the case a more extensive operation than was probably intended in this difficult and growing field of law.

L. *Objections*

Gooch v. City of Lynchburg[43] makes an interesting application of Rule 1:8 which provides that all objections shall state with reasonable certainty the ground of objection. The city ordinance under which the accused was convicted of operating a motor vehicle while under the influence of intoxicants was not introduced into evidence by the prosecution, but the accused did not object or take an exception in the trial court. It was contended the motion to set aside the verdict as contrary to the law and the evidence was an adequate and timely objection, although no reference was made to the fact that the ordinance had not been formally introduced into evidence when this motion was made.

The Court held the matter could not be argued on appeal since the failure to prove the ordinance had not been brought to the attention of the trial court.

Since process was not issued at all in *Gooch* because the offense was committed in the presence of the arresting officer, the right to have the city ordinance introduced into evidence would appear, if anything, more basic than in *Sisk v. Town of Shenandoah*,[44] where the accused was arrested on a warrant and the failure of the city to introduce the ordinance into evidence was fatal to her conviction, and this failure could not be rectified by taking judicial notice of the ordinance on appeal.

It is not imperative today that municipal ordinances be proved;[45] they should be judicially noticed in both lower and appellate courts. The Court used Rule 1:8 to soften the application of its harsh rule of judicial notice of ordinances. What it should have done was to provide a modern rule on judicial notice of such law. Section 8-270[46] which provides for copies of

43. 201 Va. 172, 110 S.E.2d 236 (1959).

44. 200 Va. 277, 105 S.E.2d 169 (1958). This was also a case of operating a motor vehicle under the influence of alcohol. Relying on Collins v. City of Radford, 134 Va. 518, 113 S.E. 735 (1922), the lower court, although refusing to permit the town to introduce a copy of the ordinance at that time, denied the defendant's motion to strike the town's evidence. The Supreme Court of Appeals held the circuit court was not authorized to take judicial notice of the town ordinance and the motion to strike should have been sustained and the warrant dismissed. The Court specifically repudiated the doctrine of the *Collins* case. The theory of this case was followed in a civil case in Bell v. Hagmann, 200 Va. 626, 107 S.E.2d 426 (1959).

45. McCormick, Selected Writings on Evidence and Trial 1068, at 1075 (1957), reprinted from 5 Vand. L. Rev. 296 (1952).

46. Va. Code Ann. § 8-270 (Supp. 1960).

city ordinances to be admitted in evidence, does not place an insuperable obstacle in the way. Its purpose was not to spell out what laws could be judicially noticed, but to provide a single method for the proof of all types of law.

M. *Judgments*

1. *How Life Extended*

Two points are made clear by *Phipps v. Sutherland*.[47] First, a judgment may be kept alive perpetually if its life is extended by *scire facias* or an action is brought within each twenty-year period under section 8-396.[48] Second, to keep judgments rendered prior to the 1948 amendment[49] of section 8-396 alive it is necessary to bring *scire facias* or an action within the twenty-year period, and it is no longer possible to extend their life merely by issuance of execution as was the practice prior to the amendment.

The Court is to be commended for taking a forthright position in interpreting this statute and in insisting that the policy of the statute reach every case affected. It is highly undesirable in interpreting this type of legislation to read in special cases or to attempt the application of any "justice" principle. The Court noted the statute was retroactive on its face, and since it dealt with procedure only, did not affect any vested right.

2. *Final Judgment*

In line with earlier Virginia cases[50] the Court held in *Turner v. Burford Buick Corp.*[51] that a trial court's order setting aside the verdict and awarding a new trial was not appealable as a final order.

In a recent case[52] brought to determine the ownership of sewer lines constructed by the defendants, the trial court adjudicated ownership in the plaintiff and directed defendants to execute a deed of conveyance, in default of which the court would appoint a special comissioner to execute the deed. It was held that the petition for appeal was timely although it was not presented within four months of the decree as required by Rule 5:4 and section 8-489 of the Code, because these provisions apply only to final judgments and decrees. This decree was not final, but interlocutory,[53]

47. 201 Va. 448, 111 S.E.2d 422 (1959).

48. VA. CODE ANN. § 8-396 (Supp. 1960).

49. Va. Acts 1948, ch. 136.

50. See, *e.g.*, Hatke v. Globe Indem. Co., 167 Va. 184, 188 S.E. 164 (1936).

51. 201 Va. 693, 112 S.E.2d 911 (1960).

52. Brooks v. Sanitation Authority, 201 Va. 934, 114 S.E.2d 758 (1960).

53. Under § 8-462, which applies to interlocutory appeals, the lower court adjudicated the principles of the cause and an appeal from its decision could be taken at any time until a final decree was entered.

since defendant could refuse to convey as directed, and further action of the court, not simply of a ministerial nature, would then be necessary. It is interesting to compare this case with *Dove v. May*[54] where the adjudication that the highway commissioner had a right to take a private cemetery was held not a final order and not appealable. So far as defendant was concerned that case adjudicated the principles of the cause, for the lower court had ruled there was no judicial review of the determination of the highway commissioner that it was necessary to take defendant's property.

N. *Appeal*

1. *Supplying Defects in Narrative of Testimony and Designations for Printing*

In the lower court in *Collins v. Pulaski County*[55] appellants used a "narrative of proceedings" instead of having the testimony transcribed. Appellees had filed written objections to the narrative, and additional testimony tendered by them was certified by the trial judge. Appellees moved to dismiss the appeal because appellants had filed a narrative which was incomplete, misleading and inaccurate, thus violating Rule 5:1, section 3(e). The Court, in overruling the motion to dismiss, held that the designations made by appellees supplied any alleged defects in the narrative and thus the printed record contained all that was germane to the question to be decided.

This sensible decision prevents technical objections from impairing the use of the provisions of the rules for a "narrative of proceedings" and places emphasis on the facts from whatever source they may appear. Since counsel would be foolish to take a chance by withholding further designations claimed necessary to complete the record in the hope that the Court would find a narrative incomplete, the decision results in a good operative rule.

2. *Decree Presumed Correct*

In an annexation case[56] the Court repeated the rule that there is a presumption of the correctness of the decision of the trial court on all questions of fact and that decision is binding on the Supreme Court of Appeals unless the decision is plainly wrong or without evidence to support it.

3. *Notice of Certification of Transcript*

In *Taylor v. Wood*[57] the Court found that counsel for appellees (bene-

54. 201 Va. 761, 113 S.E.2d 840 (1960).
55. 201 Va. 164, 110 S.E.2d 184 (1959).
56. County of Fairfax v. Town of Fairfax, 201 Va. 362, 111 S.E.2d 428 (1959).
57. 201 Va. 615, 112 S.E.2d 907 (1960).

ficiaries under a will) in response to a letter from appellants' counsel waived reasonable written notice of the tendering of the transcript for certification required by Rule 5:1, section 3(f). Counsel for the executor, however, made no reply to the letter from appellants' counsel.[58] A motion to dismiss the appeal on the ground that appellants' counsel failed to give "opposing counsel" the required reasonable written notice was denied because counsel for the beneficiaries waived the requirement.

The Court here appropriately makes the question of notice depend upon the relationship of the client to the case, the participation of his counsel in the case, and whether his interests could reasonably be said to have been protected by counsel for other parties. It is another encouraging example of the lack of patience of the Supreme Court of Appeals with attempts to create technical error because of some inconsequential failure to meet exactly the requirements of one of its Rules.

4. *Appeal From Corporation Commission*

In approving rates to be charged for insurance the State Corporation Commission used a formula including twenty per cent for agents' commissions instead of the customary twenty-five per cent. The Virginia Association of Insurance Agents appealed,[59] contending the rates would regulate compensation of agents. The Association was not a formal party to the proceedings, but its counsel had participated. The appeal was dismissed on the ground that the Association was not, under sections 38.1-279 and 12-63 of the Code, which provide for appeals from final orders or decisions of the Corporation Commission, a party interested in or aggrieved by the orders[60] because the Commission was not fixing commissions to be paid by insurers to their agents, but rather using a figure for such commissions in arriving at a fair and equitable rate.

In an appeal[61] from the State Corporation Commission's allotment of territory for gas utility service the Court declared that under the Constitution

58. The Court said at 619, 112 S.E.2d at 910:

> As the transcript shows, counsel for the bank executor made no appearance during the taking of the depositions or at the trial in the lower court. They had no firsthand knowledge whether the transcript of the proceedings was correct or not and left that entirely to counsel [for appellees], with whom they are collaborating in the motion to dismiss. Hence, the interests of the bank executor in seeing to the accuracy of the transcript was fully protected by counsel for the appellees . . . .

59. Virginia Ass'n of Ins. Agents v. Commonwealth, 201 Va. 249, 110 S.E.2d 223 (1959).

60. It was held further that the mere fact that the Commission permitted the appellants to intervene does not make them interested parties. The Commission often hears parties who are not in a strict legal sense interested parties.

61. Virginia Gas Distribution Corp. v. Washington Gas Light Co., 201 Va. 370, 111 S.E.2d 439 (1959).

of Virginia[62] the order "cannot be upset in the absence of a showing of an abuse of the discretion vested in it" and the action by the Commission "shall be regarded as prima facie just, reasonable and correct. . . ."

While the Constitution of Virginia does not seem immediately to convey the rule followed by the Court, judicial statesmanship of a high order caused the Court to continue the earlier interpretations assuring the State Corporation Commission of rather complete control of its proper sphere of action.

5. *No Transcript of Testimony on Counsel Fee*

Where no transcript of oral testimony, taken at a hearing on a petition for lawyers' fees, was provided as required by Rule 5:1, section 3(e), the Court[63] nevertheless found that the fees had not been improperly allowed.[64] No evidence was offered of abuse of discretion in allowing the fee or the amount thereof.

The clear implication seems to be that some questions relating to fees could still be argued in the absence of a transcript of testimony concerning them. However, the case should caution the bar to include this testimony.

6. *Combining Mechanics Liens for Jurisdictional Amount*

In *Shelton v. Ogus*[65] the Court held that the $300 jurisdictional amount required by section 8-464 for an appeal to the Supreme Court of Appeals was not satisfied where a contractor sought to appeal an order declaring invalid his six separate mechanics liens of $160 each. The Court found that each building and lot represented a separate security and regarded the proceeding as in rem to enforce six separate mechanics liens against six separate parcels of realty.[66]

The substantial dealings by the contractor here were with the corporation, and the question was the validity of this contract for $810.00 as it affected the property of the several new owners. Here the statute on jurisdictional amount could easily have been dealt with as an administrative device looking

62. VA. CONST. § 156(f), which provides that the Court has jurisdiction to determine the reasonableness and justness of the action as well as any other matter arising under such appeal.

63. Buchanan Realty Corp. v. Looney, 201 Va. 432, 111 S.E.2d 410 (1959).

64. The lawyers were shown to have the necessary court authority; the services were not antagonistic to defendants; and the decree recited that the fee was allowed because they had "rendered substantial service to all of the owners" of the land.

65. 201 Va. 417, 111 S.E.2d 408 (1959).

66. The Court, however, did state:

> Though establishment of the several liens and award of the several judgments sought might be accomplished and made effectual in the same decree, yet each judgment *in rem* would necessarily be against the specific parcel of land upon which the lien existed . . . .

201 Va. at 420, 111 S.E.2d at 410.

to the value of the real controversy. The case illustrates the need for drafting a more realistic section dealing with the jurisdictional amount in the Supreme Court of Appeals, or eliminating any such requirement. It would seem that the economics of appeal will eliminate the "too small" cases in most instances, and the $300 requirement stands simply, as here, as an impediment to appropriate appeal.

O. *Suit by Nonresident Guardian in Own Name*

In *Vroon v. Templin*[67] the United States Court of Appeals held that Code section 26-59, providing no person not a resident of Virginia shall be appointed or allowed to qualify or act as personal representative unless there also be appointed to serve with him a resident, does not require the appointment of a resident in order for the nonresident guardian to maintain a tort action in Virginia.[68]

The rule set forth by the United States Court of Appeals is certainly desirable to reduce the possibility of procedural complications in cases of this type. However, many lawyers will be surprised to learn that there is any question with respect to the law of Virginia that a resident guardian is required and the suit must be in the name of the ward. The need for a rule to avoid procedural complications is also desirable in the case of wrongful death actions, but the same court held earlier[69] that the 1950 amendment to the statute[70] makes it clear that a nonresident could not sue as personal representative in Virginia in such cases.

Legislation

A. *Liens*

Section 8-386 of the Code, providing that a judgment is a lien on real estate "at or after the date of the judgment", was rewritten by an amendment providing that every judgment of a state or federal court is a lien "from the time such judgment is recorded on the judgment lien docket."[71] All special provisions with respect to the confession of judgments have been removed including those with respect to the priority of judgments confessed in vacation.

Since the docketing required under section 8-390 is the same as that for section 8-386, it is difficult to see why 8-390 was not eliminated. A proviso

67. 278 F.2d 345 (4th Cir. 1960).

68. The court also remanded the case for the district court to determine whether it was still Virginia law that the guardian could not sue in his own name for the injuries to his son.

69. Holt v. Middlebrook, 214 F.2d 187 (4th Cir. 1954).

70. See Va. Code Ann. § 26-59 (Supp. 1960).

71. Va. Code Ann. § 8-386 (Supp. 1960).

was added to section 8-390 providing that a *revived* judgment secured pursuant to 8-396 shall not be a lien as to a purchaser for a valuable consideration without notice unless the judgment is again docketed.[72] This too seems to be covered now by section 8-386.

As to suits to reach property conveyed by a judgment debtor, section 8-393 has been amended to provide for recording a notice of *lis pendens* in the manner provided by section 8-142 before the expiration of the ten-year statute of limitations.[73]

B. *Procedure*

Section 8-511 on pleading contracts has been rewritten.[74] Also a new section has been added to the Code by which a party can obtain the admission of facts or the admission of the genuineness of documents after the commencement of an action.[75]

C. *Garnishment*

Section 34-29 of the Code dealing with garnishment of wages or salary has been rewritten to provide a table to make it easier to determine the amounts intended by the statute to be exempt.[76] The exemption to a laboring man or woman who is a householder or head of a family is also extended to "any person under an order of a court to support a parent, child, husband, or wife," and may be claimed on his or her behalf by any agency of government or person in interest. Section 8-441 on the institution of garnishment proceedings has been amended to require certain information under oath of a judgment creditor, his agent or attorney, before a summons shall issue and has provided that any judgment creditor knowingly giving false information shall be guilty of a misdemeanor.[77]

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72. VA. CODE ANN. § 8-390 (Supp. 1960).

73. VA. CODE ANN. § 8-393 (Supp. 1960).

74. VA. CODE ANN. § 8-511 (Supp. 1960). The changes are: (1) The plaintiff is now "entitled to a judgment on such affidavit and statement of account" and the language "on motion made in open court" has been dropped. (2) The section is extended to civil warrants. (3) Where the defendant appears and pleads under oath, the plaintiff, on motion, shall have a continuance. (4) Counsel may not now be able to act for the defendant in siguing the affidavit. (5) Now the defendant must appear and plead under oath that the plaintiff is entitled to recover from the defendant a certain sum less than that stated in plaintiff's affidavit. Judgment may then be taken by the plaintiff for the sum admitted, and the case tried as to the residue.

75. VA. CODE ANN. § 8-111.1 (Supp. 1960). This section is identical to Rule 36 of the Federal Rules of Civil Procedure, and would seem much more appropriately placed along with the Virginia rules relating to discovery, rather than with the sections on bills of particulars.

76. VA. CODE ANN. § 34-29 (Supp. 1960).

77. VA. CODE ANN. § 8-441 (Supp. 1960). Although the language is very awkward, it