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Practice and Pleading (15th Annual Survey of Virginia Law)

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THE FIFTEENTH ANNUAL SURVEY OF VIRGINIA LAW:
1969-1970

PRACTICE AND PLEADING

W. Taylor Reveley III*

After quickly outlining recent legislation in the field of practice and pleading, this Article proceeds to a more detailed treatment of pertinent judicial developments. Several of the Supreme Court of Appeals' decisions merit close attention, principally Rakes v. Fulcher and Sullivan v. Little Hunting Park, Inc. Recurrent in the discussion of the judicial opinions is concern not only with the announced law, but also with the manner of the announcement—concern, that is, with both the legal results and the legal craftsmanship. Organizationally, an attempt has been made to discuss the judicial material at the time of its "moment of truth" in the procedural process; for example, the problem of "an issue first raised on appeal" will be treated under the consideration of trial errors, since the failure to raise an issue during trial generally precludes success on appeal, so far as that issue is concerned.

THE WORK OF THE GENERAL ASSEMBLY

Among the more important 1969-1970 legislative developments was enactment of a provision empowering courts of record and courts not of record to "prescribe such rules as may be reasonably appropriate to promote proper order and decorum, the convenient and efficient use of courthouses and clerks' offices and the orderly management of court dockets." This provision is limited in that any rules adopted are to be applicable only to the courts prescribing them and are not to be "inconsistent with or in addition to any statutory provision, or the Rules of the Supreme Court of Appeals, or contrary to the decided cases." In addition, such rules may not have "the effect of abridging substantive rights of persons before such court."*

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3 Va. Code Ann. § 8-1.3 (Supp. 1970), repealing id. § 16.1-25 (1957), which stated: "The judge of a court not of record may make and enforce such reasonable rules of practice for his court, as are not in conflict with law."

4 Id. § 8-1.3 (Supp. 1970).

5 Id.
Regarding service of process and notice, the General Assembly eliminated the requirement that the return on out-of-Virginia personal service state that "the defendant so served is a nonresident of this State." The legislators also provided that, when process is served on the Commissioner of the Division of Motor Vehicles as the agent of a nonresident defendant involved in a Virginia traffic accident, notice to the defendant may be mailed (a) to the last address given by him on his license application if he was licensed by Virginia, assuming no other address is known, or (b) to the address given on the accident report if he was not so licensed. In this regard, the Virginia licensee is deemed "to have accepted as valid service" the mailing of process to the address he last reported to the Division. Even more important, the non-Virginia licensee is deemed to have waived his right to notice and to have accepted service upon the Commissioner if he incorrectly reports his address or if he moves from the reported address without providing for the forwarding of his mail.

A judicial power of some importance was made explicit in a Code section stating that a mental or physical examination of a party may be ordered if the pleadings raise an issue as to his condition and the opposing party so moves. This section provides:

Any other provision of law to the contrary notwithstanding, in any action, if the pleadings raise an issue as to the physical or mental condition of a party, the court, upon motion of an adverse party, may order the party to submit to an examination by one or more physicians or licensed clinical psychologist [sic] named in the order and employed by the moving party. A written report of the examination shall be made by the physician or physicians or licensed clinical psychologists to the court and filed with the clerk thereof before the trial and a copy furnished to each party. The court may, in the order, fix the time and place for the examination and the time for filing the report and furnishing the copies.

The General Assembly also notably heightened the penalties for failure to respond to a civil summons. Prior to its amendment, Code section 8-302 authorized, among other sanctions, that the miscreant be fined "not exceeding twenty dollars, to the use of the party for whom he was summoned." He may now be assessed up to two hundred dollars for that purpose and

6 Id. § 8-74. The amendment goes on to provide retroactively that "[a]ny defendant served pursuant to the provisions of this section prior to [January 1, 1970] shall be deemed to have been a nonresident of this State even though the return fails to state that the defendant so served was a nonresident of this State."

7 Id. § 8-67.2. See also id. § 8-76 (procedure governing notice by publication in divorce or annulment proceedings).

8 Id. § 8-210.1.
in addition to the imposition of such assessment, may be punished as for a contempt committed in the presence of the court."

Several amendments affecting jury selection were adopted. Where previously any woman could notify the jury commissioner that she did not desire that her name be placed on the jury list, she must now have the occupation of housewife before obtaining the privilege. In addition, veterinarians are now exempt from jury duty. The method of compiling jury lists has also been changed slightly so that a city's inhabitants are now counted with those of the county in which the city is located if "the circuit court of the county also has jurisdiction of cases arising within the territorial limits of such city"

The General Assembly also sought to ease somewhat the burden of counsel at trial by eliminating the necessity that lawyers make formal exception to those rulings or orders of courts of record that they oppose:

Formal exceptions to rulings or orders of the court shall be unnecessary; but for all purposes for which an exception has heretofore been necessary, it shall be sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objections to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection shall not thereafter prejudice him on motion for a new trial or on appeal.

If nothing else, this provision should reduce the number of appeals lost on technicalities.

Various changes were made in judicial costs and fees, the principal legislation centering on briefs before the Supreme Court of Appeals. Prior to its amendment, Code section 14.1-182 referred to a single brief and provided that the assessed cost for its printing could not exceed one hundred twenty dollars. The section now states that "[a]ny party in whose favor costs are allowed in the Supreme Court of Appeals shall have taxed as part of the cost the actual cost of printing his brief or briefs, if filed by him, not to exceed two hundred dollars." In addition, minor changes were made in several fees incident to suit.
Finally an act was passed to prohibit the practice of law in Virginia courts by certain retired state judges and commissioners. The measure provides that:

No former justice or judge of a court of record of the Commonwealth and no former full-time judge of a court not of record of the Commonwealth, who is retired and receiving benefits under [the Judicial Retirement System, created by 1970 legislation, §§ 51-160 to 177], shall appear as counsel in any case in any court of the Commonwealth. No former commissioner of the State Corporation Commission or Industrial Commission, who is retired and receiving benefits under [the Judicial Retirement System] shall appear as counsel in any case before the Commission of which he was formerly a member.¹⁵

This provision serves not only to remove the possibility of actual prejudice to parties who might have been opposed by such former judges, but also to “avoid even the appearance of professional impropriety.”¹⁶

THE WORK OF THE SUPREME COURT OF APPEALS

Bars to Trial

Election of Remedies

During the Survey period, parties sought by a variety of gambits to prevent trial. In Jennings v. Realty Developers, Inc.,¹⁷ defendants raised in bar an alleged election of remedies. Realty had filed a suit in chancery in June 1964 for specific performance against Jennings in a property dispute, but had taken no further steps to prosecute the action. In February 1967, Realty filed a motion for damages arising out of the same dispute. One year thereafter it sought and received a nonsuit on the specific performance claim. Defendants then argued that resort to the specific performance suit constituted an election of remedies and barred the later damage action. The Supreme Court of Appeals found no bar, holding that

the mere institution of a suit in chancery does not necessarily of itself constitute an election of remedies and preclude the bringing of an action at law; that where two proceedings are instituted on the same state of facts, the defendant can compel the plaintiff to make an elec-

¹⁵ ABA CODE OF PROFESSIONAL RESPONSIBILITY AND CANONS OF JUDICIAL ETHICS, Canon 9 (1969).
tion; and that there can be only one recovery where the cause of action involves the same parties and touches the same subject matter.

In the instant case the trial judge, before permitting Realty Developer to proceed in its law action, required that it make an election. The election was made and the chancery suit was dismissed, leaving only one cause of action which was prosecuted to a judgment. The Court noted without further explanation that its holding "reflects . . . the best considered view." 19

**Judgments in Prior Actions**

Judgments in prior actions were raised as bars in two cases. In each the Court reversed the trial judge. *Doummar v. Doummar* 20 involved the validity of a lease of property owned by an incompetent. The defendants filed a "Special Plea of Res Judicata," contending that the validity of the lease "was litigated and determined in the first proceeding, or could have been so litigated and determined, and that the second proceeding is, therefore, barred." 21 In the first proceeding the sale of certain property owned by the incompetent had been sought and granted on the ground that his existing income was inadequate to support him. The validity of the lease was squarely raised in that proceeding, but apparently the commissioner in chancery and trial court made no ruling concerning the lease "other than was necessary in finding that the income of the incompetent was insufficient for his support." 22 The Court of Appeals concluded that "the causes of action involved in the two proceedings are not the same. The first was a statutory proceeding for the sale of certain property of the incompetent. The second, to have declared void a lease of other property owned by the

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18 *Id.* at 482, 171 S.E.2d at 834; cf. *Sood v. Advanced Computer Techniques Corp.*, 308 F. Supp. 239 (E.D. Va. 1969). In *Sood*, the plaintiff successfully argued that the defendant had waived its right of removal to federal court by filing cross-claims in the Virginia trial court where it had been sued by plaintiff. The district court stated that under Virginia law the defendant "was not required to file its counterclaim in the State Court, or face the loss of its claim." *Id.* at 240. Then, as a matter of federal procedure, the court held that "[s]ince the filing of a counterclaim was not compulsory but optional, the defendant invoked the jurisdiction of the State Court, submitted all issues in that case for its determination, and thereby became a plaintiff." *Id.* at 242.

19 *210 Va.* at 483, 171 S.E.2d at 834. The Justices did cite passages from three legal encyclopedias to support their conclusion; one passage states: "[I]n Virginia, it is held that in that class of cases in which the remedies are not inconsistent but are alternative and concurrent, there is no election . . . unless the plaintiff has gained an advantage, or the defendant has suffered a disadvantage." 6 *McQuillan's Jur. Election of Remedies* § 4 (1949).


21 *Id.* at 190, 169 S.E.2d 455.

22 *Id.* at 193, 169 S.E.2d 457.
incompetent, is an equitable proceeding sounding in fraud . . . .” 23 It follows that plaintiff did not have a claim of res judicata, but, at most, a claim of collateral estoppel; and, as the Court stated, where a different cause of action is raised in the second proceeding, the prior judgment bars further litigation “‘only as to those matters in issue or points controverted [in the prior proceeding], upon the determination of which the finding or verdict was rendered.” 24 The Court continued:

It is obvious from the record of the first suit that the court . . . left to another day and another proceeding the determination of the issue of the validity of the lease. The court merely overruled . . . exceptions [to the commissioner’s report based on his failure to declare the lease a nullity] and confirmed the commissioner’s report without making any ruling concerning the lease other than was necessary in finding that the income of the incompetent was insufficient for his support.25

In contrast to *Dounnar*, where the Justices found no estoppel despite the presentation of the pertinent issue in a prior proceeding, they did find estoppel in *Thrasher v. Thrasher*, 26 where the pertinent issue had not been raised. In 1961 a decree was entered in *Thrasher* approving settlement agreements resolving a dispute over corporate control. These agreements were premised on the existence of a voting trust, but the validity of that trust was not raised or passed on in the 1961 action. The Court nonetheless held that the decree barred a subsequent suit to have the voting agreement voided as invalid. The seeming inconsistency between *Dounnar* and *Thrasher* is explained by the Court’s concern in the latter more with a belief that the party challenging the voting trust was attempting “‘to play fast and loose with courts’” than with the rules of estoppel.27 The Justices stated that the evidence “clearly shows that [the party], in signing the settlement agreements approved by the decree of . . . 1961, held himself out to be acting under a valid voting trust . . . . Having signed the 1961 settlement agreements based upon a valid voting trust, and having had his attorney ask the court to enter the decree approving these agreements, [that party] will not now be permitted to reverse his position by denying the validity of

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23 *Id.* at 192, 169 S.E.2d at 456.
25 210 Va. at 193, 169 S.E.2d at 457.
27 *Id.* at 628, 172 S.E.2d at 774, quoting *Rohanna v. Vazzana*, 196 Va. 549, 553, 84 S.E.2d 440, 441 (1954): “‘A rule denying litigants the right to play fast and loose with courts should be maintained. . . . The rule as here employed may not be strictly regarded as one of estoppel but rather in the nature of a positive rule of procedure . . . .’”
the voting trust agreement." 28 The Court also noted that "[w]e have had recent occasion to reaffirm the principle that a party cannot assume positions which are inconsistent with each other and mutually contradictory." 29.

In an analogous decision, the United States Court of Appeals for the District of Columbia Circuit held in a master-servant case that a plaintiff's defeat in a Virginia action against an employer for the alleged negligence of his employee precluded the plaintiff's subsequent suit in a District of Columbia court against the servant. The second action was based on the same claim of negligence and for the same injuries, 30 and the servant had not been a party to the prior Virginia action. Commenting on Virginia law, the federal court noted the Commonwealth's "consistent allegiance to the principle that res judicata bears only on parties to the judgment..." 31 Yet, the court continued:

We discern in the Virginia cases, not a devotion to the principle of mutuality as an unyielding dogma, but a recognition that the appropriateness of its application hangs on the relative strength of the policy considerations in competition.

Much more important—and in our view decisive—are the Virginia decisions disseminating the policy that one adverse litigative adventure on any one issue is enough for any one litigant. 32

Thus, the court felt that the prior judgment for the master would preclude relitigation of the negligence issue in an action against the servant in a Virginia court. 33

Prior Settlements

In two cases, prior settlements were presented as barriers to trial. The Virginia Court of Appeals in Piedmont Trust Bank v. Aetna Casualty & Surety Co. 34 found the settlement conclusive. The parties had settled uninsured motorist claims, and judgments by agreement had been entered and satisfied. Eighteen months later the plaintiffs sought to have these judgments set aside, primarily because an intervening ruling by the Court had made relief available from additional insurance carriers. The Court found

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28 210 Va. at 627, 628, 172 S.E.2d at 773, 774.
31 Id. at 718.
32 Id. at 719.
that no more than a possible mistake of law was at stake, and thus that "the extraordinary circumstances which would entitle the appellants to relief" were lacking.\textsuperscript{35}

The Court made clear in *Nationwide Mutual Insurance Co. v. Martin*,\textsuperscript{36} however, that a settlement cannot be used to prevent a party from introducing evidence in court in an attempt to vitiate the agreement. The *Nationwide* parties were engaged in a lawsuit when they agreed to compromise their dispute. The day after the agreement was reached, and before their suit had been dismissed, Nationwide obtained evidence that allegedly indicated that it had been the victim of fraud. The trial court confirmed the settlement nonetheless, without giving Nationwide an opportunity to present its evidence. The Court, observing that "Nationwide seeks only the opportunity to be heard,"\textsuperscript{37} ordered that the opportunity be granted. The case of after-discovered evidence was distinguished: Where there has "never been a trial, the introduction of any evidence, or the return of a verdict," a party seeking to rescind a settlement need not set forth in affidavits facts showing what efforts he made to obtain the facts prior to settlement and why he failed to get them.\textsuperscript{38} The Court premised Nationwide's opportunity to be heard on the "well established" principle that "[a]justments or settlements may be rescinded or avoided for fraud."\textsuperscript{39}

Failure to Prosecute

A seldom raised plea-in-bar was presented the Court by the defendants' argument in *Jennings v. Realty Developers, Inc.*\textsuperscript{40} that Realty had lost its cause of action by failing to prosecute its specific performance suit promptly after the suit's commencement. As indicated previously, there was a delay of more than three and one-half years between the initiation of the specific performance proceeding and, on the same day, its dismissal and the trial

\textsuperscript{35} Id. at 402, 171 S.E.2d at 268. The Court stated that "every fact necessary to be known to form a correct conclusion as to the question of law to be decided was known to both the appellants and to the representatives of the insurance companies." Id. at 400, 171 S.E.2d at 267. These facts were also known to the United States Court of Appeals for the Fourth Circuit, and it reached an incorrect conclusion as to the pertinent question of law. The *Piedmont* parties relied heavily on that federal conclusion in determining their own conduct. See text at note 141 infra.


\textsuperscript{37} Id. at 359, 171 S.E.2d at 242.

\textsuperscript{38} Id. at 358, 171 S.E.2d at 242. The Court dealt recently with the question of after-discovered evidence in *Fulcher v. Whitlow*, 208 Va. 34, 155 S.E.2d 362 (1967), discussed in Boyd, supra note 24, at 1803-05. The trial court in the present case stressed Nationwide's failure to take advantage of its opportunity to obtain the evidence of fraud before agreeing to the settlement. See 210 Va. at 356-57, 171 S.E.2d at 240-41.

\textsuperscript{39} Id. at 357, 171 S.E.2d at 242.

\textsuperscript{40} 210 Va. 476, 171 S.E.2d 829 (1970).
of Realty's damage action, premised on the facts that had been the basis for the chancery claim: "Here nothing was done in the chancery suit until the day for trial of appellee's law action, at which time a nonsuit was taken." 41 Neither Realty nor the defendants moved during the interim to speed the litigation. The Court stated simply:

While there was a duty on the part of appellee to minimize damages,... it did not lose its cause of action by the delay. Appellants were put on notice immediately they breached their contract that appellee would hold them answerable. Had they desired a more expeditious resolution of the controversy, it was within their power, as well as that of appellee, to enlist the aid of the court in speeding the cause. 42

The Court seems to have reached its result without an adequate consideration of the issues involved, or at least without an airing of them in its opinion. First, the decision implies that there is an equal obligation on both defendant and plaintiff to prosecute an action in which they are involved. The equality of their obligations, however, is open to serious question. One judge has said, for example, that "I see no reason why the party who was sued and has no counterclaim against the plaintiff should take any steps to subject himself to the expense and inconvenience of a trial if the plaintiff's neglect is such as to give the defendant the hope or expectation that the case will never be tried." 43 And Federal Rule of Civil Procedure 41(b) provides that "[f]or failure of the plaintiff to prosecute,... a defendant may move for dismissal of an action or of any claim against him." It seems fair that the party who initiates a legal proceeding and seeks to benefit from it should bear the greater burden of prosecuting it, at the peril of dismissal for delay. The Virginia Court provides no explanation of its apparent view that fairness does not compel a greater burden of prosecution on the plaintiff than the defendant.

Perhaps the Court meant less to suggest that the burdens are equivalent than that the defendants here had failed to raise timely objection to plaintiff's delay. Many courts in the analogous criminal sphere have held that the sixth amendment right to a speedy trial comes into play only after the accused has complained of delay. 44 Thus, the present decision possibly means only that delay by a plaintiff in a civil action is to be measured from the

41 Id. at 482, 171 S.E.2d at 834.
42 Id. at 483, 171 S.E.2d at 835.
time of the defendant's objection to it—apparently a period of no significance in this case.

Second, the Court made no mention of the problem of prejudice. A passage of three and one-half years takes its toll on the memories of parties and witnesses, and, at times, on their availability. Similarly, documentary evidence may be damaged or lost during the course of a lengthy delay. Thus, any significant delay makes reliable fact-finding more difficult, and, in some cases, impossible. Would the Virginia Court, for example, permit a plaintiff to prosecute an action largely dependent on testimonial evidence after a delay of ten years, even if the defendant failed to object to the delay prior to the time of trial? Presumably, though it made no mention of the fact, the Court did not feel that a delay of over three and one-half years made unlikely accurate fact-finding in Jennings; or, perhaps the defendants were unable to show that they were prejudiced by the delay.

Third, the Court did not discuss the public interest that there be no undue delays in the disposition of pending cases so that congestion in Virginia trial courts can be avoided. Judges generally have inherent power to dismiss for failure of prosecution by the plaintiff, even without a motion from the defendant.45 Presumably, then, the Justices did not think that Realty had abused Virginia's judicial process, possibly because it had presented some justification for its delay.46 Finally, the Court did not deal with the consideration that very probably underlay its decision—the desirability that, except in extreme circumstances, disputes be resolved on their merits.47 The "opportunity to be heard" is a cornerstone of due process, not easily overturned.

On balance, since the defendants apparently failed to object to Realty's delay during its progress, since they seemed unable to present evidence that the delay prejudiced their defense, and since it does not appear that Realty's dilatory conduct placed inordinate burdens on the trial court's time, the Court's resolution of the prosecution issue was proper. There were no circumstances sufficient to overcome the presumption in favor of a trial on the merits. A delay of three and one-half years, however, was sufficiently long to call for more than a terse rejection by the appellate court of the prosecution claim.

46 There was a time lag between the filing of the bill for specific performance and its dismissal, and the trial of the law action. Appellee's explanation is that a portion of the time it was endeavoring to persuade appellants to fulfill their contract, and thereafter it was trying to effect a sale of the property.

210 Va. at 483, 171 S.E.2d at 834-35.
47 "It should be kept in mind that dismissal with prejudice is a drastic sanction to be applied only in extreme situations." 2B W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 917, at 136-37 (Wright ed. 1961).
Jurisdiction

One final case dealing with a plea-in-bar is appropriately mentioned here for its ruling that even the most fundamental challenges to the propriety of trial need not be resolved before the merits are reached. In *Tidewater Construction Corp. v. Duke*, a Jones Act case, the defendants argued that the trial court lacked jurisdiction over the subject matter "because the barge on which the plaintiff was working when he was hurt was out of service; [the] plaintiff was not a member of the crew; . . . he was not entitled to any warranty of seaworthiness, and . . . his exclusive remedy was under the Longshoremen's and Harbor Workers' Compensation Act . . . ." The defendants unsuccessfully insisted that the court rule on the jurisdictional challenge before submitting the case to the jury on the merits. The judge, concluding that "substantially all of the evidence" needed to resolve the jurisdictional issues also bore on the merits, ruled that the plea-in-bar and the merits should be determined together, thus avoiding the burden of two trials. The Court of Appeals upheld his ruling, stating: "The several hundred pages of testimony taken on these questions and the outcome of the case demonstrate the propriety of this holding . . . ."

Pretrial Steps

Process

In two unexceptional federal diversity actions, defendants asked the court to quash process served on them under Virginia long-arm statutes. There was a bit of whimsy in the choice of Virginia as a forum in *Skarpelis v. M/T Arthur P.*, an action for $130 said to have been lawlessly deducted from the plaintiff's seaman's pay in Boston on December 31, 1967. Plaintiff, a Greek national who had never been a resident of Virginia, argued that a portion of that sum—approximately $2.64—could be attributed to the time he was aboard the defendant vessel during a six-hour visit to Newport News on December 6, 1967, and thus that a portion of his claim arose in Virginia. The court, however, found that defendants were not doing business in Virginia and, accordingly, that no portion of plaintiff's claim arose in Virginia for process purposes.

In *Luther Compton & Sons, Inc. v. Community National Life Insurance*
Co., however, a federal court in Oklahoma ordered full faith and credit given to a final Virginia judgment, after rejecting the arguments of defendant insurance company, an Oklahoma corporation not licensed in Virginia, that the Commonwealth's process statutes are constitutionally deficient and, if not so deficient, that defendant had not had the requisite contacts with Virginia. The court held the pertinent statutes constitutional under McGee v. International Life Insurance Co., and found that the company had engaged in four "substantial acts" in the Commonwealth via its broker-agent: It had arranged for the medical examination of the insured, delivered his policy to him, collected the initial premium, and later sought to return the premium and recover the policy, all in Virginia.

Pleading

In a series of decisions, the Supreme Court of Appeals emphasized the unsteady ground upon which trial courts and parties tread when they deal with issues beyond or inconsistent with those framed by the pleadings. In Buchner v. Kenyon L. Edwards Co., the plaintiff's pleadings sought a declaratory judgment that the restrictive covenant on certain property was void as against public policy. The trial court held the restriction valid, but nonetheless went on to find that it would be unreasonable for the defendants to prevent the contemplated use of the property. The Court reversed, stating that "[i]n holding that the restrictive covenant was not invalid the lower court ruled on the sole issue raised by the pleadings.... [T]he court erred in going further to pass upon the reasonableness of application of the restrictive covenant, an issue beyond the pleadings." In McLaughlin v. Gholson, the parties stipulated that "the sole issue for the Court is its construction of the contract to determine whether under its terms the obligation had become void for absence of any signature of an authorized [Farmers Home Administration] official..., the defendant agreeing that he has no defense by which to avoid the relief prayed for in the Bill of Complaint if such was not the case." Although the lower court found that no signature was required, it then went on to hold that informal FHA approval was required, and that the plaintiff had failed to show it. The Court of Appeals reversed, stating:

When the court found that no signature by FHA was required by the option agreement this was determinative of all matters in controversy...
By agreeing that he had no defense to the bill of complaint if the option agreement was not void for lack of signature thereto by FHA, Gholson effectively eliminated any other possible defenses which might have been available to him. He cannot take the inconsistent position that if the agreement was valid because no FHA signature was required, it was nevertheless invalid because informal FHA approval was required and not proved. A litigant cannot assume positions which are inconsistent with each other and mutually contradictory.

In a similar vein is Klein v. National Toddle House Corp., where the Court held that when "grounds for a demurrer are voluntarily stated therein then only the grounds so stated will be considered." The defendants demurred in writing on the ground that allegations in the plaintiffs' pleading were factually inconsistent. Subsequently, the defendants argued that there was also a misjoinder by plaintiffs of actions ex contractu and ex delicto. The Court held: "Since no inconsistency appears from the pleading, it follows that the trial court was in error in sustaining the demurrer.

The plaintiffs in Piedmont Trust Bank v. Aetna Casualty & Surety Co. alleged constructive fraud as one of their grounds for relief. The Court used their own pleadings to defeat them: "It is regarded as fundamental that fraud cannot be predicated upon what amounts to a mere expression of an opinion. . . . Here, under the facts set forth in the pleadings, we are clearly dealing with an expression of opinion by the representatives of the insurance companies." "From appellants' pleadings, it affirmatively appears that appellants did not rely on the opinions expressed by the representatives of the insurance companies but conducted their own independent investigation by seeking and obtaining the opinion of an outside expert. Hence the element of reliance, an essential element of fraud, was absent and, in those circumstances, there could be no fraud. Thus the bill was properly subject to demurrer.

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58 Id. at 397, 171 S.E.2d at 818.
60 Id. at 644, 172 S.E.2d at 784; cf. Nationwide Mut. Ins. Co. v. Martin, 210 Va. 354, 357, 171 S.E.2d 239, 241 (1969), where the Court stated: "There is no evidence in the record upon which the court could have made any finding of fact. All that the court had before it were Symple's motion for judgment; Nationwide's grounds of defense; and Martin's motion for an order confirming the compromise."
62 Id. at 399, 171 S.E.2d at 267.
63 Id. at 400, 171 S.E.2d at 267. Similarly, in Cales v. Chesapeake & O. Ry., 300 F. Supp. 155, 157-58 (W.D. Va. 1969), the court dismissed the proceeding because the plaintiff's "allegations pertaining to the wrongful discharge are insufficient [under Virginia law] to state a cause of action upon which relief may be granted. . . ."
Discovery: Rakes v. Fulcher

In McLaughlin v. Gholson the Justices broadly declared: "This court looks with favor upon the use of stipulations, admissions, discovery and other pre-trial techniques which are designed to narrow the issues and expedite the trial or settlement of litigation." In a major case of first impression, Rakes v. Fulcher, the Court had an opportunity to give substance to its declaration with regard to the production of documents and other tangible things.

Plaintiff Rakes sued Fulcher and his employer for bodily injuries that she allegedly sustained as a result of the negligent operation of a tractor-trailer owned by the employer and operated by Fulcher in the course of his employment. Prior to trial, plaintiff filed a motion pursuant to Virginia Supreme Court of Appeals Rule 4:9 asking the court to require the defendants "to produce all written statements of witnesses interviewed and all narratives and written reports of claims adjusters relative to their investigative activities and contacts with possible witnesses relating to the accident." Rakes' supporting affidavit stated that she believed that "immediately upon the occurrence of the accident or soon thereafter," the defendants, through their agents or agents of their insurance carrier, conducted an investigation of the facts and circumstances leading up to the accident; that the information requested was necessary and important to prove the negligence of Fulcher and it was not readily available to plaintiff. In a later affidavit, Rakes stated that the documents were needed to resolve a suspected inconsistency or incompleteness in the statement of a certain witness. On the same day that plaintiff filed her Rule 4:9 motion, she also filed interrogatories asking for the names and addresses of all persons known to defendants who knew of the facts of the accident. The trial judge denied the motion for discovery of the documents on the ground that plaintiff had failed to show "good cause" for their production. The judge did, however, approve the requested interrogatories.

Rule 4:9 provides in pertinent part:

Upon motion of any party showing good cause therefor and upon notice to all other parties, ... the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photo-

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66 Id. at 544, 172 S.E.2d at 754.
67 Id.
graphs, objects, or tangible things, not privileged, which constitute
or contain evidence relating to any of the matters within the scope
of the examination permitted by Rule 4:1(b) and which are in his
possession, custody, or control ....

Thus Rakes concerns the circumstances in which a litigant can compel
the production of documents or other tangible items. Before dealing
with the specific issue presented by the case's facts, it will be helpful to outline
the general problem of the production of tangible things. At the outset
it is well to make clear that two grounds for the denial of discovery—that
the material sought is privileged or irrelevant to the subject matter of the
action—are not at issue here. It may be assumed that the tangible things
in question are unprivileged and relevant to the action. If proper, denial of
discovery must rest on another ground.

There are different types of tangible things. For our purposes, two broad
categories may be identified: those documents or things prepared for litiga-
tion and those not so prepared. The latter may have arisen in the ordinary
course of business, to satisfy public requirements not related to the litigation
in question, or for some other reason unrelated to it. Confusion has been
created by the failure of the pertinent discovery rules to distinguish clearly
between the two categories of tangible things. Both Virginia Rule 4:9 and
its model, old Federal Rule 34, can be read to require that "good cause"
be shown before any tangible thing—whether prepared for litigation or not
—will be ordered produced. Confusion from this source has been heightened
by the existence of two distinct ways of verbalizing the qualified immunity
from discovery enjoyed by tangible things: on the one hand, the simple
"good cause" language of the rules and on the other, the "necessity or
justification" language of Hickman v. Taylor, the seminal decision in the
area. Courts have been uncertain how these two verbalizations relate to one
another—whether the qualified immunity granted by the rules' "good cause"

68 See generally 2A. W. Barron & A. Holtzoff, supra note 47, §§ 652-52.2, 652.4;
Judicial Conference of the United States, Committee on Rules of Practice and
Procedure, Preliminary Draft of Proposed Amendments to Rules of Civil Procedure
for the United States District Courts Relating to Deposition and Discovery 17-27,
69-70 (Nov. 1967); C. Wright, Federal Courts 360-69, 386-89 (2d ed. 1970). Craig,
supra note 64, at 1835-39.
70 The Court of Appeals noted in Rakes that while "Rule 4:9 was adopted by this
court on November 29, 1966, to become effective February 1, 1967, and there are no
Virginia cases interpreting it," 210 Va. at 545, 172 S.E.2d at 754, it is "substantially the
same as Rule 34 of the Federal Rules of Civil Procedure ... and both counsel urge us to
consider the federal cases interpreting the rule." Id., 172 S.E.2d at 755. This the
Court did. After Rakes was handed down, the pertinent federal rules were amended.
See text at notes 91-93 infra.
is lesser than that granted by Hickman. Nor have courts been certain whether to grant the same immunity to all documents and things, whatever their type.

A brief look at Hickman will be helpful. After the tug John M. Taylor sank drowning several crewmen, its owners hired a lawyer to defend them against any litigation from the sinking. Less than two months later the survivors testified at a public hearing; their testimony was available to the plaintiff. The owners' lawyer then interviewed the witnesses privately and obtained from them signed statements regarding the sinking. He interviewed other persons whom he believed to have pertinent information and made memoranda of what they said. Seven months after the accident, the administrator of one of the victims sued. Among the interrogatories that he presented to the defendants was one demanding that they "[s]tate whether any statements of the members of the crews of the Tugs 'J. M. Taylor' and 'Philadelphia' or of any other vessel were taken in connection with the towing of the car float and the sinking of the Tug 'John M. Taylor.' Attach hereto exact copies of all such statements if in writing, and if oral, set forth in detail the exact provisions of any such oral statements or reports." 72 The defendants refused to cooperate and the Supreme Court upheld their refusal.

The Supreme Court in Hickman indicated clearly the type of tangible things with which it was dealing, stating the issue to be "the extent to which a party may inquire into oral and written statements of witnesses, or other information, secured by an adverse party's counsel in the course of preparation for possible litigation after a claim has arisen." 73 The Court made equally clear that its primary concern was to protect the proper functioning of the adversary system by preventing interference with the thought processes and work of attorneys: "Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney." 74 On this basis the Court distinguished between written and oral statements given a lawyer, since the production of the

72 Id. at 498-99.
73 Id. at 497 (emphasis added).
74 Id. at 510. The Court explained:

Proper preparation of a client's case demands that [his attorney] assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. . . . This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs and countless other tangible and intangible ways—aptly though roughly termed by the Circuit Court of Appeals in this case as the "work product of the lawyer." Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. Any attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial.

Id. at 511.
latter necessarily "forces the attorney to testify as to what he remembers or what he saw fit to write down regarding witnesses' remarks." 76 Thus, "as to oral statements made by witnesses [to the lawyer], whether presently in the form of his mental impressions or memoranda, we do not believe that any showing of necessity can be made under the circumstances of this case so as to justify production." 76 Written statements or documents, on the other hand, generally show less of the attorney's thought processes. These, the Court held, are subject to only a qualified immunity, which can be overcome by a showing of "necessity or justification," that is, by a showing that the "denial of such production would unduly prejudice the preparation of petitioner's case or cause him . . . hardship or injustice." 77 Again, "[w]here relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had." 78

Among the occasions mentioned by the Court when "production might be justified" is "where the witnesses are no longer available or can be reached only with difficulty." 79 The Court felt no necessity was shown in Hickman because there the plaintiff sought the statements of "witnesses whose identity is well known and whose availability to petitioner appears unimpaired," 80 and because the "petitioner was free to examine the public testimony of the witnesses" 81 at the public hearing held two months after the sinking—a time when presumably the details of the event would still have been fresh in the minds of the witnesses. Moreover, as the Court stressed, the plaintiff by his interrogatories had already forced the defendants to turn over all of the facts about the sinking that they possessed. 82 It appears that the Court felt that the plaintiff suffered no significant prejudice from the denial of production. The Court might well have found prejudice, however, had the plaintiff shown that even though the witnesses remained available he could not obtain statements from them substantially equivalent to those obtained by the defendants—because, for

76 Id. at 513. It also "gives rise to grave dangers of inaccuracy and untrustworthiness." Id.
76 Id. at 512.
77 Id. at 509.
78 Id. at 511.
79 Id. Or when "[s]uch written statements and documents might . . . be admissible in evidence or give clues as to the existence or location of relevant facts. Or . . . be useful for purposes of impeachment or corroboration." Id.
80 Id. at 508.
81 Id. at 509.
82 Id. at 507, 513.
example, the witnesses were hostile, or their memories had dimmed or lapsed since they gave the written statements. Although no Supreme Court decisions have spoken to what immunity, if any, should be given to those documents and things not obtained or prepared for litigation, lower federal courts have generally given them less protection than that afforded materials prepared for litigation: "With respect to documents not obtained or prepared with an eye to litigation, the decisions, while not uniform, reflect a strong and increasing tendency to relate 'good cause' to a showing that the documents are relevant to the subject matter of the action." This practice is certainly in accord with the Supreme Court's declaration in Hickman that "deposition-discovery rules are to be accorded a broad and liberal treatment."

Unless prepared for litigation, tangible things do not possess special characteristics sufficient to justify treating them differently than other non-work product subjects of discovery. Like the latter, they do not directly reflect an attorney's thoughts, and they may provide information essential to the effective functioning of the adversary system. Thus, tangible things not prepared for litigation are appropriately discovered if relevant to the subject matter of the action and non-privileged. In this regard, it is significant that the "good cause requirement was originally inserted in [old Federal] Rule 34 as a general protective provision in the absence of experience with the specific problems that would arise thereunder." Thus, the requirement did not spring from a considered judgment that all tangible things need special protection. Subsequent empirical study has shown that, except where preparation for litigation is involved, the "good cause" requirement has proved unnecessary. Little evidence has been found of attempts by attorneys to use discovery to unfairly coerce opponents. And "[t]he data

83 See the cases cited in Preliminary Draft of Proposed Amendments to Rules of Civil Procedure, supra note 68, at 25.
84 Id. at 22. Regarding the standard for determining relevance, Professor Wright has stated that "it is not too strong to say that discovery should be considered relevant where there is any possibility that the information sought may be relevant to the subject matter of the action"—the fact that the evidence sought would be inadmissible not being a ground for objection if the evidence seems reasonably calculated to lead to the discovery of admissible evidence. C. Wright, supra note 68, at 359.
85 329 U.S. at 507.
87 A study of the operation of the discovery rules was made for the Judicial Conference's Committee on Rules of Practice and Procedure by the Project for Effective Justice at Columbia University. The study is described and its findings presented in W. Glaseki, Pretrial Discovery and the Adversary System (1968). For a discussion of its scope and methodology, see id. at 38-50. Among the areas surveyed was the Western District of Virginia.
88 See id. at 117-23, 129-34.
suggest that the requirement to show 'good cause' has little effect on the use of inspections," since "most inspections . . . occur by notice, regardless of the language of Rule 34. Most lawyers cooperate with their adversaries, avoid the time-consuming preparation of papers and visits to court, and inspect and submit to inspections by informal agreement."

It is true that the absence of a good cause requirement for the discovery of tangible things could give the lazy attorney undeserved assistance. Such lawyers would be tempted to make minimal trial preparation and rely instead on discovery to provide them with the requisite information. This fact of life, however, is inherent in discovery as a whole; it is an unfortunate but tolerable by-product of ensuring that legal opponents have sufficient knowledge of the facts to make the adversary system work.

It is important to remember, also, that Virginia courts have broad powers under Rule 4:5(b) to respond to a party's need for privacy or secrecy and to prevent the imposition on him of undue burdens. Thus, a good cause rule is not necessary to protect those non-work product, tangible things genuinely in need of immunity from discovery, since immunity for those things can be obtained through a protective order. Reliance on such orders has the merit not only of avoiding the needless protection of some things but also of making clear the process in which the court should be involved—one of identifying and weighing competing interests and of denying discovery only when the "cause" for production advanced by the would-be discoverer is less "good" than that advanced by his adversary for protection.

Effective July 1970, the United States Supreme Court revised the pertinent federal rules to take current practice into account and to end the "good cause" ambiguity. Regarding tangible things prepared for litigation (work product), the Court added a new section to Rule 26(b)(3) which provides in pertinent part:

[A] party may obtain discovery of documents and tangible things . . . prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theo-

89 Id. at 221.
90 Id. at 220.
Thus, the Court has explicitly written *Hickman* into the rules. As that opinion suggested, the lawyer’s mental processes are to be protected as much as possible. Work product is to be ordered produced only after a showing by the would-be discoverer of substantial need and an inability without undue hardship to obtain the substantial equivalent of the material held by his adversary. Good cause, so far as it relates to work product, is thus defined by the rigorous *Hickman* standard. New Rule 26(b)(3) also resolves an issue left open in *Hickman*: whether the immunity extends only to the work product of an attorney or whether it also covers materials gathered by others, presumably for trial counsel’s use and often under his guidance. It covers both.

Regarding tangible things not prepared for litigation, the Supreme Court has struck any requirement of good cause from new Rule 34. Further, such items may be inspected without court order. Rule 34 as revised provides that “[a]ny party may serve on any other party a request . . . to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents . . . or to inspect and copy, test, or sample any tangible things . . . which are in the possession, custody or control of the party upon whom the request is served . . .” Thus, a showing that non-work product things are not privileged and that they are relevant to the subject matter of the action will justify production.

Against this background, the Virginia Court’s opinion in *Rakes* is somewhat veiled in its reading of Rule 4:9. The Court opened its analysis of the Rule with a broad statement:

> One purpose of discovery procedures is to obtain evidence in the sole possession of one party and unobtainable by opposing counsel through independent means. But more than mere relevancy to the issue of the documents sought is necessary; the movant must show good cause . . .

After comment on the nature of good cause and of work product, the Court concluded by stating:

> We interpret good cause as used in our Rule 4:9 to mean that before any party is entitled to the production of documents or other tangible

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92 Though the courts have divided over the issue, persuasive authority exists for the extension of the immunity to the work product of nonlawyers. See, e.g., Allmont v. United States, 177 F.2d 971 (3d Cir. 1949), cert. denied, 339 U.S. 967 (1950).
94 210 Va. at 545-46, 172 S.E.2d at 755.
things, such as are involved in this case, there must be a showing of some special circumstances in addition to relevancy. Discovery procedures were not intended to open an attorney’s files to opposing counsel, nor were they intended to afford an attorney the luxury of having opposing counsel investigate his case for him.\footnote{Id. at 547, 172 S.E.2d at 756.}

In their comment on good cause, the Justices made clear that the requirement is not met by the “mere assertion by affidavit that discovery is necessary for a movant to investigate fully and prepare his case.”\footnote{Id. at 546, 172 S.E.2d at 755.} Neither is it satisfied “when the moving party has not shown a bona fide effort to obtain the information by independent investigation,” nor by “the mere suspicion of counsel that [a witness] had made inconsistent and incomplete statements . . . .”\footnote{Id. (emphasis added).} These rulings on the nature of good cause apparently apply to the discovery of all tangible items, whether work product or not. So far as the latter is concerned, the Court stated:

Within the scope of the good cause rule is the “work product” doctrine, which protects an attorney from opening his files for inspection by an opposing attorney. This doctrine, however, does not offer absolute immunity, and discovery will be permitted where a showing of necessity greater than the normal requirement for good cause is made . . . .\footnote{Id. at 546, 172 S.E.2d at 755-56 (paragraphing omitted).} The threshold uncertainty in Rakes is what distinction the Court of Appeals intends to draw between work product and those tangible things not prepared for litigation. The opinion noted that discovery of work product requires “a showing of necessity greater than the normal requirement for good cause,” and referred to “documents or other tangible things, such as are involved in this case.”\footnote{Id. at 546-47, 172 S.E.2d at 755-56.} But the rest of the opinion appears to deal with good cause criteria as they relate to all documents and tangible things, not simply to work product. Perhaps the import of the holding is that plaintiff Rakes lacked good cause for discovery even had she sought non-work product documents.

A second issue left unclear by the Court is why documents and things not
prepared for litigation should be given special protection from discovery, as
*Rakes* would seem to require. This protection might be given in Virginia
either because the Court believes that the language of Rule 4:9 precludes
the elimination of a good cause requirement for non-work product things,
or because as a matter of policy the Justices think that tangible material
not prepared for litigation should have a qualified immunity. But if the
former, and if the Court relies on the "plain meaning" of the rule's provi-
sions, where in those provisions is there a "plain" indication that work
product is entitled to "a showing of necessity greater than the normal re-
quirement for good cause?"

Third, the factors which the Virginia Court wishes taken into account
in determining good cause remain somewhat uncertain. The Justices upheld
denial of production in *Rakes* because

the plaintiff offered no evidence to dispute the statements in the affi-
davit filed by defendants' counsel that defendants, their agents, or
agents of their insurer did not interview or obtain statements from
witnesses "immediately upon the occurrence of the accident or as
soon thereafter," and that no investigation was begun on behalf of
defendants until after the present action was instituted.

Thus plaintiff's counsel had the opportunity to make an investiga-
tion and to interview the witnesses before defendants, their agents, or
the agents of their insurer. The names and addresses of witnesses were
available to counsel from the trooper who investigated the accident.
Plaintiff also obtained the names and addresses of all witnesses known
to defendants through interrogatories. The fact that plaintiff's counsel
was employed only a short time before the action was brought and
that plaintiff was unable to assist counsel in any way, because she was
incapacitated, does not change the situation here.106

It appears that the Court was most concerned with *Rakes*' equal "oppor-
tunity to investigate" and with the continued availability of witnesses. These
factors are, of course, important. But how substantial a showing of need
for the documents sought must the would-be discoverer make? What if,
though a party had an equal or even better opportunity to investigate than
his adversary, he failed to do so and now has substantial need for the docu-
ments? What if, though witnesses are still available, a would-be discoverer
can no longer obtain from them the substantial equivalent of the written
statements possessed by his adversary? More fundamentally, is the Virginia
Court primarily concerned with denying "an attorney the luxury of having
opposing counsel investigate his case for him" or with giving each party
access to that material necessary to eliminate surprise and facilitate reliable
fact-finding?

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106 *Id.* at 547, 172 S.E.2d at 756.
Limited to its facts, Rakes seems correctly decided. First, the documents sought were clearly work product. Second, the plaintiff apparently made no showing of substantial need for them. The witnesses were known to her and remained readily available for examination. Finally, the plaintiff does not appear to have presented convincing evidence that she would have been unable to obtain testimony from the witnesses substantially equivalent to that already held by defendants.

To the extent that Rakes goes beyond the facts presented, however, and indicates that non-work product things are entitled to special protection, the decision does not appear wise. For reasons already stated, there seems insufficient reason to provide such protection. Should the Court feel that the present wording of Rule 4:9 prevents the elimination of a good cause requirement for non-work product material, it would be well for it to consider amendments similar to those recently made in the federal rules.

Trial

Trial errors made by counsel were fatal to numerous appeals during the past year. The Court pointed to the terminal nature of (1) failing to raise first in the trial court an issue later directed to the appellate court, (2) failing to raise timely or adequately precise objection in the trial court to judicial rulings later appealed, and (3) failing to request first from the trial judge any affirmative step later urged on appeal. As the Justices made clear in Reil v. Commonwealth, the fact that a contention has merit will not overcome its faulty presentation below. During Reil’s embezzlement trial,

103 See text at pages 1317-18 supra.
104 Haymore v. Brizendine, 210 Va. 578, 581, 172 S.E.2d 774, 777 (1970) (“[C]ounsel did not offer an instruction that recovery . . . could be predicated on . . . simple negligence. The court committed no error in failing to do what counsel had not asked it to do.”)
his counsel made a general objection to the introduction of a letter to the defendant from his wife. "This letter," said the Court, "if proper objection had been made and exception noted, was inadmissible as a privileged communication . . . . Defendant's counsel did not object, however, on the ground that the letter was a privileged communication. Rather, he made a general objection, which the trial judge interpreted as an objection that the letter was irrelevant . . . . Thus, proper objection was not made in compliance with Rule 1: 8 . . . ." This Rule provides:

In civil and criminal cases, all objections to writs of every kind, pleadings, instructions, notices, the admissibility of evidence, or other matters requiring a ruling or judgment of the trial court, shall state with reasonable certainty the ground of objection, and unless it appears from the record to have been so stated, such objections will not be considered by this Court except for good cause shown, or to enable this Court to attain the ends of justice.

The Court then noted, as it has in the past, that this rule is designed to avoid the delay and expense of appeals and reversals for errors that might have been avoided or corrected by a properly informed trial judge. It seems clear that counsel who wish to ensure an appellate decision on the merits must take care to leave no procedural stone unturned below.

Similarly, within the bounds of honesty, counsel would do well to see that their clients do not give decisive force to adverse testimony by the nature of their own testimony, or by a failure adequately to rebut hostile evidence. In Crawford v. Quarterman, the Court of Appeals reversed a judgment for plaintiff on the ground that "[p]laintiff cannot expect the court to disregard his testimony. His case can be no stronger nor rise any higher than his own testimony permits." On reviewing the evidence, the Court found that plaintiff's testimony supported that of one of the defendants and ruled out negligence on his part. By the same token, the uncontradicted testimony of an adverse witness can also result in a party's downfall. In Beale v. Jones, the defendant had been found negligent, and the trial court had entered judgment for the plaintiff. The Court of Appeals disposed of the case by finding that "'[t]he testimony of [the adverse witness] is clear, reasonable and uncontradicted that [defendant's] presence and conduct did not 'detract' his attention from the road ahead and that he kept his 'eyes on the road because [he] had to see what was in front of [him].'

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106 210 Va. at 372, 171 S.E.2d at 164.
The record shows that [the witness] underwent a rigorous examination as an adverse witness. 109

In Fisher v. Gordon,110 the Court recited the hoary rules governing the inferences to be drawn on a motion to strike and the rules determining which questions of negligence are to be left to the jury and which are to be decided by the judge as a matter of law. In a 4 to 3 decision, the Justices then reversed a summary judgment for the defendant entered below on the ground that plaintiff was contributorily negligent as a matter of law.111 Fisher was the only practice and pleading case of this Survey period that divided the Court. The dissenters "disagree[d] with the majority opinion that the appellant was not guilty of contributory negligence as a matter of law. She made a left turn under hazardous weather conditions directly across the path of appellee’s car which was overtaking and passing her. A glance to her left, however fleeting, immediately before beginning her turn would have revealed the other vehicle." 112 The factual emphasis of the dissent is indicative of the thrust of many of the Court’s procedural decisions: Often the legal principles at stake are well established, and controversy centers only upon whether they have been properly applied to the facts. As a rule, such cases could safely be left to an intermediate appellate court, and their frequent appearance on the docket of the Supreme Court of Appeals provides notable incentive for the creation of such an intermediate appellate body in Virginia.113

In Rakes v. Fulcher,114 the Court held that it is not improper for a judge to give the jury form verdicts, one of which they may choose upon reaching a decision. The Justices also concluded that it is not error for a trial judge to enter judgment for both a master and his servant, in an action where the former’s liability is predicated upon that of the latter, even when the name of the master is not mentioned in the verdict returned by the

109 Id. at 522, 171 S.E.2d at 853.
111 Cf. Whitfield v. Whitaker Memorial Hosp., 210 Va. 176, 169 S.E.2d 563 (1969). Plaintiff in Whitfield claimed error in the deletion of the word “possess” from a trial court instruction that “[i]t was the duty of the defendant . . . to possess and exercise such reasonable and ordinary skill . . . as are ordinarily exercised by the average of the members of her profession . . . .” Id. at 180, 169 S.E.2d at 566. Plaintiff argued that the deletion of “possess” took from the jury the question whether or not the defendant possessed the requisite skill. The Court upheld the deletion on the ground that “all the evidence showed that [the defendant] did possess the proper training and requisite skill . . . .” Id. at 181, 169 S.E.2d at 566-67.
112 210 Va. at 528, 171 S.E.2d at 839.
jury. The Court stated that under these circumstances "a verdict in favor of the servant requires a verdict for the master also." 115

Appeal

Rule 5:1

Holland v. Bliss. 116 The Court of Appeals in Holland reaffirmed the necessity that a party hew to the letter of the explicit time limits for perfecting an appeal. The case was resolved on a motion to dismiss the appeal for appellant's failure to designate the parts of the record to be printed in time for the record to be retained by the trial court clerk for twenty days. Prior to its recent amendment, 117 Rule 5:1, section 6(a) stated that: "[a]t least twenty days before the record is transmitted, counsel for appellant shall file with the clerk [of the trial court] a designation of the parts of the record that he wishes printed." Old section 7 of the rule provided that the record then had to remain in the clerk's office for at least twenty days, unless transmission was requested sooner by all counsel. Rule 5:4, in turn, states that the record is to be filed with the Supreme Court of Appeals clerk "within the time allowed by statute for presenting a petition for appeal"—four months from the date of the final order, under Virginia Code section 8-463. Although the final order in Holland was handed down on March 27, 1968, appellant did not designate parts of the record until July 11, 1968. To enable him to present his petition to the Court before the expiration of the time for appeal, the clerk released the record to appellant's counsel on July 24th, and he delivered it that day to a Justice. "Thus," said the Court, "the record remained in the clerk's office only thirteen days before being released to counsel for the plaintiff, rather than the twenty days required by Rule 5:1, § 7. Counsel for the defendant did not consent to early transmittal of the record. The clerk was without authority to release the record as he did on July 24, 1968, and it was not, therefore, properly filed with this court. . . . The cited rules are mandatory and jurisdictional. . . . Failure of the plaintiff to comply with the rules requires dismissal of his appeal." 118

Sullivan v. Little Hunting Park, Inc. 119 While Holland fits readily into Virginia precedent affirming the sanctity of the precise temporal require-

115 Id. at 549, 172 S.E.2d at 757; cf. Lober v. Moore, 417 F.2d 714, 718 (D.C. Cir. 1969), discussed at notes 30-33 supra.
117 See text at note 135 infra.
ments for appeal. The Sullivan cases involved the more abstract requirements of Rule 5:1, section 3(f), which, as pertinent here, provides (1) that "[c]ounsel tendering the transcript... shall give opposing counsel reasonable written notice of the time and place of tendering it;" (2) that he shall also provide "a reasonable opportunity to examine the original or a true copy of it;" and (3) that "the signature of the judge, without more, will be deemed to be his certification that counsel had the required notice and opportunity, and that the transcript... is authentic.

The Sullivan cases involved alleged discrimination against a black family in the use of community recreational facilities. After their complaints were dismissed in the trial court, plaintiffs began preparation of the record for appeal. On June 9, 1967, plaintiffs' counsel notified defendants' counsel by telephone that he would submit the transcript to the trial judge that day. He wrote defendants' attorney to the same effect, indicating also that he was filing motions to correct and that he would request the judge to allow a ten-day period in which opposing counsel might inspect and consent or object to the transcript. The letter was received on the following Monday, June 12th. Since the judge had been absent from his chambers when the transcript was delivered on June 9, he ruled that he received it on June 12th. When the motions to correct were heard on June 16th, the court declined to act until defendants' counsel had a further opportunity to examine the transcript, and he was personally given a copy to inspect. Three days later, on June 19th, he informed plaintiffs' counsel that he had no objections to the transcript as corrected and signed the proposed orders which plaintiffs' counsel had prepared. The orders were then submitted to the judge who signed the transcript on June 20, without objection by the defendants.

The Virginia Court refused to review the Sullivan cases on the ground that "the appeal was not perfected in the manner provided by law in that opposing counsel was not given reasonable written notice of the time and place of rendering the transcript and a reasonable opportunity to examine the original or a true copy of it," under Rule 5:1, section 3(f). The Supreme Court granted certiorari, vacated the Virginia judgments and remanded the cases for reconsideration in light of Jones v. Alfred H. Mayer Co., decided the same day.

On remand, the Virginia Court was adamant:

Our orders of December 4, 1967, refusing the appeals in these cases, were adjudications that this court had no jurisdiction to entertain the

120 E.g., Crum v. Udy, 206 Va. 880, 146 S.E.2d 878 (1966); Mears v. Mears, 206 Va. 444, 143 S.E.2d 889 (1965).
121 209 Va. at 280, 163 S.E.2d at 589. See 208 Va. cxiii (1967).
appeals because of the failure of counsel for the Sullivans and the Freemans to meet the requirements of Rule 5:1, § 3(f). Only this court may say when it does and when it does not have jurisdiction under its Rules. We had no jurisdiction in the cases when they were here before, and we have no jurisdiction now. We adhere to our orders refusing the appeals in these cases.\textsuperscript{124}

To support its procedural ruling, the Court cited only \textit{Snead v. Commonwealth},\textsuperscript{125} ignoring countervailing precedent. And of \textit{Snead}, the Court said simply: "In \textit{Snead} . . . we held the terms of Rule 5:1, § 3(f) to be mandatory and jurisdictional, and for the failure of counsel for \textit{Snead} to meet the requirements of the Rule, the writ of error . . . was dismissed."\textsuperscript{126}

The Supreme Court again granted certiorari. No Justice found that the Virginia Court's application of section 3(f) precluded federal review of the \textit{Sullivan} merits, although failure by a party to abide by state procedural requirements constitutes an adequate state ground of decision, which almost invariably precludes such federal review. The Court, it appears, was not persuaded that the \textit{Sullivan} parties had actually violated the section as it might reasonably have been understood when they tendered the transcript.

In terms of its own prior section 3(f) decisions, the Virginia Court's action in \textit{Sullivan} was not reasonably foreseeable. Past decisions have been concerned with whether opposing counsel had a reasonable opportunity to examine the transcript after he received notice of its tender to the judge and before its signature by the judge. These decisions have put no stress on written, as opposed to actual, notice; nor have they indicated that the provision of written notice in advance of the act of tendering is quintessential. As the Court stated in \textit{Bacigalupo v. Fleming}:

The requirement that opposing counsel have a reasonable opportunity to examine the transcript sets out the purpose of reasonable notice. If, after receipt of notice, opposing counsel be afforded reasonable opportunity to examine the transcript, and to make objections thereto, if any he has, before it is signed by the trial judge, the object of reasonable notice will have been attained.\textsuperscript{127}

The Court of Appeals had also made clear in \textit{Bolin v. Laderberg}\textsuperscript{128} that the signature of the trial judge, unaccompanied by objections from a party,
virtually concludes the issue, pursuant to the mandate of Rule 5:1, section 3(f):

The motion to dismiss may be overruled summarily by referring to Rule 5:1 § 3(f) itself. It is true that the rule requires that counsel tendering a transcript “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.” But another portion of the rule provides that “the signature of the judge, without more, will be deemed to be his certification that counsel had the required notice and opportunity, and that the transcript . . . is authentic.”

Here, the trial judge noted on the transcript the date it was tendered to him and the date he signed it. His signature appears on the transcript without more and is, therefore, his certification that counsel for the lessees had the required notice of tendering the transcript and the required opportunity to examine it.129

Moreover, in Cook v. Virginia Holsiam Bakeries, Inc., the Justices found significant the fact that the party raising the section 3(f) claim “conceded in oral argument before us that the statement signed by the trial judge was correct.”130 In Cook the opposing counsel had been notified on October 15 that tender would take place on October 20; he received a copy of the transcript on October 19; it was signed by the judge two days later, on the 21st.

Opposing counsel in Sullivan received actual notice of the tendering of the transcript on June 9, and written notice on June 12. The transcript lay in the judge’s chambers from June 9 to June 19, and was available there to opposing counsel at least from the 12th. He had a copy of it in his possession for three days, from the 16th to the 19th, and he affirmatively made known his satisfaction with it. He presented no objections to its signature by the judge on June 20. During oral argument before the Supreme Court, defendants could not point to a single inaccuracy in the transcript.131 In short, opposing counsel in Sullivan had a reasonable opportunity—and all the opportunity that he desired—to examine the transcript after he was notified of its tender and before its signature by the judge.

Reliance on Snead did not avail the Virginia Court. That case involved outrageous facts: A narrative rather than a transcript was tendered; appellant’s own counsel admitted that it was “confusing;” tender occurred after working hours and with a view to immediate signature; and opposing counsel was given only one half hour’s notice. The Court emphasized the

129 Id. at 797, 153 S.E.2d at 253; accord, Boyd, supra note 24, at 1811-12.
131 396 U.S. at 246-47 n.13 (Harlan, J., dissenting).
facts heavily in determining that reasonable notice had not been given “within the plain meaning of Rule 5:1, § 3(f),” the terms of which are “mandatory and jurisdictional.” But the facts of Sullivan are wholly unlike those of Snead, and, absent any explanation by the Court, it is difficult to see how Snead in any way precluded a finding that the Sullivan plaintiffs had complied with section 3(f). Justice Harlan seems clearly correct in his conclusion that “[t]he finding of the Virginia Supreme Court of Appeals of a violation of Rule 5:1, § 3(f), in this case was . . . based on a standard of reasonableness much stricter than that which could have been fairly extracted from the earlier Virginia cases applying the rule . . . .”

This is not to say that section 3(f) is not “mandatory and jurisdictional” as the Virginia Court has insisted. Justice Douglas, writing for the majority in Sullivan, erred in terming the rule “discretionary,” but perhaps his terminology was occasioned by a desire to be gracious. For if the rule is jurisdictional, then the Virginia Court’s refusal to hear the Sullivan appeals constituted a sudden shift in judicial interpretation of the demands of the rule. Such judicial law-making was certainly within the power of the Court, and it could certainly conclude the litigation so far as Virginia rights were concerned. But the Court’s decision could not deny federal review of a state decision affecting federal rights. Failure by a party to follow a state procedural rule provides an adequate state ground of decision, foreclosing federal review, only when the party might reasonably have been aware of the rule’s demands.

The Virginia Court’s decision in Sullivan was unfortunate on a number

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132 It is important that time be given opposing counsel for a reasonable opportunity to analyze such statements characterized by defendant’s counsel as being confusing. The entire testimony of a very material witness was left out of the narrative statement when it was presented to the trial judge and it was necessary for him to insert it. We are of the opinion that the notice delivered to the Commonwealth’s Attorney at his residence, after office hours, thirty minutes before tendering a narrative statement of the evidence to the trial judge for his signature, does not constitute reasonable notice within the plain meaning of Rule 5:1, § 3(f) and that the terms of this Rule are mandatory and jurisdictional.

200 Va. at 854, 108 S.E.2d at 402.

133 396 U.S. at 245.

134 The Supreme Court in NAACP v. Alabama, 357 U.S. 449, 456 (1958), stated that “[w]e are unable to reconcile the procedural holding of the Alabama Supreme Court in the present case with its past unambiguous holdings as to the scope of review available upon a writ of certiorari addressed to a contempt judgment.” The Court went on to say that, even if the Alabama ruling had some basis in precedent, “such a local procedural rule, although it may now appear in retrospect to form part of a consistent pattern of procedures to obtain appellate review, cannot avail the State here, because petitioner could not fairly be deemed to have been apprised of its existence. Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights.” Id. at 457-58.
of scores. First, it confused and rigidified a step of the appellate process. Second, the decision amounted to little more than a judicial ipse dixit in particularly inappropriate circumstances: Sudden changes in the interpretation of a rule, especially changes costly to persons who have reasonably relied on past interpretation, should be carefully explained and justified in the opinion announcing the new reading. Finally, the Sullivan cases provided the Virginia Justices an opportunity to deal with a matter of great complexity and contemporary moment. Had they treated the merits in a well-reasoned opinion, they could have contributed significantly to the shaping of the national corpus juris. It is regrettable that the Court felt itself jurisdictionally precluded from dealing with the substance of Sullivan.

Amendment of Rule 5:1

On September 1, 1970, a significant amendment of Virginia Supreme Court of Appeals Rule 5:1 took effect, changing the time for designation of the parts of the record to be printed. Prior to its amendment, section 6(a) called for designation "[n]ot less than twenty days before the record is transmitted." Designation now takes place "[n]ot more than fourteen days after the date of the certificate of the clerk of this Court . . . that an appeal has been awarded." This temporal shift provides welcome relief to appellate counsel by limiting the time-consuming process of designation to those cases in which appeal is actually granted. Under amended section 6(a), counsel for the appellee has fourteen days from the filing of the appellant's designation to note "the additional parts of the record that he wishes printed as germane to the assignments of error and of any cross-error made." Counsel for appellant, in turn, has fourteen days from the appellee's designation to indicate "any additional [germane] parts of the record that he may wish printed." The amended requirements of section 6(a) have been incorporated into section 6(b) as well, and thus apply to criminal as well as civil proceedings. Section 6 has been further altered by an amendment of section 6(c), which presents in greater detail and somewhat different format the proper form of designation. Rule 5:1, section 7, governing transmission of the record, was necessarily amended in the wake of the section 6 changes. Section 7 previously provided for the retention of the record in the office of the trial court clerk for twenty days after the appellant's designation of the parts to be printed. Under the section as amended,

> The clerk shall retain the record for twenty-one days after the notice of appeal and assignments of error have been filed with the clerk . . . or, if at the time of such filing counsel for the appellant also files with

1See 211 Va. 113 (1970).
the clerk notice that a transcript or statement will thereafter be filed . . ., the clerk shall retain the record for twenty-one days after the filing of such transcript or statement . . . .

Thus, as a rule, transmission of the record now occurs before, rather than after, designation of the parts to be printed. The amended Rule adds a statement that "[t]he clerk's failure to transmit the record as herein provided shall not be ground for dismissal of the appeal by this Court." In addition, the section eliminates the possibility, present under the old rule, of transmittal "to the clerk of this Court at . . . Staunton." Transmittal must now take place in Richmond alone; the same geographic restriction has been imposed in amended Rule 5:4, governing the place for filing petitions and records.

Rule 5:1's section 8, like its section 7, has been modified to take account of the change in section 6. Under old section 8, the clerk simply caused the record to be printed after an appeal was allowed; now he does so "[a]fter an appeal has been allowed and all designations for printing have been made, or the time allowed therefor has expired, or counsel have indicated earlier in writing that no further designations will be made."

Standard of Review

In Bailey v. Pioneer Federal Savings & Loan Association, the Court of Appeals reiterated that "[t]he report of a commissioner in chancery . . . is entitled to great weight and should not be disturbed unless its conclusions are unsupported by the evidence. The decree of a trial court confirming the report is presumed to be correct and will not be reversed unless plainly wrong." 136 In Bryant v. Commonwealth Custom Builders, Inc., the Court affirmed the holding of the trial court, stating:

The issues which are dispositive of the case are factual.

The case was tried without a jury. The evidence was not transcribed. From the narrative statement of the testimony and incidents of trial prepared by the trial judge, the exhibits and extracts from the depositions of two witnesses, we cannot say that the judgment of the lower court is plainly wrong or without evidence to support it.137

And in Beale v. Jones, the Court noted the effect of a jury verdict on appellate review, indicating that "the evidence and all proper inferences from the evidence will be stated in the light most favorable to the appellee since she was awarded the jury's verdict." 138

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The Virginia Court of Appeals had occasion during the Survey period to reiterate its supremacy over Virginia law. Commenting on a Fourth Circuit decision construing Virginia insurance law\(^{139}\) that had been nullified by a subsequent Virginia holding,\(^{140}\) the Court stated of the federal ruling that it "was not binding precedent but was only persuasive authority. It represented the opinion of the . . . Fourth Circuit on the validity of the 'other insurance' provision in a Virginia insurance policy that had been issued pursuant to statute. Until such time as this court spoke, the validity of the 'other insurance' provision was not a matter susceptible of exact knowledge or interpretation and could only be the subject of an opinion."\(^{141}\)

Federal courts deferred to Virginia law on numerous occasions during the past year—for example, by upholding Virginia process and ordering full faith and credit to a Virginia judgment,\(^{142}\) by refusing to give a federal forum to a party who had previously acceded to Virginia jurisdiction by filing counterclaims in state court,\(^{143}\) and by denying impleader in federal court where there was no substantive right under Virginia law to the relief sought.\(^{144}\) On the other hand, when a Virginia decision affected substantive federal rights, the Supreme Court in Sullivan refused to have its jurisdiction ousted by a Virginia procedural ruling that it found to be without adequate basis.

Federalism confronts an unusually delicate situation when a United States district court is requested to enjoin the operation of a state law allegedly incompatible with the Federal Constitution. There is potential not only for the disruption of state programs and activities in such requests, but also for a sharp blow to state hubris. Disruption and insult may in turn breed resistance. Accordingly, it is important that federal courts take steps to lessen the chance of error in the granting of such injunctions,\(^{145}\) and, further, that action be taken by a trial court of unusual dignity, with expedited appeal. To these ends, Congress established the three-judge district court, with direct appeal of its decisions to the Supreme Court.\(^{146}\)

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\(^{139}\) Travelers Indem. Co. v. Wells, 316 F.2d 770 (4th Cir. 1963).
\(^{145}\) "The crux of the business is procedural protection against an improvident state-wide doom by a federal court of a state's legislative policy." Phillips v. United States, 312 U.S. 246, 251 (1941).
with it the severe disadvantage of heightening the burdens of an already overburdened federal judiciary. These burdens—the need to assemble three federal judges to sit as one trial court and the automatic, direct appeal to the Supreme Court—are particularly vexing when the case involves relatively unimportant issues. Thus, federal courts have severely limited the availability of a three-judge court, reading the pertinent statute “not as a measure of broad social policy to be construed with great liberality, but as an enactment technical in the strict sense of the term and to be applied as such.”

A federal district court in Virginia recently was requested to convene a three-judge court to hear a class action for declaratory and injunctive relief against both Virginia Senate Joint Resolution No. 12, entitled “Unionization of officers and employees of the Commonwealth,” and certain rules and regulations of the Newport News police and fire departments restricting the political activity and unionization of their members. The Senate resolution, adopted in 1946 with the concurrence of the House, provides that “[i]t is contrary to the public policy of Virginia for any State, county, or municipal officer or agent to be vested with or possess any authority to recognize any union as a representative of any such public officers or employees, or to negotiate with any such union or its agents with respect to any matter relating to them or their employment or service . . . .” The plaintiffs challenged the resolution and the Newport News provisions on first and fourteenth amendment grounds, suing the city, certain city officials and the local Commonwealth’s Attorney. The district court denied plaintiff’s motion to convene a three-judge court, while granting the motion of the Commonwealth’s Attorney that the action be dismissed as to Virginia, on the grounds that the Newport News regulations were purely local in effect and that the Senate resolution “expresses only the opinion of that legislative body,” since it was not adopted in the form of a statute. Thus, there was “no state statute of general and statewide application in issue,” and no basis for a three-judge court or for suit against the Commonwealth.

Though the Newport News regulations are clearly of only local effect, a decision for the plaintiffs in this action will have impact on other such regulations throughout the Commonwealth. Moreover, though the Senate resolution was not adopted in statute form, a state policy is certainly at issue. Nonetheless, much can be said for the district court’s decision. Precedent


150 307 F. Supp. at 1115.
suggests that no technicality is too slight to be seized upon as a means to avoid a three-judge court. Here, two routes of escape presented themselves. The Newport News regulations are unescapably local, and among the classic three-judge court technicalities is the rule that, even where a decision against a state policy would affect the state as a whole, if the issue arose with direct impact only on a locality, the three-judge court procedure is unavailable. And, of course, it could be argued in any event that no statewide statute is at stake. As a matter of policy, the wisdom of the court's refusal to convene a three-judge court was manifest in the Commonwealth's lack of interest in the case. The only compelling reason for the existence of the three-judge procedure is to minister to states aroused over the prospect that a federal court may enjoin practices highly valued by them. Virginia was obviously not so aroused here. Thus, federal-state comity did not call for an extraordinary trial court and an extraordinary appellate process.

A Concluding Note on Craftsmanship

Court should be encouraged to say no more than necessary, if for no other reason than to contain our burgeoning case reports. But the Virginia Supreme Court of Appeals could safely have said more about several of its more difficult procedural decisions of the past year. There is, of course, some merit in a selective use of precedent that largely ignores decisions opposed to the announced result, just as there is some merit in limiting discussion of the policy considerations that shaped the result. An opinion that simply delivers the law, unexplained, may facilitate decision-making, since the court need not come to grips with the precise reasons for its decision; absent the need to articulate rationale, there is less necessity and impetus to confront and deal with countervailing precedent and policy—or, for that matter, with material that supports the desired result. An unexplained opinion also helps to ward off criticism, for if the court veils its distinguishing or overruling of contrary precedent and if it rarely reveals its policy choices and the reasons for them, the opinion will not lend itself easily to attack by those with different views about precedent or policy. Further, the failure to articulate rationale may promote unanimity on a collegial court, as often the brethren can agree on result though not on the reasons for it.

Against these advantages, however, are the notable disadvantages of unexplained exposition of the law. First, decision-making in which the decision-maker is not encouraged to face and resolve all pertinent issues of precedent and policy runs the risk of being at best unfocused, and at worst ill-advised.

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151 See note 147 supra.
Second, results without rationale do less than necessary to explain what the law is, and this, in turn, breeds uncertainty and unpredictability about things legal. It has been well stated that "[e]ven when a court reaches results whose wisdom is open to debate, good craftsmanship and technique can contribute to predictability and 'certainty.' For if a court demonstrates that it has considered all the precedents and fully weighed all the relevant policy considerations before reaching its final result, even those who disagree can evaluate the basis for the holding and recognize the extent to which the judgment announced is maintainable and unlikely to yield to future attack. Even more important, a careful student can then more accurately estimate the probable future scope of the announced holding or rule and the probable future development of the doctrine in the area." 153 Finally, a simple statement of a court's conclusion does little to satisfy the party who loses, and who may have advanced strong precedent and policy arguments in his favor. An important function of any court is to explain to the unsuccessful party why he lost so that he and society as a whole can have confidence that his legitimate claims have been heard and justice done.