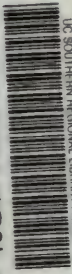


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# PLEADING AND PRACTICE

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## Preface

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The first four hundred and twenty four pages of this book were printed in the Fall of 1911, hence no reference could be made therein to the Acts of Assembly of 1912. A separate table of these Acts, so far as they affect the text, is given on p. xxxi. The residue of the book, however, contains the changes made by said Acts. No attempt has been made to cite all of the Virginia cases, except in a few of the chapters, but it is believed that the citations given are sufficient to put the intelligent reader on the track of the authorities. Frequent reference has been made to the Encyclopædias and to monographic notes containing collections of cases where it was deemed desirable to give a fuller citation of authorities than could be given in the notes to the text. Part II of the book consists of Stephen's Rules of Pleading, taken from the eighth American edition. Sections 434 and 435 and pages 1012-1019 are taken from the notes of this edition, which were the author's text in an earlier edition. As far as possible I have eliminated matter that was antiquated or not adapted to modern use, and wherever modern illustrations of the rules could be found I have either substituted them for the illustrations given by Stephen, or have given them as additional illustrations. The omissions from the text are indicated by stars, and the new matter by brackets.

I beg to acknowledge my indebtedness to Mr. Robert W. Withers of the law faculty of Washington and Lee University for the preparation of the chapters on the contract actions and the index, and to Mr. N. C. Manson, Jr., of the Lynchburg, Va. bar for the preparation of the chapter on Mechanics' Liens. These chapters have been simply edited by me.

M. P. B.

*Lexington, Va.,  
January, 1913.*



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## Acts of 1912

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After the first four hundred and twenty-four pages of this book were printed, the legislature, at its session of 1912, enacted the following statutes affecting subjects treated in the text:

- Acts 1912, p. 15. An Act giving a remedy by motion for *torts*. *Thirty days* notice is required, and the court must have jurisdiction "otherwise than under" § 3215 of the Code. See § 99 of the text.
- Acts 1912, p. 38. Section 2920 of the Code is so amended as to make the limitation on *store accounts* *three years* instead of two, as formerly. This changes the law as laid down in § 219, page 387, of the text.
- Acts 1912, p. 133. A remedy, by petition after notice, is given for the ascertainment and designation by the court of "the true boundary line or lines to such real estate as to one or more of the coterminous landowners." The Act declares who shall be parties, and provides the mode of procedure. See Chapter on Ejectment.
- Acts 1912, p. 651. Section 3211 of the Code is so amended as to allow a recovery for *damages* founded upon any contract, and also to recover any statutory penalty. This changes the law as laid down in § 99 of the text.



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## Errata

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- Page 28 Line 6 from top—for "legal" read "illegal."
- Page 132 At end of line 13 from top—after note (50) add "There are, however, some exceptions to this rule."
- Page 158 At end of note 60—for "sec. 198" read "sec. 197."
- Page 168 Lines 1 and 2 from top—for "returnable" read "given."
- Page 168 Strike out last sentence of first paragraph and note 15a.
- Page 202 Line 2 from top—for "defendant" read "plaintiff."
- Page 231 Line 10 from top—for "malice" read "libel."
- Page 232 Line 14 from the bottom—for "controversy" read "country."
- Page 253 Line 12 from bottom—for "three" read "two."
- Page 269 Line 8 from top—strike out "other."
- Page 273 Line 7 from bottom—for "plaintiff" read "defendant."
- Page 288 Line 9 from bottom—for "Oct. Rules" read "day next term."
- Page 288 Line 10 from bottom—for "\$500" read "\$50."
- Page 326 Lines 3 and 5 from top—after "agent" insert "or officer."
- Page 332 Line 5 from top—strike out "not."
- Page 347 Note 42—for "sec. 3958" read "sec. 3258a"; also, in Code of Virginia Cited, p. xlv, same correction.
- Page 396 Note 89—for "44 S. E. 333" read "44 S. E. 888;" for "Shields" read "Shield;" for "112 Va. ———," read "111 Va. 643."
- Page 426 Line 12 from top—strike out "not."
- Page 431 Line 13 from bottom, last word—for "after" read "before."
- Page 579 Note 7—for "205" read "265."
- Page 664 Line 7 from bottom—for "debtor" read "creditor."
- Page 673 Lines 3 and 4—strike out "and return."
- Page 708 Last line—strike out "other."
- Page 718 Note 68, line 1—after "sue" insert "out."
- Page 781 Note 34—insert "3 Code, sec." before "3022."
- Page 901 Line 2 from top—for "like" read "lie."
- Page 921 Note 9—after "Hogan" read "(Cal.) 18 Pac. 784."
- Page 928 Line 3 from top—for "stories" read "stores."
- Page 956 Line 11 from bottom—for "plaintiff" read "defendant."
- Page 973 Line 3 from top—for "plea" read "complaint."
- Page 1013 Line 8 from bottom—for "respondent" read "respondeat."

# Common Law Pleading and Practice.

## CHAPTER I.

### REDRESS OF PRIVATE WRONGS—DISTRESS FOR RENT.

- § 1. Self-defence—Recaption—Abatement of nuisance.
- § 2. Distress.
- § 3. Distress for taxes and officers' fee bills.
- § 4. Distress for rent.
- § 5. Interest on rent.
- § 6. Limitation of time to distrain.
- § 7. By whom distress warrant levied.
- § 8. Irregularity or illegality in making distress.
- § 9. Disposition of property levied on.
- § 10. Delivery or forthcoming bond and proceedings thereon.
- § 11. What property may be distrained.
- § 12. Redress for illegal distress—At common law.
- § 13. A year's rent under the Virginia statute.
- § 14. Motion on delivery bond—Proof.
- § 15. Effect of general covenants to repair.
- § 16. Abatement of rent.

#### § 1. **Self-defence—Recaption—Abatement of nuisance.**

As stated by Blackstone, all private wrongs, or civil injuries, may be redressed in one of three ways: (1) By the mere act of the parties themselves; (2) by the mere act or operation of the law; (3) by the joint act of the parties and of the law, or a civil action. Redress by act of the parties may be either: (a) By the act of the party injured alone, or (b) by the joint act of both parties.

Redress by act of the party injured alone may be effected (1) by self-defence, (2) by recaption of goods, wife, child or serv-

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NOTE.—References to the Code, unless otherwise stated, are to the Code of Virginia of 1904. Other references are as follows: To the Code of West Virginia of 1906; to the third edition of Minor's Institutes; and to the second edition of Andrew's Stephen on Pleading.

ant, (3) by re-entry upon lands, (4) by abatement of nuisance, and (5) by distress. If one is in a place where he has a right to be, and is doing what he has a right to do, in a lawful manner, he may resist any assault made upon him, even if necessary to the extent of taking his assailant's life, provided the assailant apparently threatens life or great bodily harm. The same right is extended to persons occupying the relationship of husband and wife, parent and child, master and servant, and is mutual and reciprocal between them.

So also if one's goods, his wife, child or servant have been wrongfully taken from him, he may retake them when found, provided the retaking be not in a riotous manner, nor attended with a breach of the peace; and if one has been wrongfully deprived of the possession of his real estate, the owner may re-enter upon his land provided it be done peaceably and without force.

Whatever unlawfully annoys or does damage to another is a nuisance and may under proper conditions be abated. Abatement is simply removing, or taking away, the nuisance, but it must not be done riotously nor by breach of the peace. If the nuisance be one of commission no notice is required before removal, but if it be one of omission notice of the fact that it is a nuisance should generally be given, except, perhaps, in case of overhanging trees. The abatement should not exceed the necessities of the case—e. g., a whole tree should not be cut down simply because the branches create a nuisance.

## § 2. Distress.

Distress is the taking of a personal chattel out of the possession of the wrongdoer into the custody of the party injured to procure a satisfaction for the wrong committed.<sup>1</sup> Distress is generally used as a remedy in three cases: (a) to recover damages for cattle, damage feasant; (b) to enforce the collection of taxes and officers' fee bills; (c) for the collection of rent.

At common law, every man's boundary line was a lawful fence, and if cattle strayed upon another's land the owner of the cattle was liable in damages for the injury. In many of the

1. 3 Bl. Com. [6].

states, including Virginia and West Virginia, it has been held that this common-law rule does not apply, and it has also been held that the common-law rule is inapplicable to the public lands of the United States Government. The reason assigned is that it was not adapted to the nature and conditions of the country at the time of its settlement; that fencing materials were scarce, that there was a vast extent of land not occupied or cultivated, chiefly valuable for pasturage, and that the public interests would be best subserved by requiring each landowner to protect his crops by proper enclosures.<sup>2</sup> In those states where the common-law rule does not apply, the owner of the land must protect his crops against trespassing cattle by a lawful fence. But even when a landowner is required to enclose his land, if he fails to do it, the owners of cattle have no right to drive their cattle on the uninclosed land, and if they do they will be liable as for wilful trespass.<sup>3</sup> What constitutes a lawful fence is usually defined by statute. In the absence of such statute, it means a fence adequate to keep out ordinary animals of the particular kind, or animals not given to breaking through. In Virginia, the Board of Supervisors of the county are authorized, under given conditions, to adopt the common-law rule for the county or any portion thereof, or to declare what shall be a lawful fence, as to any or all animals designated in the statute, not exceeding the requirements of the general law.<sup>4</sup> At common law, cattle damage feasant, that is doing damage, or trespassing upon land, could be distrained therefor. They were simply taken as a pledge or security for the damage done. The distrainer could not work, use, or sell them, but could only hold them as a security for the damage done, and in the meantime must feed and otherwise provide for them. If the owner proved obdurate, the distrainer had no means of enforcing his demand, and if the distress was irregularly made, the distrainer was a trespassor *ab initio*.<sup>5</sup> In Virginia trespassing cattle may be impounded, and a speedy remedy is provided by a warrant before

2. Poindexter v. May, 98 Va. 143, 34 S. E. 971; Blaine v. Ches. & O. R. Co.; 9 W. Va. 253; Buford v. Houtz, 133 U. S. 320.

3. Poindexter v. May, *supra*.

4. Code, § 2048.

5. 3 Bl. Com. [10].

a justice of the peace for enforcing the demand for the damage done. For a second or any subsequent trespass the owner of the animal is liable for double damages, both actual and punitive, recoverable before a justice, and a specific lien is given on the animal after judgment for the amount of such damages.<sup>6</sup>

### § 3. Distress for taxes and officers' fee bills.

This is a purely statutory remedy, which need not be here discussed.<sup>6a</sup>

### § 4. Distress for rent.

At common law this was a remedy afforded by the mere act of the party injured, for the landlord, or his private servant (bailiff) by warrant from him, made the levy. In Virginia, West Virginia, and other states the proceeding to recover rent by distress is no longer a remedy afforded by the mere act of the party injured but is a judicial remedy, one afforded by the joint act of the party injured and of the law,<sup>7</sup> and hence would not be properly discussed in this connection, but is here inserted merely for the sake of convenience.

Rent proper is defined to be a right to a certain profit issuing periodically out of lands and tenements corporeal in retribution (or return, *reditus*) for the land that passes.<sup>8</sup> It must not be supposed from this definition that the profit must issue exclusively out of lands and tenements corporeal. There are many cases where personal property enters very largely into the consideration of the price agreed to be paid and yet the whole is treated as rent. It is not within the purview of these notes to discuss this question, but many of the authorities are collected and discussed in the opinion of the court in the case cited in the margin.<sup>9</sup> In Virginia rent of every kind may be recovered by distress or action<sup>10</sup> but in order to distrain, the rent must be re-

6. Code, § 2042.

6a. See Code, §§ 622-626, 1044, 3518.

7. *Wickham v. Richmond Spike Co.*, 107 Va. 44, 57 S. E. 647.

8. 4 Min. Inst. 124.

9. *Wickham v. Richmond Spike Co.*, *supra*.

10. Code, § 2787.

served by contract.<sup>11</sup> If a tenant holds over with the consent of the landlord, but without a new contract, he becomes a tenant from year to year. The law presumes the holding to be upon the terms of the former lease so far as they are applicable to the new situation.<sup>12</sup> But the rent is still rent reserved by contract implied by law, and may be distrained for.<sup>13</sup> An agreement, however, that a tenant is to get a house at a price stated in the agreement for one year, and to have the preference each succeeding year is not a tenancy from year to year, such as will entitle the tenant to notice to quit;<sup>14</sup> and an agreement by a tenant that he will surrender possession whenever a purchaser of the land requires it makes him a tenant at will or by sufferance, and not from year to year.<sup>15</sup> Where tenancy is from year to year, neither party can terminate the tenancy without notice to the opposite party. It is as much the duty of a tenant from year to year to give the landlord the statutory notice of his intention to quit as it is of the landlord to give notice to the tenant that he can no longer keep the premises, and if the tenant fails to give such notice he is liable for a year's rent.<sup>16</sup> In Virginia the notice required from either party to the other in case of a tenancy from year to year is three months within a city or town, and six months in the country.<sup>17</sup> The tenancy can, however, only be terminated by notice to take effect at the end of some current year of the tenancy, and not at any other time of the year. The notice must be in writing, unconditional, and must be executed as above stated the required length of time

11. Code, § 2790.

12. *Peirce v. Grice*, 92 Va. 763-767, 24 S. E. 392; *Allen v. Bartlett*, 20 W. Va. 46; *Voss v. King*, 38 W. Va. 607, 18 S. E. 762.

13. *City of Richmond v. Duesberry*, 27 Gratt. 210, 212.

14. *Crawford v. Morris*, 5 Gratt. 90.

15. *Harrison v. Middleton*, 11 Gratt. 527.

16. *Allen v. Bartlett*, 20 W. Va. 46.

17. Code, § 2785. The statute also provides for a tenancy from month to month.

In this connection, see *Kaufman v. Mastin*, 66 W. Va. 99, 66 S. E. 92, holding that where a tenant holds over paying monthly rent beyond the time of his lease for a year, in which his rent is reserved by the month, payable monthly, does not thereby alone imply a renewal by the year, but rather a renewal by the month.

before some current year of the tenancy.<sup>18</sup> In a number of states the remedy by distress for rent has been repealed or else was never adopted. Distress for rent does not exist in Colorado, Massachusetts, North Carolina, Mississippi, Minnesota, New York and Wisconsin. In the last three named states it once existed, but was abolished.<sup>19</sup>

A distress warrant is in the nature of an execution against the goods of the defendant to make the amount of money set forth in the warrant, and the costs. It is issued without judgment or other judicial investigation into the liability of the defendant for the amount claimed. The defense comes afterwards. No return day is fixed in the warrant in Virginia, but the officer holding the warrant is required to return it within sixty days to the office of the clerk of his county or corporation.<sup>20</sup> For form of affidavit and distress warrant, see Hurst's Guide and Manual, 723, 724.

### § 5. Interest on rent.

In the absence of statute, interest is generally not allowed, the common law not allowing interest unless stipulated for expressly or impliedly. In Virginia interest is generally allowed, the statute declaring that in any action for rent interest may be allowed as on other contracts.<sup>21</sup>

### § 6. Limitation of time to Distrain.

At common law there was no limitation to the right to distrain so long as the property remained on the leased premises. In Virginia, rent cannot be distrained for, for a period longer than five years after maturity, where the property is still on the leased premises; and, if it has been removed, it must be distrained within thirty days after removal.<sup>22</sup>

### § 7. By whom distress warrant levied.

At common law a distress warrant was levied by the landlord himself or his private servant (bailiff), in pursuance of the au-

18. *Balt. Dental Ass'n v. Fuller*, 101 Va. 627, 44 S. E. 771.

19. 7 Encl. Pl. & Pr. 21 and 22.

20. Code, § 2794a.

21. Code, § 2787.

22. Code, §§ 2790, 2791.

thority conferred by the landlord. In Virginia a warrant issues from a justice of the peace or the clerk of the circuit or corporation court, regardless of the amount of the rent, and is directed to a constable, sheriff, or sergeant of a corporation. This warrant is obtained by making and delivering to the justice of the peace, or clerk, an affidavit (written oath) of the person claiming the rent, or his agent, that the amount of money or other thing to be distrained for (to be specified in the affidavit) as affiant verily believes, is justly due to the claimant for rent reserved upon contract from the person of whom it is claimed.<sup>23</sup> In order to justify a distress warrant, the rent must be reserved by contract, and it must be *due*; that is, the warrant cannot issue until after midnight of the last day of the tenancy. For rent not due, the proceeding is by attachment, as will hereafter be seen. The officer levies the warrant generally by taking into custody the property subject to the levy. At common law the levy could only be made on the premises by daylight, and the distrainer could not break open the outer door of the tenant's dwelling, but might break the inner door of the dwelling house, or outer door of an outhouse, or of a stranger's dwelling provided goods liable to distress were found therein; but of this he took the risk of being held to be a trespasser *ab initio*. Generally by statute the rule is otherwise. In Virginia goods removed not more than thirty days, may be distrained anywhere, and, whether removed or not, an outer door of the tenant's own dwelling may be broken by the officer in the daytime, if goods are found there liable to distress; and if goods have been clandestinely or fraudulently removed, he may either in the daytime or nighttime, break and enter any house wherein there may be goods so liable.<sup>24</sup>

### § 8. Irregularity or illegality in making distress.

At common law the distrainer became a trespasser *ab initio*, and liable for all damage done, if there was any irregularity or illegality in making the distress. In Virginia, if the rent is justly due the distress is valid, but the landlord is liable for ac-

23. Code, § 2790.

24. Code, § 2793.

tual damages resulting from the irregularity or illegality. If no rent is due, he is a trespasser *ab initio* as at common law.<sup>25</sup>

### § 9. Disposition of property levied on.

At common law it was simply held as a pledge or security, but long since in England and in all the states provision has been made for a sale of the property by an officer, and the payment of the rent. In Virginia, the sale is made at public auction for cash, after ten days' notice posted at some place near the residence of the owner of the property levied on, if a resident of the county or corporation, and at two or more public places in the officer's county, city, or district. If the property levied on, however, be horses, mules, or work oxen, they must be advertised for thirty days by hand-bills posted at the front door of the courthouse, and at five or more public places in the county or corporation where the levy is made, and if it be in the county these places must be at least two miles apart.<sup>26</sup>

### § 10. Delivery or forthcoming bond and proceedings thereon.

At common law if the validity of a distress was questioned by a tenant it was settled by an action of replevin, which will be treated of later, but in Virginia when property of a tenant is levied on for rent and he wishes to contest the right of the landlord to recover, in whole or in part, or wishes simply to retain the property for awhile, so as to get a breathing spell, in either case, he executes and delivers to the officer making the levy what is called a forthcoming or delivery bond. This is a plain bond, usually for an amount equal to double the amount for which the distress is made (principal, interest, and costs), regardless of the value of the property levied on, and is generally executed by the tenant with one or more sureties payable to the landlord, with a condition underwritten as a part of the bond (after reciting the issue of the distress warrant, and the

<sup>25</sup>. Code, § 2794.

<sup>26</sup>. Code, §§ 906, 907. Where the property levied on is perishable or expensive to keep; these sections make provision for a sale on less than ten days' notice, but this requires on order of the court, the judge, or justice after notice to the adverse party.

levy thereof on certain personal property of the tenant, and that the tenant wishes to retain possession thereof until the day of sale) that the tenant shall have the property forthcoming at the time and place of sale mentioned in the bond, or else will pay the penalty of the bond. This time and place is fixed by the officer taking the bond. If the property is delivered to the officer he advertises and sells it, and pays the rent and costs to the landlord, but if the property is not then and there delivered the bond is said to be forfeited. It is then the duty of the officer to return the bond to the clerk's office of his county or corporation, when it has the force and effect of a judgment against such of the obligors therein as are alive at the time it was forfeited and returned.<sup>27</sup> The landlord then gives the obligors in the bond ten days' written notice that on a certain day he will move the court for an award of execution on this bond, and, in reply, the tenant may show "that the distress was for rent not due in whole or in part, or was otherwise illegal."<sup>28</sup> If no such defence is made, judgment is given for the penalty of the bond to be discharged by the amount of the rent due (principal and interest) and the cost of the motion. The defendant may also make other defences such as *non est factum*, conditions performed, set-off, etc.<sup>29</sup> Generally no formal pleadings are filed by the defendants, but they state the grounds of their defence *ore tenus*, or, if required, in writing.<sup>30</sup> If an issue of fact is made, and either party desires it, he may have a jury trial.<sup>31</sup>

27. Code, §§ 3617, 3619, 3210.

28. Code, § 3621.

29. *Allen v. Hart*, 18 Gratt. 722; *Hancock v. Whitehall Tobacco Co.*, 100 Va. 443, 41 S. E. 860.

30. Code, § 3249.

31. Code, § 3213. As to the return of the officer, it is provided that "such return shall be to the court from which such order, warrant, or process emanates, or to which it is returnable, and in other cases, not specifically provided for, shall be to the court of the county or corporation in or for which he was elected or appointed." Code, §§ 900, 3619, 2794-a. As a distress warrant does not emanate from a court, and is not returnable to a court, the warrant and any bond taken thereunder cannot be returned to the Circuit Court of a city, but must be returned to the corporation court, and if the distress warrant is levied on property outside of the city or county in

If the tenant is unable to give bond, and yet has a valid defense, he may make affidavit to these facts, and the officer levying the warrant is required to permit the property to remain in the possession and at the risk of the tenant, and to return the affidavit and distress warrant to the first day of the next term of the circuit court of his county, or the corporation court of his corporation, and thereupon the defendant may make the same defense as if a bond had been given.<sup>32</sup> The claimant of the rent, however, may require the officer to take possession of the property and hold it subject to the order of the court, by giving bond with sufficient surety, in the penalty double the value of the property levied on, with condition to pay all costs and damages which may accrue to any one by reason of his suing out said warrant. No form of procedure is given, but it is presumed that the landlord makes a motion, after notice, for a judgment for his rent, and in reply to this motion the tenant makes defense, but the statute is silent both as to notice and motion.

If rent be reserved in a share of the crop, or in anything other than money, a distress warrant is first obtained as in other cases, and then the claimant of the rent is required to give notice to the tenant of the time and place when he will apply to the court to ascertain the value of the share of the crop reserved. When this value is ascertained, the court makes an order for the sale of the property. It is not clear at what stage of the proceeding the tenant can make his defense, whether it is at that time of the application to ascertain the value, or whether the tenant is allowed to give a forthcoming bond and make his defense when motion on that bond is made. The forms given by Mr. Minor would seem to indicate the latter.<sup>33</sup>

which it issues, the forthcoming bond, if one is given, must be returned to the circuit court of the county, or the corporation court of the city wherein the levy was made, and not where the warrant issued. If a forthcoming bond is taken "upon a *feri facias* issued by a justice," provision is made for taking judgment thereon "on motion" before a justice, but the statute is silent where the bond is taken upon a distress warrant and it is presumed that the proceeding by motion before a justice does not lie (Code, § 3625) and the jurisdiction of the justice will be determined by the Code, § 2939.

32. Code, § 3618.

33. Code, § 2795; 4 Min. Inst. (3rd ed.) 1619-1620.

**§ 11. What property may be distrained.**

At common law, generally all goods and chattels found on the leased premises were liable to distress, whether they belonged to the tenant or not, except things in which there could be no property, such as dogs, cats, wild animals, and the like; things so perishable in their nature that they could not be returned in the same condition as when taken, such as milk, fruit, and the like; things affixed to the freehold as a part thereon, such as millstones, grates, mantels, and the like; things in the actual personal possession of the tenant; personal property not the property of the tenant, but in his possession temporarily, either for purposes of trade, such as a horse at a shop to be shod, or goods at a tailor's to be made up; or things in possession of the tenant without the default of the owner; as cattle which were not levant and couchant and tools of a man's trade. The purpose of the common law was to detain the property as a means of compelling the tenant to pay the rent, and not to sell it and apply it to the payment of the rent. Hence there was some reason for not levying on things that could not be returned in kind, and for not depriving the tenant of the use of certain things which were necessary to enable him to make the money to pay the rent, as in case of tools of a man's trade. As the object of the modern distress warrant is to sell the property levied on and pay the rent, the common-law rule has been very generally changed. The common-law doctrine of exemption on account of the perishable nature of property is greatly modified, and in large measure repealed, in consequence of the use of modern preservatives and the provisions of modern codes, authorizing a speedy sale of articles perishable in their nature or expensive of keep.<sup>34</sup> Most, if not all, fruits may be preserved until a speedy sale, and such things as can be preserved are probably no longer exempt from necessity on account of the perishable nature of the goods. Now only the property of the lessee, his assignee or under tenant (not that of others) found on the leased premises, or removed therefrom not more than thirty days, is liable to distress in Virginia.<sup>34a</sup> There is exempt, however, tools of a man's trade to an amount

34. Code, § 906.

34a. Code, § 2791.

not exceeding \$100 in value, and numerous articles of personal property, generally known as the poor debtor's exemption.<sup>35</sup> What is known as the poor debtor's exemption cannot be waived.<sup>36</sup> It will be observed that the landlord may distress on the undertenant for the whole amount of the rent due by the tenant regardless of the state of accounts between the tenant and the under-tenant—e. g., if the tenant owes \$1,000 rent, and the under-tenant has contracted to pay only \$100 for the part of the premises occupied by him, the landlord may levy on the property of the under-tenant found on the leased premises for the entire \$1,000 rent. The statute puts no limit on the extent of the liability of the assignee, or under-tenant.

### § 12. Redress for illegal distress.

*At common law*, the remedies were either replevin, injunction or trespass. If the distress was void *ab initio*, trespass; in other cases, trespass on the case. *By statute*, the rights of a *third* person to property levied on are usually settled by a proceeding of interpleader.<sup>37</sup> The *tenant* generally makes his defenses in the proceeding on a delivery bond, which has been hereinbefore given. In a few cases where there is no adequate remedy at law, the tenant or a third person may have an injunction. In other cases the remedy is by action of trespass, or trespass on the case.<sup>38</sup>

### § 13. A year's rent under the Virginia statute.

The statutory provisions on this subject will be found in §§ 2791 and 2792 of the Code. One of the many difficulties which have arisen in construing these sections is as to when a particular tenancy begins, for if a lien is created on the goods after the tenancy begins, the landlord has priority for a year's rent; if before, the lien creditor has priority. If a tenant holds over, it seems that the hold-over term is regarded as a new and different

35. Code, §§ 3650, 3651.

36. Code, § 3655.

37. *Edmunds v. Hobbie Piano Co.*, 97 Va. 588, 34 S. E. 472; Code, §§ 2999, 3000.

38. *Manchester Loan Ass'n v. Porter*, 106 Va. 528, 56 S. E. 337.

term from the contract term, and hence if a lien be created during the contract term on goods then on the leased premises, such lien has priority over rent accruing during the hold-over term, because created before the commencement of the tenancy for which the rent is claimed.<sup>39</sup> A landlord in Virginia is not allowed to distrain for rent after the lapse of more than five years after maturity, but if he makes a levy of a distress warrant for rent that has not been due more than five years, e. g., for four years last past, before any other lien is acquired on the tenant's property, he thereby acquires a lien for his full rent, and is not restricted to the year's rent provided by §§ 2791, 2792 of the Code. These sections were not intended to operate to the detriment of the landlord, but to his advantage.<sup>40</sup>

The above sections of the Code undoubtedly seem to give the landlord a lien for a year's rent as against all liens obtained after the goods were carried on the leased premises. Whether this lien is created by § 2791 or § 2792 seems to be a matter of some doubt.<sup>41</sup> If the lien be created by § 2791, it would seem that the distress might be levied on the goods not only while on the leased premises, but for thirty days after the removal, and that the landlord would have priority over any intervening lien, but it has been held<sup>42</sup> that the landlord's lien for a year's rent does not extend to protect the tenant's property from execution except in cases where the goods are on the premises leased, and that a lien attaching to goods after removal, but within the thirty days, takes precedence over the landlord's subsequent levy, although within the thirty days. If property is removed from the leased premises, and within thirty days thereafter an execution is levied thereon, and after such levy, but still within the thirty days, a distress warrant for rent is levied on the same property, who has priority? The case of *Geiger v. Harmon*, 3 Gratt. 130, seems to hold that the execution creditor has priority. In that case there was no distress warrant,

39. *City of Richmond v. Duesberry*, 27 Gratt. 210; *Wades v. Figgatt*, 75 Va. 575; *Upper Appomattox Co. v. Hamilton*, 83 Va. 319, 2 S. E. 195.

40. *Sprinkel v. Rosenheim*, 103 Va. 185, 48 S. E. 883.

41. *Anderson v. Henry*, 45 W. Va. 319, 31 S. E. 998.

42. *Geiger v. Harmon*, 3 Gratt. 130.

but the landlord gave notice of a lien. The language of § 2791 apparently gives the same right to levy within the thirty days on the property removed from the leased premises as upon property remaining thereon. But while the right to levy within thirty days is given by § 2791, nothing is said as to its effect on some other creditor who has levied a *feri facias* in the meantime. The statute now is the same as when *Geiger v. Harmon* was decided. The right of the landlord to levy within thirty days was given by statute then as it is now. But both then and now the lien for a year's rent applied only to goods "while they are on the leased premises." So also the provision of § 2792 for paying or securing a year's rent is applicable only to "goods on the premises leased or rented" and the right given is only "to remove said goods from the premises" under certain conditions. This seems to have been the view in *Geiger v. Harmon*. Neither § 2791 nor § 2792 gives the landlord any lien, but simply a right to levy, that is an inchoate lien which may be perfected by a levy in time, but may be lost as to an execution creditor who first obtains a lien and perfects it by a levy. The opinion in *Geiger v. Harmon* is very brief, but seems to lead to the conclusion that if the levy of the distress warrant is not made on goods removed from the leased premises before an execution is levied on it, then that the latter has priority. In *Geiger v. Harmon* the question necessarily involved was whether the potential lien for the rent could be perfected within thirty days by a levy so as to override an execution already levied on goods removed from the leased premises not more than thirty days, and the conclusion of the court was in effect that it could not, and hence *Geiger v. Harmon* would seem to decide that in order for the distress warrant to take priority over an execution it must be levied within the thirty days, and before the execution is levied.

#### § 14. Motion on delivery bond—Proof.

If the execution of the bond is alleged in the notice, as it generally is, it is not necessary to prove it, but as this proceeding is given to enable a tenant to make defence, it is a necessary part of the landlord's case to prove that there is rent due by

*contract*, and the amount thereof. The burden of proof is on the landlord, and if he simply produces the bond without more, judgment should be given against him. He must establish a contract for the payment of rent and must also prove the default of the obligors in the performance of the conditions of the bond.<sup>43</sup>

### § 15. Effect of general covenants to repair.

At common law a covenant to keep in repair, bound the tenant to rebuild buildings destroyed on the leased premises.<sup>44</sup> This rule has been changed by statute in Virginia, which now relieves the tenant from that duty, and also provides for abatement of the rent "for such time as may elapse until there be again upon the premises buildings of as much value to the tenant for his purposes as what may have been destroyed."<sup>45</sup> If the buildings were of no value to the tenant, but were simply leased by him to keep some one else from getting them, and thereby create a monopoly in his business conducted in another place, then the destruction of the buildings cannot be said to lessen their value to the tenant for his purposes as tenant, and there will be no abatement of the rent.<sup>46</sup>

### § 16. Abatement of rent.

If part of the premises be recovered by a title paramount to that of the landlord, or if part of the land be taken back by him with the tenant's consent, or there be a total destruction of part of the premises by act of God, the rent is apportioned, but if the landlord enter, against the will of the tenant on any part of the leased premises and take possession thereof, the whole rent is abated until the tenant is restored to the whole possession.<sup>47</sup>

43. *Carter v. Grant*, 32 Gratt. 769.

44. *Ross v. Overton*, 3 Call. 309. See also and compare *Wattles v. So. Omaha Co.*, 50 Neb. 251, 61 Am. St. Rep. 554 and note.

45. Code, § 2455; *Richmond Ice Co. v. Crystal Ice Co.*, 99 Va. 239, 38 S. E. 141, 6 Va. Law Reg. 824.

46. *Richmond Ice Co. v. Crystal Ice Co.*, 103 Va. 465, 49 S. E. 650.

47. *Briggs v. Hall*, 4 Leigh 484; *Tunis v. Grandy*. 22 Gratt. 109.

## CHAPTER II.

### ACCORD AND SATISFACTION.

§ 17. Introductory.

§ 18. Definition.

§ 19. Subject matter.

§ 20. Accord without satisfaction.

§ 21. Persons who may make satisfaction.

§ 22. Consideration of accord.

Part payment of a liquidated money demand.

New or additional consideration.

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Acceptance of property.

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§ 23. Pleadings—Accord and satisfaction.

#### § 17. Introductory.

In the previous chapter it was stated that redress by act of the party might be effected either by the act of the party injured alone, which was the subject discussed in that chapter, or by the joint act of both the party injured and the party suffering the injury. The latter remedy by the joint act of both parties may be effected either: (1) by Accord and Satisfaction, or (2) by Arbitration and Award. The present chapter will be devoted to a brief discussion of the subject of Accord and Satisfaction.

#### § 18. Definition.

Accord is the agreement of one party to give or perform, and of the other to accept, instead of some claim, something different from what he is or considers himself entitled to; and satisfaction is the fulfillment, or carrying out, or execution of the agreement. The effect is to bar recovery on the original claim.<sup>1</sup>

#### § 19. Subject matter.

All *simple contract debts* may be the subject of accord and

1. 1 Cyc. 305; Monographic Note, 100 Am. St. Rep. 390; Cumber-  
27 Wane, 1 Smith L. C. 633.

satisfaction. *Judgments* may, by weight of authority, be settled by parol accord and satisfaction, but upon this subject the authorities are in conflict.<sup>2</sup> As to *obligations under seal*, it is said that a parol accord and satisfaction of an obligation which is required to be under seal is bad,<sup>3</sup> but the exceptions are so numerous as almost to destroy the rule. It is believed that the true rule is "that for a valuable consideration the specialty may, before breach, the same as after, be discharged by the mutual parol agreement of the parties."<sup>4</sup>

All *torts* are likewise proper subjects of accord and satisfaction. While accord and satisfaction cannot operate to transfer title to a freehold and such title cannot be barred by a collateral satisfaction, the rights of the parties with reference to such freehold are a legitimate subject of accord and satisfaction.<sup>5</sup>

## § 20. Accord without satisfaction.

This is not sufficient. This would simply be agreement without consideration. The *thing agreed* must be done or there is no satisfaction, but the execution of an executory contract may be the thing agreed, and this would be a good satisfaction. For example, it may be agreed that a party shall give a note payable at a future day for an unascertained liability. If the note is actually given and accepted in pursuance of this agreement, the transaction is valid, and will bar all proceedings on the original cause of action. The *time of performance* must be the time fixed, if any, if none, a reasonable time. Neither readiness to perform, nor tender of performance, nor *part performance* and tender of the residue is sufficient.<sup>6</sup>

2. 1 Cyc. 309; 100 Am. St. Rep. 417 ff; *Boffinger v. Tuyes*, 120 U. S. 205.

3. 1 Cyc. 309.

4. Bish. on Con., §§ 132, 135; *Canal Co. v. Ray*, 101 U. S. 522; *Phelps v. Seely*, 22 Gratt. 573.

5. 4 Min. Inst. 167; 1 Am. & Eng. Encl. Law (2nd ed.) 409.

6. *Jones v. Perkins*, 64 Am. Dec. 136 and note; *Hearn v. Kiehl*, 38 Penn. St. 147, 80 Am. Dec. 472; *Kromer v. Hein*, 75 N. Y. 574, 31 Am. Rep. 491; 1 Smith L. C. 646; 7 Rob. Pr. 528; 1 Encl. L. & P. 641.

### § 21. Persons who may make satisfaction.

The *parties*, if of contractual capacity, of course may make satisfaction. *Strangers* may likewise make satisfaction if previously authorized, or if their acts are subsequently ratified; and it would seem that the ratification may be made by plea after action brought. There is considerable conflict, however, as to the validity of a satisfaction made by a stranger.<sup>7</sup>

On the subject of satisfaction by one of several *joint* wrongdoers, there is much conflict of authority. There can be but one satisfaction for a wrong, and if complete satisfaction has been made by any one of the wrongdoers, that is a complete discharge of all the others. It is immaterial that several actions are pending against the different wrongdoers. If the satisfaction by any one is for the whole wrong, it inures to the benefit of all, although the injured party expressly reserves his right against the others. It is said that where the release is under seal, or expresses full satisfaction on its face, the attempted reservation of rights against other joint wrongdoers is void as being repugnant to the effect and operation of the release. But that where the release of one is not a technical release under seal and does not purport to be a complete satisfaction for the wrong done, the reservation of remedies against other joint wrongdoers is good, and effect will be given to the intention of the parties.<sup>8</sup>

The right of the injured party to settle with one wrongdoer does not involve any question of contribution among wrongdoers. He may sue all, or any one, or any intermediate number. They cannot apportion the wrong among themselves nor compel him to do so. This is forbidden by public policy. But as he may select whom he will sue, no reason of public policy forbids him to settle with any one for his share of the wrong, provided he settles only for his share, and does it in the proper manner. A technical release under seal of one of several joint wrongdoers saying nothing as to others is a release of all. The release being

7. Note, 100 Am. St. 396, 397.

8. 24 Am. & Eng. Encl. Law 306, 307, and cases cited; Bloss *v.* Plymale, 3 W. Va. 393, 100 Am. Dec. 752, which criticises Ruble *v.* Turner, 2 H. & M. 38, 11 Am. St. 906; 100 Am. St. 401-2; 2 Black on Judgments, § 782.

under seal and absolute, the law conclusively presumes that it was given in full satisfaction of the entire wrong, and for a sufficient consideration. But no such presumption arises where the injured party simply covenants not to sue one of the wrongdoers, or even where a technical release under seal is given reserving on its face remedies against other wrongdoers, when in fact what was given by the party released was not full compensation. In such case, the injured party is still entitled to *compensation* for the wrong done, and may recover the full amount from the party not released, subject to credit for the amount received from the party released. In such case no rule of evidence is violated. It must be conceded, however, that there is much conflict of authority on this subject.<sup>9</sup> While such seems to be the law as to a *compromise* made by one of several wrongdoers, the rule is not altogether the same as to the effect of a *judgment* against one of several wrongdoers. In England and in Virginia a judgment against one of several joint wrongdoers, with or without satisfaction, is a bar to any action against the others.<sup>10</sup> The great weight of authority, however, in the United States is to the effect that judgment alone without satisfaction is not a bar to an action against the other wrongdoers, and that, in order for such judgment to constitute a bar, the judgment must be satisfied.<sup>11</sup>

Generally, in the absence of statute, a total release of one of several *joint obligors* is a release of all,<sup>12</sup> but it is otherwise provided by statute in Virginia.<sup>13</sup> It must be observed that the Virginia statute applies only to joint contractors or co-obligors, and has no application to joint wrongdoers. Satisfaction, however, of the whole claim to one of several *joint obligees* is a satisfaction to all, in the absence of fraud.

9. *Louisville Mail Co. v. Barnes*, 117 Ky. 860, 111 Am. St. Rep. 273 and note; 1 Encl. L. and P. 648.

10. *Brinsmead v. Harrison*, L. R. 7 C. P. 547; *Petticolas v. City of Richmond*, 95 Va. 456, 28 S. E. 566.

11. *Lovejoy v. Murray*, 3 Wall. 10; *Miller v. Hyde*, 161 Mass. 472, 42 Am. St. Rep. and note.

12. 100 Am. St. 400, 401.

13. Code, § 2856.

## § 22. Consideration of accord.

*Part payment of a liquidated money demand* was not good at common law, unless it was evidenced by a release under seal, or the transaction was founded upon a new consideration,<sup>14</sup> but the surrender of an instrument for cancellation is said to be equivalent to a release.<sup>15</sup> This common-law rule has been changed in Virginia and in many other states including Alabama, California, Georgia and Mississippi.<sup>16</sup> If there be a *bona fide* controversy about the currency in which an obligation is to be discharged, and the kind is afterwards agreed upon and paid, this is good.<sup>17</sup>

*Any new or additional consideration* will generally suffice to make the satisfaction valid. Payment before maturity, at another place, by a third person, abandonment of a defence and payment of costs, are all good. Receiving a debtor's note for less than the debt due is said to be a good satisfaction, and so it is said the acceptance of the check of the debtor for \$100 in payment of \$125 is good, because it is paid by check and not in cash.<sup>18</sup> This seems to be straining the doctrine to the utmost limits, if it does not exceed it. So giving a new security and even the giving of an individual note by one of several joint debtors for a less sum, has been held to be good.<sup>19</sup>

*Unliquidated or disputed claims* may be settled at any price or on any terms agreed upon between the parties. Retention of a check declared to be in full will constitute a good accord and satisfaction of a disputed claim.<sup>20</sup>

*Acceptance of property* in satisfaction is good against any claim unless an agreed money value be fixed upon the property. In the latter case it would not be good against a liquidated demand for a larger sum in those jurisdictions which deny the right

14. See cases cited in note 16, *infra*.

15. Reynolds v. Reynolds, 55 Ark. 369, 18 S. W. 377.

16. Code, § 2858; Seymour v. Goodrich, 80 Va. 303; Standard S. Co. v. Gunter, 102 Va. 568, 46 S. E. 690; Frank v. Gump, 104 Va. 306, 51 S. E. 358.

17. San Juan v. St. Johns Gas Co., 195 U. S. 510.

18. 1 Am. & Eng. Encl. Law (2nd ed.) 416.

19. Note 100 Am. St. 399.

20. 1 Cyc. 333.

to make part payment of a money demand a satisfaction of the whole. The same rule applies to services.

*Acceptance of a promise* is good as a satisfaction if based upon a sufficient consideration.

### § 23. Pleadings—Accord and satisfaction.

The defence of accord and satisfaction may be made under the general issues in *assumpsit*, case, and debt on a simple contract. In other actions it must be specially pleaded. The plea should allege (1) the accord or agreement, (2) satisfaction in pursuance thereof, (3) the acceptance of the satisfaction.<sup>21</sup> In code states accord and satisfaction must be specially pleaded.

<sup>21</sup>. 4 Min. Inst. 169; 7 Rob. Pr. 552, *et seq.*

## CHAPTER III.

### ARBITRATION AND AWARD.

- § 24. Introduction.
- § 25. Who may submit.
- § 26. What may be submitted.
- § 27. Mode of submission.
- § 28. Who may be arbitrator.
- § 29. The umpire.
- § 30. Revocation of submission.
- § 31. Proceedings before arbitrators.
- § 32. The award.
- § 33. Form of award.
- § 34. Effect of award.
- § 35. Mode of enforcing performance of award.
- § 36. Causes for setting aside award.
- § 37. Relief against erroneous award.
- § 38. Awards, how pleaded.
- § 39. Costs.

#### § 24. Introduction.

Usually two or more arbitrators are selected (though there may be only one), and if they cannot agree they are allowed to select an umpire. The arbitrators are "judges of the parties' own choosing." Their decision is called an "award."

#### § 25. Who may submit.

Any person or corporation capable of making a contract may submit a controversy to arbitration, but in the absence of statute personal representatives and other fiduciaries practically guarantee the correctness of the award.<sup>1</sup> In Virginia they are not liable for losses by arbitration unless occasioned by their fault or neglect.<sup>2</sup> It has been held that infants cannot submit to arbitration, and if they are parties to a submission they are not bound thereby, and hence the adults are not bound either; that the award is in the nature of a judgment, and the interest of the infant cannot be looked after and protected as in court, and the award will not

1. *Wheatley v. Martin*, 6 Leigh 62.

2. Code, § 3010.

be enforced, although in favor of the infant,<sup>3</sup> but this is not believed to be sound.<sup>4</sup> The guardian of an infant may submit, and the award will be binding under the Virginia statute.<sup>5</sup> One partner cannot submit firm matters unless specially authorized, though he himself will be bound.<sup>6</sup> An attorney to prosecute or defend a suit may submit the matter involved in the cause to arbitration, but ordinarily agents cannot unless specially authorized.<sup>7</sup> It has been held in West Virginia that an attorney cannot submit his client's case to arbitration unless the submission be in open court.<sup>8</sup>

### § 26. What may be submitted.

Personal demands of all kinds, *ex contractu*, and *ex delicto*, disputes touching boundaries of land,<sup>9</sup> but not public crimes.<sup>10</sup>

3. Britton *v.* Williams, 6 Munf. 453.

4. 2 Am. & Encl. Law (2nd ed.) 616.

5. Section 3010 of the Code is as follows: "Any personal representative of a decedent, guardian of an infant, committee of an insane person, or trustee, may submit to arbitration any suit or matter of controversy touching the estate or property of such decedent, infant, or insane person, or in respect to which he is trustee. And any submission so made in good faith, and the award made thereupon, shall be binding and entered as the judgment of the court, if so required by the agreement, in the same manner as other submissions and awards. No such fiduciary shall be responsible for any loss sustained by an award adverse to the interests of his ward, insane person, or beneficiary under any such trust, unless it was caused by his fault or neglect."

6. 2 Am. & Eng. Encl. Law (2nd ed.) 617; Wood *v.* Shepperd, 2 Pat. & H. 442.

7. Marshall, Ch. J., in Holker *v.* Parker, 7 Cranch 436, 449; 2 Am. & Eng. Encl. Law (2nd ed.) 625, and cases cited.

8. McGinnis *v.* Currie, 13 W. Va. 29.

9. Miller *v.* Miller, 99 Va. 125, 37 S. E. 792.

10. Section 3006 of the Code is as follows: "Persons desiring to end any controversy, whether there be a suit pending therefor or not, may submit the same to arbitration, and agree that such submission may be entered of record in any court. Upon proof of such agreement out of court, or by consent of the parties given in court, in person or by counsel, it shall be entered in the proceedings of such court; and thereupon a rule shall be made, that the parties shall submit to the award which shall be made in pursuance of such agreement."

The award, however, cannot *per se* transfer title to a freehold, nor in Virginia, to a term of over five years.<sup>11</sup> An agreement to submit *all* matters in dispute that may arise in future is contrary to public policy, as it ousts the courts of their jurisdiction,<sup>12</sup> but particular questions of value and amount, such as the value of property destroyed by fire, extra work done by builders, or whether work was done according to specification, estimates of engineers, architects, etc., are legitimate subjects of contract in advance to submit to arbitration.<sup>13</sup>

### § 27. Mode of submission.

An agreement to submit may be either (a) by or under rule of court, that is, the parties agree that the award shall be entered as the judgment of the court, whether a suit be pending about the controversy or not, or (b) by agreement out of court, called *in pais*. It may be in writing or oral, under seal or not under seal, to be entered as a judgment or not.<sup>14</sup> In 2 Am. & Eng. Encl. Law (2nd ed.) 543, it is said: "Where a written instrument is necessary to convey or pass the title to the subject matter of the dispute, a written submission is necessary," and this would seem to be the weight of authority, but it has been held in Virginia that parties may agree by parol to settle by arbitration the dividing line between their lots of land, and that an award made in pursuance of a submission for that purpose will bind the parties, although the arbitrators make a parol award, where the submission does not require the award to be in writing.<sup>15</sup>

### § 28. Who may be arbitrator.

Any one, infant or adult, married woman or unmarried, sane or insane, may be an arbitrator.<sup>16</sup> An arbitrator, however, must not have an interest unknown to the parties, or be biased, or be

11. Code, § 2413.

12. 2 Am. & Eng. Encl. Law (2nd ed.) 570; note 2 Am. St. Rep. 567; Insurance Co. v. Morse, 20 Wall. 445.

13. Note 2 Am. St. Rep. 567; Condon v. So. Side R. R. Co., 14 Gratt. 302.

14. Code, § 3006.

15. Miller v. Miller, 99 Va. 125, 37 S. E. 792.

16. 2 Am. & Eng. Encl. Law (2nd ed.) 633.

related to either party without knowledge of the other. The refusal of one arbitrator to act revokes the submission unless the others are authorized to decide the controversy.<sup>17</sup> Text-writers with one accord say that an idiot or lunatic (if known to be such) may be an arbitrator,<sup>18</sup> but I can find no case so holding. In a large number of instances, insanity is only partial and there is no good reason why one known to be partially insane may not be a competent arbitrator as to most questions which might be submitted, but if parties should submit a controversy to the decision of one who is an idiot or totally insane it may be well doubted whether the award would be upheld, as such a decision would be a mere game of chance which is not encouraged by the law. Arbitrators need not be sworn in a common-law arbitration unless it is required by the parties to the submission, nor is any oath required of arbitrators by statute in Virginia. There is no uniformity in the statutory provisions of others states on this subject.<sup>19</sup>

### § 29. The umpire.

There is a well-defined distinction between an umpire and a third arbitrator. Whether the person is one or the other is to be determined from the language of the submission. If the party selected is alone to determine the whole dispute, when the arbitrators disagree, then he is an umpire, and his decision may be wholly different from that of either of the arbitrators. If the party selected is simply to be added to the arbitrators, and to act with them, and decide with them, then he is a third arbitrator, and his decision must accord with that of one or more of the arbitrators so as to make the opinion of a majority of all the arbitrators settle the dispute. Whether the party chosen be an umpire or a third arbitrator, he must possess the same qualifications as any other arbitrator. He is generally either selected by the parties at the same time as the arbitrators, or more commonly the arbitrators are allowed to select an umpire in case of dis-

17. 2 Am. & Eng. Encl. Law (2nd ed.) 642.

18. 2 Am. & Eng. Encl. Law (2nd ed.) 633; Bac. Abr. Arb. D.; Special Topics in Contracts, 279.

19. 2 Am. & Eng. Encl. Law (2nd ed.) 639.

agreement. According to the weight of authority, the umpire must hear the evidence himself directly from the witnesses, and cannot, except by consent, take the arbitrators' statement of what the evidence given before them was.<sup>20</sup> But several states, including Florida and South Carolina, hold the contrary. After hearing the evidence, the *umpire* is to decide the whole controversy submitted, according to his own judgment, and not merely the questions on which the arbitrators have disagreed, unless the submission indicates a different rule.<sup>21</sup> If the case is decided by the umpire, he alone should sign the award, which should recite the disagreement of the arbitrators.<sup>22</sup>

### § 30. Revocation of submission.

At common law, if submission was by rule of court it could not be revoked except by leave of court, and if revoked it was punishable as a contempt, but if revoked it is probable no award could be made. Under the Virginia statute,<sup>23</sup> submission under a rule of court is not revocable except by leave of court. Other submissions may be revoked at any time before the award is made, with liability on the revoking party to an action for damages for the breach, but this is of little value where the damages are not liquidated. The only remedy is an action for damages for breach of the submission. The agreement to submit is no bar to an action at law or a suit in equity on the original cause of action, and no foundation for suit for specific performance. If damages are sought for breach of the agreement to submit, the measure of recovery is the costs and expenses incurred, unless there be a bond with penalty in the nature of liquidated damages.<sup>24</sup> The revocation may be express or implied, and may be in writing or oral, though it is sometimes said if the submission is under seal the revocation must be also.<sup>25</sup> In 2 Am. & Eng.

20. 2 Am. & Eng. Encl. Law (2nd ed.) 716, and notes; *Coons v. Coons*, 95 Va. 434, 28 S. E. 885.

21. *Bassett v. Cunningham*, 9 Gratt. 684.

22. 2 Am. & Eng. Encl. Law (2nd ed.) 710, *et seq.*

23. Code, § 3007.

24. *Corbin v. Adams*, 76 Va. 58; *Rison v. Moon*, 91 Va. 384, 22 S. E. 165.

25. 4 Min. Inst. 175.

Encl. Law (2nd ed.) 599, it is said that the revocation must be of the same dignity as the submission, and, in the notes, that "a written submission requires a written revocation, a submission under seal can only be revoked under seal." The same or equivalent language is used in "Law of Contracts, Special Topics," p. 285, and practically the same authorities are cited. But unless the matter submitted embraces some matter required by law to be in writing, a written (unsealed) contract stands on no higher footing than an oral contract; nor is it clear that a sealed contract may not be discharged by parol.

A submission under rule of court or which has been agreed to be entered as the judgment of a court is irrevocable.<sup>26</sup> Revocation will be implied by the death of an arbitrator or a party, but probably not by the bankruptcy of the party.<sup>27</sup> Express revocation to be complete must be communicated to the arbitrators. Until then the award, if made, is valid. It has been held that a submission by rule of court was not revoked by the death of the party when the suit was subsequently revived by the administrator, and the arbitration proceeded with.<sup>28</sup> Sovereign states cannot always withdraw from a submission.<sup>29</sup>

### § 31. Proceedings before arbitrators.

The proceeding is judicial in its nature, and should be conducted like other judicial proceedings, by notifying parties of time and place of meeting,<sup>30</sup> swearing witnesses, and hearing only legal evidence, and excluding none that is legal, hearing arguments of counsel, if any, seeing that neither party is put to disadvantage, or taken by surprise, and deciding according to legal principles. The evidence must be taken in the presence of the parties, or at least after notice to them and an opportunity

26. *Riley v. Jarvis*, 43 W. Va. 43, 26 S. E. 366; *Turner v. Stewart*, 51 W. Va. 492, 41 S. E. 924.

27. 2 Am. & Eng. Encl. Law (2nd ed.) 600-602; 5 Encl. L. & P. 61, 62.

28. *Wheatley v. Martin*, 6 Leigh 62.

29. *Columbia v. Cauca Co.*, 190 U. S. 524.

30. *Coons v. Coons*, 95 Va. 434, 28 S. E. 885.

to be present. It must not be taken behind their backs.<sup>31</sup> In 2 Am. & Eng. Encl. Law (2nd ed.) 661, it is said that in the United States arbitrators are not bound to strict rules of law as to the admission or rejection of evidence, but may receive the evidence of witnesses who are legally incompetent if they think proper. The mere hearing of legal or incompetent evidence will not vitiate the award, but if the decision is rested on such evidence it is believed it will vitiate the award unless the arbitrators are constituted the sole judges of the law as well as the facts.<sup>32</sup> In England and probably most of the states the umpire must rehear the case *de novo*, but in some states this right is held to have been waived unless demanded at the time.<sup>33</sup>

### § 32. The award.

The award should decide all that was submitted, and no more (be within the submission), and be certain, definite and final in its findings. Awards are construed liberally so as to uphold them if possible. All fair presumptions are to be made in favor of an award.<sup>34</sup> If an award is in excess of the submission, the court may reject the excess, and render judgment for what is within the submission, if it be severable.<sup>35</sup> It is not necessary that the award should be delivered in order to be valid unless the submission so requires.<sup>36</sup> When signed and read to the parties as and for an award it is complete and final, though not delivered.<sup>37</sup> If the award is uncertain on its face and is not made certain by reference, it is void, and the parties may proceed as if there had been no submission.<sup>38</sup> An award once made is final, and the powers of the arbitrators then cease. They cannot thereafter, without a new submission, alter or amend it. If they attempt to change it, it may be enforced as originally made.<sup>39</sup>

31. 1 Cyc. 645.

32. Bassett *v.* Cunningham, 9 Gratt. 684.

33. 2 Am. & Eng. Encl. Law (2nd ed.) 716; Coons *v.* Coons, *supra*.

34. Armstrong *v.* Armstrongs, 1 Leigh 491.

35. Martin *v.* Martin, 12 Leigh 495.

36. Byars *v.* Thompson, 12 Leigh 550.

37. Pollard *v.* Lumpkin, 6 Gratt. 398.

38. Cauthorn *v.* Courtney, 6 Gratt. 381.

39. Rogers *v.* Corrothers, 26 W. Va. 238.

### § 33. Form of award.

It is not required to be in any particular form, but if it be returnable to a court it must be in writing. In fact, all awards should be in writing to prevent mistakes and misapprehensions.

### § 34. Effect of award.

An award properly made bars action on the original cause. Some contracts provide as a condition precedent that no action shall be maintained on the contract until the amount has been first settled by arbitrators, or by an engineer, or architect, or some person selected by the parties. Under contracts containing such provisions, the award is a condition precedent to the right to maintain an action on the contract. The most frequent instances of contracts of this nature are construction contracts and fire insurance policies.<sup>40</sup>

### § 35. Mode of enforcing performance of award.

If the award has been entered as the judgment of a court, it is enforced as any other judgment by appropriate writ of execution, or by process of contempt. If it has not been so entered, it may be enforced by action on the award for the thing awarded, or, if the thing awarded be land, by a bill in equity, or by appropriate action on the agreement of submission. If the submission is by penal bond, an action may be maintained on the bond for the penalty, and in this action the damages sustained may be proved. If the submission is by agreement under seal, an action of covenant, or now in Virginia assumpsit, may be maintained on it. If by agreement not under seal, assumpsit is the appropriate action.

### § 36. Causes for setting aside award.<sup>41</sup>

An award may be set aside for improper conduct on the part of the arbitrators, such as bias prejudice, interest, hearing illegal

40. *Condon v. So. Side R. R. Co.*, 14 Gratt. 302; *N. & W. Ry. Co. v. Mills*, 91 Va. 613, 22 S. E. 556.

41. Section 3009 of the Code, relating to awards made under a rule of court, is as follows: "No such award shall be set aside, ex-

evidence, refusing to hear legal evidence and refusing continuance when proper, etc.,<sup>42</sup> or for improper conduct of one or more of the parties, such as fraud, surprise, etc., or for errors appearing on the fact of the award, if at law; and it is equally the rule of equity as of law, that as a rule, the reasons for setting aside an award must appear on its face, or there must be misbehavior of the arbitrators, or some palpable mistake.<sup>43</sup> Usually, as stated, the errors must appear on the fact of the award, but a court of equity may look into the testimony before the arbitrators for the purpose of determining from such evidence and other circumstances, whether the errors were so gross and palpable as to indicate fraud, corruption or misconduct on the part of the arbitrators.<sup>44</sup> "The weight of authority in the United States leans towards making absolute the certain and simple rule that the award of arbitrators, when made in good faith, is final, and cannot be questioned or set aside for a mistake either of law or fact."<sup>45</sup> But if the mistake is so gross as to amount to fraud, the parties are not bound, and may sue on the original cause of action.<sup>46</sup> Unless there is a perverse misconstruction of the law, or the arbitrators intend to decide according to law, but mistook the law in a palpable, material point, the award will not be set aside. If the legal question is doubtful, or is designedly left to the judgment of the arbitrators, the award is generally conclusive. It must appear that they grossly mistook the law. It is not sufficient simply that the court would have rendered a different decision or judgment.<sup>47</sup>

"When parties submit to arbitration their rights involved in

cept for errors apparent on its face, unless it appear to have been procured by corruption or other undue means, or that there was partiality or misbehavior in the arbitrators or umpire, or any of them. But this section shall not be construed to take away the power of courts of equity over awards."

42. 4 Min. Inst. 185-187; *Wheeling Gas Co. v. Wheeling*, 5 W. Va. 448.

43. *Wheatley v. Martin*, 6 Leigh 62.

44. *Fluharty v. Beatty*, 22 W. Va. 698.

45. 2 Am. & Eng. Encl. Law (2nd ed.) 778.

46. *N. & W. v. Mills*, 91 Va. 613, 22 S. E. 556; *Cornell v. Steele*, 109 Va. 589, 64 S. E. 1038.

47. *Portsmouth v. Norfolk*, 31 Gratt. 727.

law and fact, they are understood to submit the facts to the arbitrators to be decided on according to law, and if it appear upon the face of the award that they grossly mistook the law, the award will be set aside. But where it appears, as in the case before us, that the parties intended to submit the question of *law alone*, the decision of the arbitrators is binding, though contrary to law. If not, it would not be competent to parties to make a valid submission of a point of law; for, however the arbitrators might decide, no litigation would be avoided. The proper court would still have to consider and decide the point of law as if no award had been made."<sup>48</sup> This is believed to be the correct principle.

### § 37. Relief against erroneous award.

Generally relief can be given by a bill in equity only, though in some cases, where the award is offered to a court of law to be entered as its judgment, objections may there be made.

### § 38. Awards, how pleaded.

In Virginia and West Virginia and a few other states an award may be given in evidence under the general issue in assumpsit, debt on simple contract, and trespass on the case. In other actions it must be specifically pleaded. Under non-assumpsit to an action upon an award under parol submission, the defendant may show that the submission was obtained by fraud.<sup>49</sup> While an award may in some states be shown under the general issue, an agreement to submit cannot, although it be irrevocable. Such an agreement is a matter of abatement only, and must be so pleaded.<sup>50</sup> If the submission and award be made in a pending suit, the award cannot be given in evidence under any of the general issues, as all pleadings speak as of the date of the writ, and at that time there was no award.<sup>51</sup>

### § 39. Costs.

Where the submission is silent, arbitrators could not award

48. *Smith v. Smith*, 4 Rand. 95, at p. 101.

49. *Bierly v. Williams*, 5 Leigh 700.

50. *Riley v. Jarvis*, 43 W. Va. 43, 26 S. E. 366.

51. *Austin v. Jones*, Gilmer 341; *Harrison v. Brock*, 1 Munf. 22.

costs of arbitration at common law, but the weight of authority in the United States is that the authority is incident to the power to make an award on the subject of controversy.<sup>52</sup>

52. 2 Am. & Eng. Encl. Law (2nd ed.) 693, 694.

## CHAPTER IV.

### REMITTER AND RETAINER.

§ 40. Remitter.

§ 41. Retainer.

Order of payment of debts.

Order of liability of estates for debts.

#### § 40. Remitter.

The second way in which wrongs may be redressed is by the mere *act or operation of the law*. At common law this occurred in two cases only: (1) Remitter and (2) retainer.

“*Remitter* is where he who hath the true property or *jus proprietatis* in lands, but is out of possession thereof, and hath no right to enter without recovering possession in an action, hath afterwards the freehold cast upon him by some subsequent, and, of course, defective, title; in this case he is remitted, or sent back by operation of law, to his ancient and more certain title. The right of entry, which he hath gained by a bad title, shall be *ipso facto* annexed to his own inherent good one; and his defeasible estate shall be utterly defeated and annulled, by the instantaneous act of law, without his participation or consent.”<sup>1</sup>

#### § 41. Retainer.

“If a person indebted to another makes his creditor or debtee his executor, or if such a creditor obtains letters of administration to his debtor; in these cases the law gives him a remedy for his debt by allowing him to retain so much as will pay himself, before any other creditors whose debts are of equal degree. This is a remedy by the mere act of law, and grounded upon this reason: that the executor cannot, without an apparent absurdity, commence a suit against himself, as a representative of the deceased, to recover that which is due to him in his own private capacity; but, having the whole personal estate in his hands, so much as is sufficient to answer his own demand is, by operation

1. 3 Bl. Com. [19].

of law, applied to that particular purpose. Else by being made executor he would be put in worse condition than all the rest of the world besides."<sup>2</sup>

ORDER OF PAYMENT OF DEBTS.—In Virginia the doctrine of retainer is abolished by a statute prescribing the order of payment of the debts of a decedent. It is provided that when the assets of the decedent in the hands of his personal representative, after the payment of funeral expenses and charges of administration, are not sufficient for the satisfaction of all demands against him, they shall be applied:

First: To the claims of physicians, druggists, nurses and hospitals, respectively, for services or articles furnished during the last illness of the decedent, to an amount not exceeding fifty dollars in each case.

Second: To debts due the United States and this state.

Third: To taxes and levies assessed against the decedent previous to his death.

Fourth: To debts due as trustee for the persons under disabilities, as receiver or commissioner under decree of court of this state, as personal representative, guardian or committee, when the qualification was in this state.

Fifth: To all other demands except those in the next class; and

Sixth: To voluntary obligations.

Debts are to be paid in the above order, and where the assets are not sufficient to pay all of any class in full, those of that class are to be paid ratably.<sup>3</sup>

This order of liability of *personal estate* for the debts of a decedent cannot be destroyed by will of the debtor. The rule is otherwise in Virginia as to *real estate*. At common law the real estate of a debtor was not bound, upon his death, for his simple contract debts, nor for debts under seal, unless the heir was expressly bound by the instrument. This rule is changed in Virginia so as to make real estate assets for the payment of the debts of the decedent, but the language of the statute<sup>4</sup> is such as to permit a debtor to give a preference by his will, to such of his

2. 3 Bl. Com. [18].

3. Code, §§ 2660, 2661.

4. Code, § 2665.

creditors as he may desire to prefer, so far as effects his real estate.<sup>5</sup>

*Order of Liability of Estate, for Debts.*—Generally, the personal estate is the primary fund for the payment of all debts of a decedent, and it will not be exonerated by a charge on the real estate, unless there be express words, or a plain intent in the will to make such exoneration. This is true even when there is a specific lien on real estate for the debt.<sup>6</sup> If, however, real and personal property are equally and expressly charged by a testator with the payment of his debts they must share the burden ratably.<sup>7</sup> But a simple expression by a testator in his will of a desire that all his just debts shall be paid is not a charge of such debts upon his real estate.<sup>8</sup>

If the assets are not sufficient to pay the whole of the debts due "the United States and this state" it would seem that the former must be first paid in full, as it is so provided by United States Statutes.<sup>9</sup> If the individual assets of a partner are insufficient to pay all his debts, those due in fiduciary capacity will be preferred to other individual or social debts.<sup>10</sup>

An indebtedness found against a guardian upon the settlement of his guardianship account does not cease to be a fiduciary debt simply because the debtor gives his individual bond for it,<sup>11</sup> but if the surety of a guardian pays a liability due to the ward, and seeks indemnity from his principal, the debt as between the principal and his surety is no longer a fiduciary debt.<sup>12</sup> It will be observed by the student that voluntary bonds may be enforced against a decedent's estate, but the same is not true of a note given without consideration.

In this connection it may also be noted that the proper order for marshaling assets for the payment of debts is the following:

(1) Personal estate at large not exempted by the terms of the

5. *Deering v. Kerfoot*, 89 Va. 491, 16 S. E. 671.

6. *New v. Bass*, 92 Va. 383, 23 S. E. 747.

7. *Elliott v. Carter*, 9 Gratt. 541.

8. *Leavell v. Smith*, 99 Va. 374, 38 S. E. 202.

9. U. S. Rev. Stats., §§ 3466, 3467.

10. *Robinson v. Allen*, 85 Va. 721, 8 S. E. 835.

11. *Smith v. Blackwell*, 31 Gratt. 291.

12. *Cromer v. Cromer*, 29 Gratt. 280.

will, or necessary implication. (2) Real estate or any interest therein expressly set apart by will for payment of debts. (3) Real estate descended to the heir. (4) Property, real or personal, expressly charged with the payment of debts, and then subject to such charge, specifically devised or bequeathed. (5) General pecuniary legacies (ratably). (6) Specific legacies (ratably). (7) Real estate devised.<sup>13</sup>

13. *Elliott v. Carter*, 9 Gratt. 541; *Frazier v. Littleton*, 100 Va. 9, 40 S. E. 108.

## CHAPTER V.

### COURTS.

§ 42. Supervisors.

§ 43. Clerks.

§ 44. Justices of the peace.

1. Civil powers of justices.

Small claims.

2. Proceedings before a justice on small claims.

3. Civil bail.

Attachment.

4. Unlawful detainer.

5. Garnishment.

§ 45. Circuit and corporation courts.

Corporation courts.

§ 46. Civil jurisdiction of court of appeals.

(1) In matters pecuniary.

(2) In matters not pecuniary.

### § 42. Supervisors.

Boards of supervisors have the control, management and jurisdiction of all county roads, causeways, and bridges, landings and wharves erected or repaired in their respective counties.<sup>1</sup> They have no jurisdiction of condemnation proceedings relating to mills, railroads and the like. These belong to the circuit courts. An appeal of right lies from the Board of Supervisors in case of which they have cognizance to the circuit court of the county and it may hear the case *de novo*, with the further right of appeal as provided by general law.<sup>2</sup> The constitution allows an appeal to the Supreme Court of Appeals in controversies concerning mills, roadways,<sup>2a</sup> ferries and the like.<sup>3</sup> The power of eminent domain is a legislative power to be exercised by the legislature as it pleases, and, under the general road law, there is an unrestricted right of appeal to the court of appeals, but it is within the power

1. Code, § 944a (1).

2. Code, § 944a (5).

2a. A "bridle way" is not a roadway. *Terry v. McClung*, 104 Va. 599, 52 S. E. 355.

3. Va. Constitution (1902), § 88.

of the legislature by special enactment to limit that right of appeal to judicial questions only. The power to condemn property for a public use is a legislative power to be exercised as the legislature shall direct, but the ascertainment of the damages is a judicial question and upon this question the constitution grants a right of appeal.<sup>4</sup>

### § 43. Clerks.

The statute declares that the clerk of any circuit or corporation court may in term time or vacation appoint appraisers of estates of decedents, admit wills to probate, appoint and qualify executors, administrators, curators of decedents and committees, and take bonds in the same manner as courts.<sup>5</sup> The Constitution<sup>6</sup> authorizes the legislature to confer this power on the clerks of the several *circuit* courts, but is silent as to any other clerks. Article VI of the Constitution prescribes a complete judicial system and no other courts are allowed except those mentioned in that article. The legislature, therefore, has no power to confer the jurisdiction above mentioned on the clerks of any other court, and hence the statute above mentioned, so far as it undertakes to confer such jurisdiction on clerks of city courts, is unconstitutional. Such clerks are not within the terms or intendment of § 101 of the Constitution, nor is such jurisdiction conferred by § 98, authorizing the legislature to provide "additional courts" for certain cities. The additional courts authorized must be courts of similar grade, dignity and jurisdiction of existing city courts.<sup>7</sup> An appeal of right is allowed from an order made by the clerk, within one year (on giving bond as required by law) to the court whose clerk made the order.<sup>8</sup> Such clerks have *no power* to appoint *guardians*, or to substitute trustees. The constitution authorized the legislature to confer this power on the clerks of the several circuit courts, but it has not done so.<sup>9</sup> The clerks of the circuit and corporation courts may issue distress warrants for

4. *Wilburn v. Raines*, 111 Va. 334, 68 S. E. 993.

5. Code, § 2639a.

6. Va. Constitution (1902), § 101.

7. *McCurdy v. Smith*, 107 Va. 757, 60 S. E. 78.

8. Code, § 2639a.

9. Va. Constitution (1902), § 101.

rent.<sup>10</sup> The clerks of circuit courts of counties and of the circuit or any city court of corporations may issue attachments against debtors removing their effects out of the estate, or against tenants removing their effects from the leased premises.<sup>11</sup> They have no power to issue an attachment holding a defendant to civil bail. The provision with reference to issuing distress warrants was inserted in December, 1903. The constitution is silent as to the power of the legislature to enact any such statute, but it is believed to be a constitutional enactment. The issuing of the distress warrant can hardly be said to be a judicial act. The clerk does not hear or determine anything, but simply issues the warrant, and the judicial feature of the case arises on subsequent proceedings.

#### § 44. Justices of the peace.

1. CIVIL POWERS OF JUSTICES.—They may take *acknowledgments* of deeds and other writings.<sup>12</sup> They may administer *affidavits* when not of such a nature that they must be administered in court.<sup>13</sup>

SMALL CLAIMS.—They have jurisdiction of claims to specific personal property or to any debt, fine, or other money, or to damages for any breach of contract, or for any injury done to real or personal property, if the claim to the fine, does not exceed \$20.00, and in other cases “if it does not exceed \$100, exclusive of interest.” If the claim be such as would bear an action of *assumpsit* and there be served with the warrant a copy of the account on which the warrant is brought, stating distinctly the several items of the claim, the aggregate amount thereof, the time from which interest is claimed, and the credits, if any, to which the defendant may be entitled, and such account be verified by the affidavit of the plaintiff or his agent, the plaintiff is entitled to judgment unless the defendant makes a “sworn defence.”

If the claim exceeds \$20 the defendant may remove the case to the circuit court of the county or the corporation court of the

10. Code, § 2790.

11. Code, §§ 2961 and 2962.

12. Code, § 2501.

13. Code, § 173.

corporation in which the warrant is brought, at any time before trial, "upon affidavit that he has a substantial defence thereto." The justice cannot require security for the debt or costs. When removed it cannot be tried except by consent, unless it has been docketed ten days previous thereto.<sup>14</sup>

When removed, the case is to be tried according to principles of law and equity, and if they conflict, equity is to prevail.<sup>15</sup>

The court may correct any defects, irregularities, or omissions in the proceedings before the justice, or in respect to the form of the warrant. The statute is to be construed liberally.<sup>16</sup>

2. PROCEEDINGS BEFORE A JUSTICE ON SMALL CLAIMS.—On application, the justice issues a warrant directed to the sheriff, sergeant, or constable to summon the defendant to appear before him or some other justice on a certain day. The warrant must be returnable "on a certain day not exceeding thirty days from the date thereof." It must be returnable to some place in the *magisterial district* in which the defendant, or some one or more of them, if there be more than one, resides, or in which the cause of action arose, unless the justice for good cause shown on oath direct it to be returned to some other place in his county or corporation. But in no case can it be returnable in a *county* or *corporation* other than that in which the defendants, or some of them, reside. It may be executed in any part of the county or corporation.<sup>17</sup>

If a corporation or company be defendant, it is provided that, for the purposes of this act, it shall be construed to reside in any county or corporation through which its line (if it be a transportation company) runs, or in which it conducts its business.<sup>18</sup> There can be no trial within five days after the service of the warrant, except with consent of the parties. If, at any time before trial, the defendant shall make affidavit that he verily believes he cannot obtain justice from the justice of the peace who issued said warrant, and before whom it is returnable, the said justice

14. Code, § 2939.

15. Code, § 2939.

16. Code, § 2939.

17. Code, § 2940.

18. Code, § 2940.

of the peace who issued said warrant shall associate himself with two other justices of the peace of that county, who shall try said warrant, and in case of disagreement of opinion, the opinion of the majority is to prevail.<sup>19</sup> There seems to be no similar provision for calling in additional justices in cities.

The justice must write on the face of the writing, account, or other paper, on which the warrant is sued out, or on any warrant, account, or any other paper allowed as a set-off, the date and amount of the judgment and costs, and affix his name thereto.<sup>20</sup>

The justice may allow a new trial within thirty days, but not after. The opposite party must be present, or have five days' notice of the application for the new trial.<sup>21</sup>

The justice may stay execution for certain periods upon security being given.<sup>22</sup>

The justice may allow an appeal within ten days to the circuit court of the county, or the corporation court of the corporation, where the matter in controversy, exclusive of interest, is of greater value than ten dollars, on security being given to be approved by him "for the payment of such judgment as may be rendered against the defendant, and all costs and damages." The verbal acknowledgment of the surety shall be sufficient, and the endorsement of his name by the justice on the warrant is *conclusive* evidence of such acknowledgment. The appellate court may require new or additional security.<sup>23</sup> Costs before the justice are no part of the amount in controversy, and are not to be taken into consideration in determining the right of appeal.<sup>24</sup>

The justice has no right to demand that costs be paid before allowing the appeal. In cattle-guard cases, appeal lies for either party, regardless of the amount involved.<sup>25</sup> If a judgment is rendered in a corporation in a case involving the constitutionality or validity of a by-law or ordinance of said corporation, the ap-

19. Code, § 2942.

20. Code, § 2943.

21. Code, § 2946.

22. Code, § 2947.

23. Code, §§ 2947-2956.

24. *N. & W. v. Clark*, 92 Va. 118, 22 S. E. 867.

25. Code, § 1294b, cl. 20.

peal lies only to the circuit court having jurisdiction over said corporation.<sup>26</sup>

The justice may issue an execution, directed to the sheriff, sergeant, or constable, of any county or corporation, and it may be executed anywhere within the county or corporation. The execution must be returnable within sixty days. If not wholly satisfied, it may, within one year from the date of the judgment, be returned and renewed by a justice; but if not so returned and renewed it must be returned to the clerk's office of the court of the county or corporation in which it issued.<sup>27</sup> Thereafter, further executions, if need be, may be issued by the clerk of the court.<sup>28</sup>

Appeals from the justice are tried in a summary way without pleadings in writing, and if the matter in controversy exceed \$20 either party may require a jury. All legal evidence is to be heard, whether heard by the justice or not, and if the judgment is given against the appellant, and his surety, the execution thereon is endorsed, "No security to be taken."<sup>29</sup>

Justices may issue distress warrants for rent due. The warrant is issued on affidavit of the claimant of the rent, or his agent, that the amount of money or other thing to be distrained for, as he verily believes, is justly due to the claimant for rent reserved upon contract from the person from whom it is claimed. Rent cannot be distrained for after five years from the time it becomes due.<sup>30</sup>

The justice or the clerk of the circuit or corporation court may issue this warrant for any amount, however large. There is no trial of the warrant, but the warrant itself is a mandate to the officer to levy the amount. The defences are made on the forthcoming bond. When motion is made on this bond the defendant may defend on the ground that the distress was for rent not due in whole or in part, or was otherwise illegal.<sup>31</sup> If the tenant be unable to give the forthcoming bond, the case is provided for by,

26. Code, § 2956.

27. Code, §§ 2948-2949.

28. Code, § 2950.

29. Code, § 2957.

30. Code, § 2790.

31. Code, § 3621

§ 3618. On the general subject of rents, see Code, ch. 127. As to judgments of justices on forthcoming bonds, see Code, § 3625.

3. CIVIL BAIL.—Justice may require bail of the defendant (in action or suit) if he is about to quit the state. It is a personal attachment, a *capias ad respondendum*.<sup>32</sup> For procedure thereon, see Code, § 2992, *et seq.*

4. ATTACHMENT.—An attachment may be issued by a justice of the peace in the following cases:

(1) Where a debtor intends to remove, or is removing, or has removed his effects out of the state so that there will probably not be therein effects of such debtor sufficient to satisfy the claim when judgment is obtained therefor, should only the ordinary process of law be issued to obtain such judgment.<sup>33</sup> If issued in a pending suit, the attachment is returnable to rules, or to court. In other cases, if the claim exceed \$20, it is returnable at the option of the plaintiff to the next term of the circuit court of the county, or to the circuit or any city court having jurisdiction of the subject matter of the corporation in which such justice or clerk resides. If \$20, or under, it is returnable before the justice.<sup>34</sup>

(2) Where a tenant intends to remove or is removing, or has within thirty days removed his effects from the leased premises, and the landlord, or his agent, believes that unless an attachment issues there will not be left on such premises property liable to distress sufficient to satisfy the rent to become due and payable within one year.<sup>35</sup>

(3) For a claim under \$20, if it is due,<sup>36</sup> and there is ground for the attachment.

5. UNLAWFUL DETAINER (but not unlawful or forcible entry).—A justice has jurisdiction in an action of unlawful detainer against *a tenant, or any person claiming under him*, unlawfully detaining possession of premises, where the lease was originally for

32. Code, § 2991.

33. Code, § 2961.

34. Code, § 2965.

35. Code, § 2962.

36. Code, § 2988.

not more than one year, or for such time as the tenant is employed by the landlord as a laborer.<sup>37</sup>

6. GARNISHMENT.—On judgments rendered by a justice.<sup>38</sup> Wages of a minor cannot be garnished for debts of parents.<sup>39</sup>

### § 45. Circuit and corporation courts.

The single court system prevails in Virginia, and, outside a few matters of minor importance of which the tribunals hereinbefore mentioned have exclusive jurisdiction, the circuit courts of the counties are the only courts provided by law for counties. In each city there is a corporation court whose civil jurisdiction is for the most part concurrent with that of the circuit court for such city. In the cities of Richmond and Norfolk there are several courts whose jurisdiction is declared by statute. The following discussion is not intended to apply to these excepted cities :

Circuit courts have original and general jurisdiction of all cases in chancery and civil cases at law, except cases at law to recover personal property or money, not of greater value than \$20, exclusive of interest, and except such cases as are especially assigned to some other tribunal.<sup>41</sup> Between \$20 and \$100 the jurisdiction is for the most part concurrent with that of the justice, but if the action be for a *fine exceeding \$20* or for a *personal injury*, the jurisdiction of the *circuit court* is exclusive.<sup>42</sup> Circuit courts also have jurisdiction of proceedings by *quo warranto*, and to award writs of *mandamus*, *prohibition* and *certiorari* to all inferior tribunals created or existing under the laws of this State, and to issue *mandamus* to the boards of supervisors of their respective counties, and in other cases in which it may be necessary to prevent the failure of justice and in which a *mandamus* may issue according to the course of the common law. They have also jurisdiction in all cases for the recovery of fees, penalties, or any cases involving the right to levy and collect tolls or taxes, or involving the validity of any ordinance or by-law of any corporation, and

37. Code, § 2716.

38. Code, § 3609, *et seq.*

39. Code, § 3652.

41. Code, § 3058.

42. Code, § 2939.

also of all civil and criminal cases where an appeal may be had to the Court of Appeals.<sup>43</sup>

They also have original jurisdiction of all presentments, informations and indictments for felonies, or for such misdemeanors as are made cognizable therein by statute, and of the proceedings therein.<sup>44</sup>

Circuit courts may admit wills to probate,<sup>45</sup> grant letters of administration,<sup>46</sup> and appoint guardians for infants,<sup>47</sup> and committees for lunatics,<sup>48</sup> and curators of estates of infants.<sup>49</sup> In the matters of appointment of guardians or curators the judge may act in vacation.<sup>50</sup> Circuit, corporation, and other courts in which a will is admitted to probate, or a deed or other writing is or might have been recorded, have jurisdiction to appoint trustees in the place of one or more who have died, resigned, removed from the state, or declined to accept the trust. The personal representative, however, of a sole trustee who has died, is authorized to "execute the trust or so much thereof as remained unexecuted at the time of death" of such trustee "unless the instrument creating the trust directs otherwise" or a new trustee be appointed.<sup>51</sup>

Circuit and corporation courts may summon all persons interested in a will, require production of all testamentary papers, have a trial by jury, and settle all controversies concerning wills.<sup>52</sup>

Circuit courts (concurrently with corporation courts in cities) have jurisdiction of applications for change of names.<sup>53</sup>

An appeal lies from the decision of the justice of the peace where the matter in controversy, exclusive of interest and cost, is greater than \$10, or where the case involves the constitutionality of a law, or the validity of a by-law or ordinance of a cor-

43. Code, § 3058.

44. Code, § 3058.

45. Code, § 2533.

46. Code, § 2639.

47. Code, § 2599.

48. Code, § 1700.

49. Code, § 2602.

50. Code, §§ 2599, 2602.

51. Code, § 3419.

52. Code, §§ 2539, 2542.

53. Code, § 3138.

poration. If the case arises in a city, the appeal is to the corporation court except where it involves the validity of a by-law or ordinance of a corporation, when it is to the circuit court. If the case arises outside of the city, the appeal is to the circuit court.<sup>54</sup>

Circuit courts have (concurrently with corporation courts) jurisdiction "to enforce police regulations, and over all offences committed in any county within one mile of a city."<sup>55</sup>

It is provided by § 98 of the Constitution that "during the existence of the corporation or hustings court (of cities of less than ten thousand inhabitants, called cities of the second class) the circuit court of the county in which such city is situated shall have concurrent jurisdiction with said corporation or hustings court in all actions at law and suits in equity." No statute has been enacted in accordance with this provision, but it seems to be self-executing.

Circuit courts also have jurisdiction of all cases, civil and criminal, which were existing or pending in the respective county courts for the counties, on January 31, 1904, and appellate jurisdiction in all cases, civil and criminal, "where an appeal may, as provided by law, be taken or allowed by the said court or the judge thereof, from or to the judgment or proceeding of any inferior tribunal."

"They shall have appellate jurisdiction of all cases, civil and criminal, where an appeal, writ of error, or supersedeas may, as provided by law, be taken to or allowed by the said courts or the judges thereof, from or to the judgment or proceedings of any inferior tribunal. They shall also have jurisdiction of all other matters, civil and criminal, made cognizable therein by law; and where a motion to recover money is allowed in said courts other than under § 3211, they may hear and determine the same, although it be to recover less than twenty dollars; provided, however, that no circuit court shall have original or appellate jurisdiction in *criminal* cases arising within the territorial limits of any city wherein there is established by law a corporation or hustings court."<sup>55a</sup>

54. Code, §§ 2947, 2956.

55. Code, § 3055.

55a. Code, § 3058.

Under a general statute<sup>56</sup> all jurisdiction vested in the county courts on January 31, 1904, is vested in and imposed upon the circuit courts. This would embrace the following:

(1) Motions on bonds returned to or filed in the county court or its clerk's office, or given to any sheriff, sergeant or constable.<sup>57</sup>

(2) Motions for awards of executions on bonds for the forthcoming of property taken on distress warrants,<sup>58</sup> and also motions for sale of property attached or levied on, or for rent reserved in part of the crop.<sup>59</sup>

(3) Injunctions to restrain the removal of crops upon which advancements have been made.<sup>60</sup>

(4) Interpleader proceedings to try the title to property levied on under a distress warrant, or *fi. fa.*<sup>61</sup>

(5) *Mandamus* in respect of any matters arising before the board of supervisors of a county.<sup>62</sup>

(6) Forcible or unlawful entry, or unlawful detainer,<sup>63</sup> and other matters not here enumerated.

*Corporation courts* "have the same jurisdiction within their territorial limits as the circuit courts have in counties for which they are established." They also have jurisdiction for the appointment of electoral boards, and such other jurisdiction as may be conferred upon them by law; but these provisions do not apply to the courts of the city of Richmond, nor to the law and chancery court of the city of Norfolk.<sup>64</sup>

The jurisdiction of the corporation court of the city of Lynchburg extends one mile beyond the city limits.<sup>65</sup>

The legislature has no power to allow an appeal from a corporation to a circuit court in any case, as the constitution makes the two courts of equal dignity and co-ordinate jurisdiction.<sup>66</sup>

56. Code, § 3058b.

57. Code, § 3210.

58. Code, §§ 900, 3210, 3619.

59. Code, § 2795.

60. Code, § 2495.

61. Code, § 2999.

62. Code, § 3046.

63. Code, § 2716.

64. Code, § 3055.

65. Code, § 3067a.

66. *Watson v. Blackstone*, 98 Va. 618, 38 S. E. 939.

### § 46. Civil jurisdiction of Court of Appeals.

The court of appeals has *original* jurisdiction in cases of *habeas corpus*, *mandamus*, and *prohibition*, but not *quo warranto*.<sup>66a</sup>

It has *appellate* jurisdiction in the following cases:

(1) *In matters pecuniary*. Where the amount in controversy, exclusive of costs, is not less in value and amount than \$300.

(2) *In matters not pecuniary*. Here the amount is wholly immaterial. The court has jurisdiction in civil cases at law of an appeal from any judgment or order in controversy concerning the title to or boundaries of land, the condemnation of property, the probate of a will, the appointment or qualification of a personal representative, guardian, committee, or curator, or concerning a mill, roadway, ferry, wharf, or landing, or the right of the state, county, or municipal corporation to levy tolls or taxes, or involving the construction of any statute, ordinance, or county proceeding imposing taxes. It also has jurisdiction in case of appeal from any final order, judgment, or finding of the State Corporation Commission, irrespective of the amount involved, except the action of the said commission in ascertaining the value of any property or franchise of a railroad or canal company, for the purpose of taxation and assessing taxes thereon. It has jurisdiction also of appeals from an order of a judge or court refusing a writ of *quo warranto*, or a final judgment on said writ, and the Commonwealth has an appeal from the action of the said corporation commission in all cases, irrespective of the amount involved. No appeal lies from the judgment of a circuit or corporation court rendered on an appeal from the judgment of a justice, except in cases where it is otherwise expressly provided.<sup>67</sup> It also has jurisdiction of cases involving the constitutionality of a statute, but if the validity of the statute be drawn in question before a justice of the peace, there must be first an appeal to the circuit court of the county on the corporation of the city. There is no direct appeal from the justice to the Court of Appeals.<sup>67a</sup>

66a. *Watkins v. Venable*, 99 Va. 440, 39 S. E. 147.

67. Code, §§ 3454, 3455.

67a. Va. Constitution § 88; *Southern R. Co. v. Hill*, 106 Va. 501, 56 S. E. 278.

## CHAPTER VI.

### PARTIES TO ACTIONS.

§ 47. Proper parties to actions *ex contractu* generally.

§ 48. Joint and several contracts.

§ 49. Proper parties to actions *ex delicto* generally.

§ 50. Assignees of contracts.

§ 51. Assignees of rights of actions for torts.

§ 52. Joint tortfeasors.

§ 53. Actions by and against court receivers.

§ 54. Partnership.

§ 55. Executors and administrators.

§ 56. Corporations.

§ 57. Infants.

§ 58. Insane persons.

§ 59. Married women.

§ 60. Unincorporated associations.

§ 61. Death by wrongful act.

§ 62. Undisclosed principal.

§ 63. Convicts.

§ 64. Official and statutory bonds.

§ 65. Change of parties.

§ 66. Misjoinder and non-joinder of parties.

Too many or too few plaintiffs or defendants. Mode of taking the objection at common law.

1. Actions *ex contractu*.

2. Actions *ex delicto*.

### § 47. Proper parties to actions *ex contractu* generally.

The following succinct statement is made by Professor Minor:<sup>1</sup>

“In actions *ex contractu* the general principle is that the action must be brought by the person who *has the legal title* to the benefit of a contract, inasmuch as a *court of law* does not usually take cognizance of an *equitable title*. But this principle, which was once universal, has, in process of time, in *personal actions*, come to be subject to many exceptions. Thus, in contracts *not under seal*, it has been held, for two centuries or more, that any one *for whose benefit* the contract was made may sue upon it; that is, if

1. 4 Min. Inst., pp. 450-451.

A promises Z, not under seal, but for valuable consideration, to pay B \$1,000, B may in his own name maintain an action against A.<sup>2</sup> But where the promise is *under the seal of the promisor*, the common law never relaxed its requirement that the action should be brought by the promisee alone, or his personal representative, and not by any one *for whose benefit*, ever so expressly, the promise was made; a rule which is particularly inflexible where the deed is an *indenture* or *inter partes*. Thus, if in a deed indented, 'between A of the first part and Z of the second part,' there be contained a stipulation that Z should pay C \$1,000, C can maintain no action for the money; and even if it be a *deed poll*, whereby Z stipulates *with A* that he will pay C \$1,000, the better opinion is that at common law no action is maintainable by C.<sup>3</sup> Here, however, our statute law has intervened, and permits the *beneficiary* to assert his merely equitable title in his own name, in a Court of Law, in both of the cases last stated. 'If a covenant or promise,' says the statute, 'be made for the sole benefit of a person with whom it is not made, or with whom it is jointly made with others, such person may maintain in his own name any action thereon which he might maintain in case it had been made *with him only*, and the consideration had moved from him to the party making such covenant or promise.'<sup>4</sup>

Whatever may have been the rule at the ancient common law with reference to a deed poll where Z stipulates with A that he will pay C \$1,000, it has been held several times in Virginia that even at common law and independently of statute, the beneficiary C could maintain an action in his own name. It is said that such beneficiaries not described as parties in deeds poll, or even mentioned as having a beneficial interest therein, may sue thereon in their own names if it manifestly appears that the covenants were made for their benefit, but the beneficiary must be pointed out and designated *in the instrument*, though it is not necessary that his name should in terms be used.<sup>4a</sup>

2. 1 Chit. Pl. 4, 5.

3. 1 Chit. Pl. 3, 4; *Ross v. Milne et ux*, 12 Leigh 204, 218, *et seq.*

4. Code, § 2415; 3 Rob. Pr. (2nd ed.), 14, *et seq.*; *Jones v. Thomas*, 21 Gratt. 101-102; *Clemmitt v. N. Y. Ins. Co.*, 76 Va. 355.

4a. *Jones v. Thomas*, 21 Gratt. 96, 100; *Newberry Land Co. v. Newberry*, 95 Va. 119, 27 S. E. 899, and cases cited.

A different rule, however, prevails as to a deed *inter partes*. Such a deed was only available between the parties to it and their privies, and a third person (beneficiary), though expressly mentioned in the deed, if not a party to it, could maintain no action upon it in his own name. The reason is set forth by Judge Staples in *Jones v. Thomas, supra*. It is said that the Virginia statute "does not enable one who is not a party to a deed to maintain an action thereon unless he is plainly designated by the instrument as the beneficiary and the covenant or promise is made for his sole benefit."<sup>5</sup> It would seem from these cases that if the beneficiary in a deed poll was named in the deed or definitely pointed out, he might maintain an action thereon in his own name, but under no other conditions, and the effect of the Virginia statute above quoted seems to be to put deeds *inter partes* on the same footing with deeds poll in this respect, but does not seem to have extended the common-law rule any further.

In discussing the subject of parties to actions, it must be borne in mind that, no matter what the form of action may be, whether in tort or contract, all proceedings in court must be by and against *living* parties. This rule applies to appellate courts as well as to trial courts. Usually, if there are more parties than one on a side, and one dies, the action survives for or against the living party. If there is only one party on a side, and the action is one which survives, it may be revived by or against the representative of the decedent. If a sole party dies before action brought, the action should be brought by or against his representative. There can be no such thing as an action by or against one who is dead.<sup>5a</sup>

#### § 48. Joint and several contracts.

A contract may be joint only, as where all of the parties to the contract jointly promise to do a particular thing; or it may be joint and several, as where by the terms of the contract the parties *jointly and severally* promised to do a particular thing; and it has been held that a contract which begins "I promise to pay" signed by more than one is joint and several.<sup>6</sup> If the con-

5. *Newberry Land Co. v. Newberry*, 95 Va. 119, 27 S. E. 899.

5a. 4 *Minor's Inst.* 975, 977; *Booth v. Dotson*, 93 Va. 233, 24 S. E. 935.

6. *Holman v. Gilliam*, 6 Rand. 39.

tract be joint and several, a single action may be brought against all or several actions may be brought against each one, but generally there can be no action against an intermediate number if there be more than two. An exception, however, has been made to this rule by the statute in Virginia as to negotiable instruments. The statute provides that an action of debt or assumpsit may be maintained and judgment given jointly against all liable, whether drawers, endorsers or acceptors, or against any one, or any intermediate number of them.<sup>7</sup> Furthermore, § 68 of the Negotiable Instruments Act declares that joint payees or joint endorsees who endorse are deemed to endorse jointly and severally.<sup>8</sup> If the obligation is joint only, and one of the parties dies, the survivor only was liable at common law and the estate of the decedent was discharged except in equity. But by statute in Virginia this has been changed so that the personal representative of the decedent may still be sued in an action at law, but the action would be a separate and independent action against the personal representative.<sup>9</sup> A further exception to the general rule that joint contractors can only be sued jointly has been made by statute in Virginia in a proceeding by motion, instead of a regular action. If the proceeding be by motion for a judgment under § 3211 of the Code, although the contract be joint only, the proceeding may be against all or any one or any intermediate number, and also against the personal representative of such as are dead.<sup>10</sup>

At common law, a judgment against one of several joint

7. Code, § 2853.

8. Code, § 2841a.

9. Code, § 2855.

10. Section 3212 of the Code is as follows: "A person entitled to obtain judgment for money on motion, may, as to any, or the personal representatives of any person liable for such money, move severally against each, or jointly against all, or jointly against any intermediate number; and when notice of his motion is not served on all of those to whom it is directed, judgment may nevertheless be given against so many of those liable as shall appear to have been served with the notice: Provided, that judgment against such personal representatives shall, in all cases, be several. Such motions may be made from time to time until there is judgment against every person liable, or his personal representative."

contractors was a bar to any action against the others, but this has been materially changed by statute in Virginia: (1) By § 3212, cited in the margin, where the proceeding is by motion for judgment. The statute permits the proceeding to be against each, all, or any intermediate number, even on a joint contract, and provides that the motions may be made from time to time until there is judgment against every person liable or his personal representative; (2) where the action is brought on negotiable paper under § 2853, allowing an action against all, any one, or any intermediate number; (3) under § 3396 quoted in the margin, where the plaintiff is expressly allowed to proceed to judgment as to defendants served, and either to discontinue as to others, or proceed to judgment from time to time against them as the process is served.<sup>11</sup> In Judge Burks' address before the Bar Association in July, 1891, it is said: "It had been declared by the Court of Appeals that, in an action *ex contractu* against several defendants, if the action was discontinued as to one on whom the process was not served, and judgment rendered against the other on whom it was served, the judgment was a bar to a subsequent action for the same cause against the defendant as to whom the former action had been discontinued.<sup>12</sup> The Code provides that the discontinuance shall not operate as such a bar."<sup>13</sup> In *Corbin v. Bank*, 87 Va. 661, 13 S. E. 98, it is said that the discontinuance provided for by this section is a discontinuance as against one or more defendants upon whom *process had not been served*, and there is a plain intimation that the common-law rule still prevails if the discontinuance is after service of process. The point has not been directly decided. In *Cahoon v. McCulloch*, 92 Va. 177, 23 S.

11. Section 3396 of the Code is as follows: "Where, in any action against two or more defendants, the process is served on part of them, the plaintiff may proceed to judgment as to any so served, and either discontinue it as to the others, or from time to time, as the process is served as to such others, proceed to judgment as to them until judgments be obtained against all. Such discontinuance of the action as to any defendant shall not operate as a bar of any subsequent action which may be brought against him for the same cause."

12. *Beazly v. Sims*, 81 Va. 644.

13. Code, § 3396.

E. 225, the proceeding was by motion under § 3212. This section makes no mention of a dismissal after service, but it was held that such dismissal did not work a discontinuance and although reference is made in the latter case to important changes made by §§ 3395 and 3396 of the Code, the decision is rested on the language of § 3212. Under the very broad language of §§ 3395 and 3396, it is doubtful at least whether a dismissal after service would operate a discontinuance of a regular action any more than it would of a motion under § 3212, though it is not to be forgotten that § 3212 gives an action against all, or any one, or any intermediate number on a joint contract. In the last mentioned case, Riley, Judge, said: "The statute declares in effect that there shall be no merger of the original cause of action until there has been a judgment against every person liable to a recovery on it." If the contract be both joint and several, of course a judgment against one is no bar to an action against any other, because the judgment is in strict accord with the contract of the parties; but if there has been judgment against one, there cannot thereafter be another judgment against all, nor if there has been judgment against all can there thereafter be judgment against any one separately.<sup>14</sup> Subject to the qualifications above stated, parties jointly bound by contract can only be sued jointly, and it is a valid ground of objection if any of them are omitted. In the absence of statute, the mere fact that a claim is barred by the act of limitations as to one of several joint contractors, or that he has a personal defence, or that he is not a resident of the state, is generally no reason why he should not be joined. He may be willing to waive his personal defence. It has been held in Virginia that the failure to join an infant joint contractor as defendant is error.<sup>15</sup> But it is provided by statute that no plea in abatement for non-joinder of a defendant shall be allowed unless it be stated in the plea that he is a resident of this state and the place of his residence be stated with convenient certainty in the affidavit verifying the plea.<sup>15a</sup>

14. See Graves' Notes on Pleading, 7-14, as to all matters embraced in this section.

15. *Walmsley v. Lindenberger*, 2 Rand. 478

15a. Code, § 3261.

## § 49. Proper parties to actions ex delicto generally.

Professor Minor makes the following statement:<sup>16</sup> "In actions *ex delicto* the same general principle prevails as in actions *ex contractu*, namely, that the action must in general be brought in the name of the person whose *legal right* has been affected, and who was legally interested in the property to which the tort relates at the time the tort was committed.<sup>17</sup> Thus a *cestui que trust*, or other person having only an *equitable* interest, cannot, for the most part, sue in the courts of common law, either his trustee or a third person, unless in cases where the action is against a mere wrongdoer, and for an injury to the *actual possession* of the *cestui que trust*.<sup>18</sup> Indeed, wherever one is *in possession*, notwithstanding he may have only an *equitable title*, when that *possession* is invaded, as it is by a trespass upon the land, a legal wrong may fairly be considered as having been committed against him, so as to qualify him to sue therefor in a court of law.<sup>19</sup>

"The proper *defendants* in actions *ex delicto* are those in general who committed the tort, whether by their own hands or by the hands of others. Even an *infant* may be made responsible for torts, as corporations may also be.<sup>20</sup>

"When the defendant has occasion to invoke his own title to the subject, as a defence to the alleged tort, the title must in general be as much a *legal title* as if he was founding an action upon it, and for the same reason, that is to say, that as a general rule, a *court of law* will not take cognizance of a title *merely equitable*. Thus, if the defendant, in an action of ejectment, relies upon his own better title, it must usually be a *legal title*, and if not, his defence, if it is available anywhere, must be made in a *court of equity*."

Torts are in their nature joint and several, and it is so universally conceded that the injured party has the right to sue all, or any one, or any intermediate number of the tortfeasors, that it is not deemed necessary to cite authorities to sustain

16. 4 Min. Inst. 452.

17. 1 Chit. Pl. 69, *et seq.*

18. 1 Chit. Pl. 69.

19. 1 Chit. Pl. 202, 203.

20. 1 Chit. Pl. 87, *et seq.*

the proposition. In England, a judgment against one tortfeasor, although not satisfied, merges the entire cause of action against the others,<sup>21</sup> and Virginia, following an early case, has adopted the same rule.<sup>22</sup> But the rule that a judgment without satisfaction merges the cause of action as against other wrongdoers is repudiated well nigh universally in the United States. In nearly, or quite all of the states, it is held that judgment against one must be satisfied in order to bar an action against the others.<sup>23</sup>

### § 50. Assignees of contracts.

At common law the assignee of a contract could not sue thereon in his own name. The doctrine that, in the absence of statute, an assignee of a contract cannot sue thereon in his own name is fully sustained by *Glenn v. Marbury*, 145 U. S. 499, 507, holding that where an insolvent corporation had assigned all of its assets to a trustee, an action to collect unpaid calls on stock must be brought in the name of the company, and that the trustee cannot sue in his own name. The assignment does not pass the legal title. In order to sue at law, he is required to sue in the name of the assignor, but this has been changed by statute in Virginia, which allows the action to be brought by the assignee or beneficial owner of any bond, note, writing, or other chose in action not negotiable, in his own name.<sup>24</sup> The rule, of course, was and is different as to negotiable paper,

21. *Brinsmead v. Harrison*, L. R. 7 C. P. 547.

22. *Petticolas v. City of Richmond*, 95 Va. 456, 28 S. E. 566.

23. *Lovejoy v. Murray*, 3 Wall. 10; *Griffin v. McClung*, 5 W. Va. 131; *Miller v. Hyde*, 161 Mass. 473, 42 Am. St. Rep. 424, and note.

24. Section 2860 of the Code is as follows: "The assignee or beneficial owner of any bond, note, writing or other chose in action, not negotiable, may maintain thereon in his own name any action which the original obligee, payee, or contracting party might have brought, but shall allow all just discounts, not only against himself, but against such obligee, payee, or contracting party, before the defendant had notice of the assignment or transfer by such obligee, payee, or contracting party, and shall also allow all such discounts against any intermediate assignor or transferrer, the right to which was acquired on the faith of the assignment or transfer to him and before the defendant had notice of the assignment or transfer by such assignor or transferrer to another."

for the endorsement of such paper, whether made before or after maturity, carries the legal title, and the holder of such paper has no right to sue thereon in the name of the payee who has endorsed the paper, or of any prior endorser. The holder of such paper has both the legal and equitable title and sues in his own name. As to common-law paper, the assignee is allowed by statute to assert his equitable title in his own name at law. But the statute expressly provides that he shall allow all just discounts, not only against himself, but against the obligee, payee or contracting party before the defendant had notice of the assignment. It will be observed that the statute extends this right not only to the assignee, but to the beneficial owner of any chose in action. It might be doubted whether an open account was in its nature such a paper as is the subject of an assignment, but it has been held that it is.<sup>25</sup> However this may be, the language of the statute is broad enough to cover the case of the beneficial owner of the account, and he may sue thereon in his own name, though not a formal assignee. The action may be brought at the option of the assignee in his own name, or in that of the assignor. If brought in the name of the assignee, then the declaration must set forth the assignment so as to trace title in the plaintiff. If brought in the name of the assignor, the beneficiary need not be mentioned at all, but the action may be brought in the name of the assignor for the benefit of the assignee; or if originally brought in the name of the assignor, the fact that there is a beneficiary may, pending the action or afterwards, be endorsed on the writ or declaration. The declaration may be amended and the name of the beneficial plaintiff inserted, even after verdict.<sup>26</sup> If in any way it is made to appear that there is a beneficiary other than the plaintiff on the record, and there is judgment for the defendant, judgment for costs will be against the beneficial plaintiff, and not the nominal plaintiff. The assignment need not be in writing even though the obligation assigned be under seal, but if the action be by an assignee against the assignor, the assignment must be supported by a valuable consideration. If

25. *Porter v. Young*, 85 Va. 49, 6 S. E. 803.

26. *Kain v. Angle*, 111 Va. 415, 69 S. E. 355.

the action be brought in the name of the assignor, upon proper indemnity to him for costs, he will not be allowed in any way to obstruct or interfere with the prosecution of the action.

While the owner of a non negotiable chose in action is permitted to assign it, the assignment must be of the whole debt. He cannot split up his demand and assign a portion of it to one person and another portion to another so as to enable them to maintain separate actions for their different portions. If partial assignments have been made, the action must be in the name of the assignor. A single cause of action arising on an entire contract cannot be divided by partial assignments so as to enable each assignee to sue for the part assigned.<sup>28</sup>

Although the Virginia statute has enlarged the rule of the common law so as to make a chose in action assignable, and authorized the assignee to maintain in his own name any action which the original obligee might have brought, it does not create any new cause of action. Hence, the assignment of a chose in action does not invest the assignee, as an incident, with a right against a third party to recover damages for an injury which occurred prior to the assignment. A prior accrued right to sue a sheriff and his sureties for a failure to return a delivery bond and thereby create a lien on the land of the sureties does not pass as an incident to the assignment of the original judgment.<sup>29</sup> This rule, however, is qualified to the extent that, if a debtor has transferred his property without consideration to the prejudice of his creditors who have the right to avoid the conveyance, the right to avoid the conveyance passes with the assignment by the creditor to the assignee of the debt.<sup>30</sup>

### § 51. Assignees of rights of actions for torts.

If the tort is purely personal, it is not the subject of assignment. The maxim, *actio personalis moritur cum persona* applies. Whether or not the tort is purely personal will be determined by the court, looking to the substance of the action rather than to its form; and, although the tort may arise out of con-

28. *Phillips v. Portsmouth*, 112 Va. —, 70 S. E. 502.

29. *Commonwealth v. Wampler*, 104 Va. 337, 51 S. E. 737.

30. *Nat. Valley Bank v. Hancock*, 100 Va. 101, 40 S. E. 611.

tract, and the action be in form as for breach of contract, as for example a suit to recover damages for a breach of contract of marriage, or against a carrier for failure to safely carry a passenger, the action is in substance purely personal, and dies with the person, and is not subject to assignment.<sup>31</sup> Nor will the result be different simply because the plaintiff may have sustained special damages as an incident of a personal injury, as, for instance, a claim for medical services, as incident to an action to recover damages for a personal injury.<sup>32</sup> Only those causes of action are assignable which upon death would survive to the personal representative of the party sustaining the damage, and only those actions survive which consist of injuries to property, real and personal, or grow out of breach of contract.<sup>33</sup>

## § 52. Joint tortfeasors.

It has already been pointed out that in case of joint wrongs, the plaintiff may at his election sue all, or any one, or any intermediate number, but in order to sue all there must have been a joint wrong. In respect to negligent injuries, there is great difference of opinion as to what constitutes joint liability, and it is said that no comprehensive general rule can be formulated which will harmonize all the authorities.<sup>34</sup> It has been held that when the negligence of two or more persons produces a single, indivisible injury, they are joint tortfeasors, although such persons act independently of one another; and further that where the negligence of two or more persons concurs in producing a single, indivisible injury, then such persons are jointly and severally liable, although there was no common duty, common design, or concert of action.<sup>35</sup> But with respect to nuisances,

31. *Birmingham v. C. & O. R. Co.*, 98 Va. 548, 37 S. E. 17; *Grubb v. Sult*, 32 Gratt. 203.

32. *Birmingham v. C. & O. R. Co.*, *supra*.

33. *Graves' Notes on Pl. 16, 17, and cases cited; N. & W. R. Co. v. Read*, 87 Va. 185, 12 S. E. 395.

34. *Cooley on Torts (Students' Ed.)*, § 37.

35. *Walton v. Miller*, 109 Va. 210, 63 S. E. 458. As to joint liability of carriers of goods whose negligent acts are not simultaneous, but successive, see *Norfolk W. R. Co. v. Crull*, 112 Va. —, 70 S. E. 521.

“where different proprietors on a stream, each acting independently and for his own purposes, conduct filth or refuse into the stream from their respective estates they are held not to be jointly liable.”<sup>36</sup> Whether a master and servant can be jointly sued for a negligent injury inflicted by the servant, when the liability of the master is by relation only, has been seriously questioned, and the weight of authority seems to be in favor of the joint liability,<sup>37</sup> though it is stated in 26 Cyc. 1545, that, as a general rule, there is no joint liability when the master is liable solely on the doctrine of *respondeat superior*. Certainly, on principle, the statement in Cyc. would seem to be the right doctrine, and the reasons assigned for the joint liability are not at all convincing.<sup>38</sup> In Virginia the joint liability has been upheld though the subject was not discussed.<sup>39</sup> If the plaintiff elects to sue only one of the joint tortfeasors, and there is judgment against the plaintiff, this is no bar to an action against the others where the defence was personal to that defendant, but if the defence was equally applicable to all the joint tortfeasors, as, for instance, contributory negligence of the plaintiff, it would seem that a judgment in favor of one joint tortfeasor would be a bar to an action against another,<sup>40</sup> but this question has been left open in Virginia.<sup>41</sup> If, however, the plaintiff elects to sue all in a single action, and all are found guilty, the verdict must be joint against all, and the assessment of damages must be the same as to all of the defendants. The jury have no power to apportion the damages among them.<sup>42</sup> In a joint action of tort against master and servant, after a verdict against the master and in favor of the servant has been set aside, although the

36. Cooley on Torts (Students' Ed.), § 38; Pulaski Coal Co. v. Gibboney, 110 Va. 444, 66 S. E. 73.

37. Cooley on Torts (Students' Ed.), § 39, and cases cited; Huffcut on Agency, § 214 and cases cited.

38. Schumpert v. So. Ry. Co., 65 S. C. 332, 43 S. E. 813, 95 Am. St. Rep. 802.

39. Singer Mfg. Co. v. Bryant, 105 Va. 403, 54 S. E. 320; Ivanhoe Furnace Corp. v. Crowder, 110 Va. 387, 66 S. E. 63.

40. 23 Cyc. 1213.

41. Staunton Tel. Co. v. Buchanan, 108 Va. 810, 814, 62 S. E. 928.

42. Cooley on Torts (Students' Ed.), § 41; Crawford v. Morris, 5 Gratt. 90.

evidence disclosed no negligence on the part of the master, except that imputed on account of the negligence of the servant, it is entirely competent for the plaintiff to dismiss the action as to the servant and proceed with the second trial against the master only, as he might in the first instance have sued either or both of them.<sup>42a</sup>

### § 53. Actions by and against court receivers.

In the absence of statute, a receiver has no authority except that conferred by the order of his appointment. He is a mere arm of the court, and has no right to institute an action without authority from the court of his appointment. For reasons of public policy, the court determines for itself what litigation it will engage in, and does not trust to the judgment of the receiver as to the conservation or preservation of the assets under its control. So, likewise, being an officer of the court, no one has a right to sue him except by leave of the court of his appointment, and to bring such suit would be a contempt of the appointing court. The right either to sue or be sued must appear in the pleadings. This rule, however, with reference to suits *against* receivers, has been modified by statute in Virginia, and also by Act of Congress.<sup>43</sup> It will be observed

42a. *Ivanhoe Furnace Co. v. Crowder, supra.*

43. Section 3415a of the Code is as follows: "Any receiver of any corporation appointed by the courts of this commonwealth may be sued in respect of any act or transaction of his in carrying on the business connected with such corporation without the previous leave of the court in which such receiver was appointed: provided, the institution or pendency of such suit shall not interfere with or delay a decree of sale for foreclosure of any mortgage upon the property of said corporation, and said claim shall not be a lien upon the property or funds under control of the court until filed in said court under the second section.

"(2) No execution shall issue upon such judgment, but upon the filing of a certified copy thereof in the cause in which the receiver or receivers were appointed the court shall direct the payment of such judgment in the same manner as if the claims upon which the judgment is based had been proved and allowed in said cause.

"(3) Process or notice may be served upon such receiver or receivers or their agents in the same manner as is provided by sec-

upon reading these statutes, which are quoted in the margin, that the State statute applies only to receivers of corporations, whereas the Federal statute applies to "every receiver or manager of any property, appointed by any court of the United States." It will be further observed that the basis of the action under either statute is "any act or transaction of *his* in carrying on the business." Hence the act does not apply to acts or omissions of the principal before the appointment of the receiver. The receivership, however, is an entirety and it has been held that the act is broad enough to cover an action against a receiver in respect to an act or transaction of his *predecessor in office*. It is said that "actions against the receiver are in law actions against the receivership or the funds in the hands of the receiver, and his contracts, misfeasances, negligence and liabilities are official and not personal, and judgment against him as receiver are payable only from the funds in his hands."<sup>44</sup>

While there has been some difference of opinion as to what

tion seven of chapter three hundred and ninety-six of acts of assembly eighteen hundred and eighty-five and eighty-six for serving process or notice upon a trustee, or trustees or their agents where a corporation is operated by a trustee or trustees or their agents.

"(4) All warrants before a justice of the peace under this act shall be tried only after ten days' notice.

"(5) All suits now pending before any court in this commonwealth upon petition against any receiver or receivers shall upon the motion of the petitioner be removed to the county or corporation where the cause of action arose, the issue to be made upon the petition and answer, or the petitioner shall be allowed if he so elect to dismiss his petition and institute his suit or action as is herein provided if his said action shall not have been barred by the statute of limitations before the filing of said petition."

25 U. S. Stat. 436; 1 Sup. Rev. Stat. U. S. 614, § 3, provides that: "Every receiver or manager of any property, appointed by any court of the United States, may be sued *in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed*. But such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice."

44. *MacNulta v. Lochridge*, 141 U. S. 327.

is the effect of the judgment against the receiver when rendered, it would seem that the judgment is conclusive as to the existence and amount of the claim, but that the time and manner of its payment is subject to the control of the court appointing the receiver.<sup>45</sup>

Although there is some conflict among the state courts on the subject, it has been held by the Supreme Court of the United States that a receiver is an officer of the court which appoints him, and, in the absence of some conveyance or statute vesting the property of the debtor in him, he cannot sue in the courts of a foreign jurisdiction upon the order of the court appointing him, to recover the property of the debtor. His right to sue will not be recognized by comity; and if he has no right to sue, jurisdiction cannot be acquired by authorizing the receiver to sue in the name of the creditor, if it appears that the property or its proceeds would be turned over to the receiver to be by him administered under the order of the court appointing him.<sup>46</sup> The proper method of procedure in such case is to have an ancillary receiver appointed in the state in which the action is to be brought and let the action be brought by him.

#### § 54. Partnership.

In partnership matters, the partners, in the absence of statute, must sue and be sued in the partnership name, giving the Christian and surnames of the individual partners composing the firm, for example, John Smith, Henry Jones and William Brown, partners, doing business under the style and firm of Smith & Company. If the firm has been dissolved, the same form should be adopted, except that they would be described as *late* partners, doing business, etc. Dormant and special partners need not be joined as plaintiffs, but they are nevertheless partners, and may be joined. In other words, they are proper parties, but not necessary parties.<sup>47</sup> It is not necessary to join them

45. *Dillingham v. Hawk* (C. C. A.), 60 Fed. 494; *St. Louis R. Co. v. Holbrook* (C. C. A.), 73 Fed. 112; Cf. *Tex., etc., R. Co. v. Johnson*, 151 U. S. 81; *contra*, *Mo. Pac. R. Co. v. Tex. Pac. R. Co.*, 41 Fed. 311.

46. *Great Western Mining Co. v. Harris*, 198 U. S. 561.

47. 15 Encl. Pl. & Pr. 856, and cases cited.

as defendants where it is sought only to subject the partnership assets or obtain judgment against the active partners, but if any judgment is sought against them personally, they must be made parties and served with process. This is specially provided for by statute in Virginia so far as affects special partners.<sup>48</sup> If one member of the firm dies after a cause of action has arisen, but before the action is brought, the right of action generally survives for and against the survivors, and so on until the last survivor, and, in the event of his death, to his personal representative. The form of the writ and declaration where one partner has died, would be as follows: John Smith and Henry Jones, survivors of themselves, and William Brown, late partners, doing business under the style and firm of Smith & Company. If there has been any change in the firm after a right of action has accrued, either by the retiring of a partner, or the addition of a new partner, the action should be brought in the name of the firm as it existed at the time the right of action accrued. When a partnership has no right to sue in the firm name, the objection on that account comes too late after judgment. The judgment is believed to be valid, certainly where there has been appearance to the merits. In no event, can the judgment be collaterally assailed. If the defendants are sued in the firm name only, it is doubtful what the effect would be. If there was appearance, and no objection, it would probably bind the firm assets as between the plaintiff and the defendants.<sup>49</sup> If an action is brought by a firm on a contract made with it, but the plaintiff omits to state the name of one of the partners, the objection is fatal. If the omission appears on the face of the declaration, advantage may be taken of it on a demurrer,

48. Section 2876 of the Code is as follows: "All suits respecting the business of any partnership formed or renewed, as hereinbefore prescribed, shall be prosecuted by and against the general partners only, except in those cases wherein it is provided in this chapter that a special partner shall be liable as a general partner, in which cases all partners so liable may join or be joined in such suits. A special partner shall also be liable to and may be sued by the firm for debts contracted with it, in the same manner as if he were not a partner."

49. 15 Encl. Pl. & Pr. 956, 7, and cases cited.

or motion in arrest of judgment, or writ of error. If it does not so appear, it can be taken advantage of by a plea in abatement, or a non-suit at the trial. If the omission is the name of a defendant partner on a contract made by the firm, and it is not apparent on the face of the declaration, the objection can be taken by a plea in abatement only.<sup>50</sup>

One partner cannot sue another, or others, as such, at law, but will be compelled to go into equity.<sup>51</sup>

One partner after dissolution cannot employ an attorney to represent the firm and thus bind the absent partners; and a judgment rendered upon such appearance against a non-resident who is not served with process does not bind him, although other members of the firm may be bound.<sup>52</sup> By statute in West Virginia, a partnership may sue in the firm name where the action is before a justice of the peace, but the names of the individuals composing such firm shall be set forth in the summons.<sup>53</sup>

### § 55. Executors and administrators.

Executors and administrators sue and are sued in their representative capacity, on contracts made with or by the decedent; and on contracts with an executor or administrator himself, he may sue either representatively or individually. Co-executors

50. Graves' Notes on Pl., § 6; Stephen on Pl., §§ 33, 35. The reason of the rule is that each partner is liable for the whole debt and it is no hardship upon him to make him pay the whole, as he must have credit for it in his account with the partnership, and if he knows that another is bound to share this liability with him he should make known this fact at an early stage of the pleadings so that the plaintiff may amend and bring him in, and if he fails to do so he will be deemed to have waived the right. "He ought not to be permitted to lie by and put the plaintiff to the delay and expense of a trial, and then set up a plea not founded in the merits of the cause, but on the forms of the proceeding." Lord Mansfield in *Rice v. Shute*, Burr. 2611, 1 Smith's L. Cases (8th ed.) 1405.

51. *Aylett v. Walker*, 92 Va. 540, 24 S. E. 226; *Strother v. Strother*, 106 Va. 420, 56 S. E. 170; *Summerson v. Donovan*, 100 Va. 657, 66 S. E. 822.

52. *Hall v. Lanning*, 91 U. S. 160; *Bowler v. Huston*, 30 Gratt. 266.

53. Code, W. Va. (1906), § 1976.

or administrators must all join or be joined on contracts with the decedent, but upon the death of one, the action survives to the other or others.<sup>54</sup> In the absence of statute, foreign executors and administrators cannot, as a rule, sue in another jurisdiction, and this is true even in the federal courts having jurisdiction over two states. If the administration is granted in one state, the representative cannot sue in another state without taking out ancillary letters.<sup>55</sup> In a few jurisdictions, such suits are allowed by comity. The objection, however, is not to the jurisdiction of the court, but to the disability of the plaintiff to sue, and if relied upon, must be taken at the proper time and in the proper manner, otherwise it will be deemed to have been waived; and it has been held that it comes too late after a plea to the merits, and, of course after verdict. In some jurisdictions, the action will be upheld if ancillary letters are taken out pending the action, in others not.<sup>56</sup>

### § 56. Corporations.

Corporations sue and are sued in their corporate names.

### § 57. Infants.

Infants sue by next friend. They are sued in their proper names, but a guardian *ad litem* is appointed to defend them. In Virginia, the guardian *ad litem* must, as a rule, be an attorney at law.<sup>57</sup> In most states, the statutes require process to be served upon the infant personally, but there is no such statute in Virginia.

### § 58. Insane persons.

Actions by an insane person before adjudication should be brought in his name suing by his next friend, after adjudication generally by his committee. Actions against an insane person

54. 8 Encl. Pl. & Pr. 658; *Lawson v. Lawson*, 16 Gratt. 230.

55. *Fugate v. Moore*, 86 Va. 1045, 11 S. E. 1063; *Johnson v. Powers*, 139 U. S. 156; 8 Encl. Pl. & Pr. 700.

56. *Lusk v. Kimball* (C. C. A. 4th Cir.), 4 Va. Law Reg. 731, 91 Fed. 845; *Dearborn v. Mathes*, 128 Mass. 194; 13 Am. & Eng. Encl. Law (2nd ed.) 948; 8 Encl. Pl. & Pr. 703.

57. Code, § 3255; 10 Encl. Pl. & Pr. 600-2.

when no committee has been appointed should be against him personally, and will be defended by a guardian *ad litem* appointed for that purpose by the court.<sup>58</sup> Usually after the appointment of a committee, actions affecting the estate of the insane person are brought by or against the committee. In a suit to subject the lands of an insane person to the payment of his debts, he is not a necessary party when he has a committee clothed with absolute power over him and his estate, together with authority to sue and be sued with respect to such estate. In a proceeding affecting the property rights of an insane person, it is the duty of the court, if he have no committee, to appoint a guardian *ad litem* to represent and protect his interests, but if he has a committee, the appointment of a guardian *ad litem* is wholly unnecessary, except where there is a conflict of interest between the committee and the insane person.<sup>59</sup> It may be well to note in this connection that the right of action against the estate of an insane person for past expenses incurred in supporting him in one of the state hospitals exists only by virtue of the statute imposing a personal liability for his support. At common law no such right existed, in the absence of express contract.<sup>60</sup> No action lies against the State, or against one of the State hospitals for the insane, for an injury to or the death of an insane inmate occasioned by the negligence or misconduct of those in charge of the hospital, or their agents or employees.<sup>60a</sup>

### § 59. Married women.

Married women sue and are sued in Virginia like men. If a next friend is added, his name may be simply stricken out, as it is her suit.<sup>61</sup> The husband is not responsible for any contract, liability of tort of his wife, whether the contract or liability was incurred, or the tort was committed, before or after marriage. A judgment against a married woman, whether in tort or contract,

58. Code, § 3255; 10 Encl. Pl. & Pr. 1225.

59. Howard *v.* Landsberg, 108 Va. 161, 60 S. E. 769.

60. Brown *v.* Western State Hospital, 110 Va. 321, 66 S. E. 48.

60a. Maia *v.* Eastern State Hospital, 97 Va. 507, 34 S. E. 617.

61. Richmond Ry. Co. *v.* Bowles, 92 Va. 738, 24 S. E. 388.

binds her personally.<sup>62</sup> It has been said that a married woman when properly sued alone defends in proper person and not by attorney,<sup>63</sup> but this can hardly be true under the very comprehensive language of the present statute in Virginia. There is no longer any reason why she may not appear by attorney. Notwithstanding the very comprehensive provisions of the present married women's law in Virginia, the husband is still entitled to the services of his wife and in an action by her to recover damages for injuries inflicted upon her, the diminution of her ability to perform her ordinary household duties is a damage to the husband and not the wife. A personal injury to the wife may give rise to two causes of action; one in favor of the husband for the loss of her services and the other in favor of the wife for the personal injury and suffering occasioned her.<sup>64</sup>

#### § 60. Unincorporated associations.

These have no legal entity and at law are treated in the nature of partnerships, and all, however numerous, must sue or be sued. There can be no action against the association as such.<sup>65</sup> In some instances, some members of such an association may in equity sue on behalf of themselves and others constituting the association.<sup>66</sup>

#### § 61. Death by wrongful act.

Whether a non-resident alien is entitled to the benefit of a statute giving a right of action for wrongful death is a question upon which courts are divided. The decided weight of authority seems to allow the action, but it has been denied in Pennsylvania and Wisconsin and probably other States. It is allowed in Virginia.<sup>67</sup> Where the action is brought in the State in which

62. Code, § 2286a; 6 Va. Law Reg. 52, 485; *Young v. Hart*, 101 Va. 480, 44 S. E. 703.

63. 4 Min. Inst. 764.

64. *Richmond Ry. Co. v. Bowles*, *supra*; *Norfolk Ry. & L. Co. v. Williar*, 104 Va. 679, 52 S. E. 380.

65. 22 Encl. Pl. & Pr. 330.

66. *Perkins v. Seigfried*, 97 Va. 444, 34 S. E. 64.

67. *Low Moor Iron Co. v. La Bianca*, 106 Va. 83, 55 S. E. 532; *Mulhall v. Fallon*, 176 Mass. 266, 54 L. R. A. 934, 79 Am. St. 309; *Deni v. Penn. R. Co.*, 181 Pa. 525, 59 Am. St. 676; *McMillan v. Spider Lake Co.*, 115 Wis. 332, 60 L. R. A. 589, 95 Am. St. 947.

the injury occurs, it is generally fairly plain who should be the plaintiff, but sometimes redress is sought in another jurisdiction. The first question then presented is, whether the action can be maintained in the foreign jurisdiction, although the defendant resides there. Upon this question there has been serious conflict of authority. But it is generally held that, where the statutes of the two States are substantially similar, the action may be maintained in any jurisdiction where service can be had on the defendant.<sup>68</sup> The law of the place where the injury is inflicted should, on principle, determine, (1) in whose name the action should be brought; (2) the time in which it should be brought; (3) who are the beneficiaries; (4) the measure of recovery; (5) the distribution of the damages; and (6) questions touching contributory negligence, fellow-servants and the like, though upon many of these questions there is serious conflict.<sup>69</sup> In some jurisdictions it is said that where the personal representative is authorized to sue only for the benefit of the widow, children, or next of kin, the existence of such beneficiaries must be alleged. The Virginia statute gives the action for the benefit of certain near relatives, but provides, if there are none, that the recovery shall be for the benefit of the estate of the deceased.<sup>70</sup> Under this statute it has been held that the names of the beneficiaries need not be stated, because the defendant has no interest in the manner of the distribution of the damages, nor is it under the control of the plaintiff.<sup>71</sup> Neither is it permissible to show the number and condition of the family dependent upon the deceased for support,<sup>72</sup> nor the value of decedent's estate, as it is said that such evidence is calculated to excite the sympathy of the jury.<sup>73</sup>

68. *Nelson v. C. & O. R. Co.*, 88 Va. 971, 14 S. E. 838; 8 Am. & Eng. Encl. Law 878, and cases cited; 56 L. R. A. 193 and note; 3 Va. Law Reg. 607.

69. 8 Am. & Eng. Encl. Law (2nd ed.) 882, *et seq.*; *Boston R. Co. v. McDuffey*, 79 Fed. Rep. 934; *Dennick v. Central R. Co.*, 103 U. S. 11; *Nelson v. C. & O. R. Co.*, *supra*; *Dowell v. Cox*, 108 Va. 460, 62 S. E. 272.

70. Code, § 2904.

71. *Matthews v. Warner*, 29 Gratt. 572; *Baltimore & O. R. Co. v. Wightman*, 29 Gratt. 431.

72. *Southern Ry. Co. v. Simmons*, 105 Va. 651, 55 S. E. 459.

73. *Ches. & O. R. Co. v. Ghee*, 110 Va. 527, 66 S. E. 826.

Nor is it permissible to show in mitigation of damages that the beneficiaries have received life or accident insurance in consequence of the death of the deceased.<sup>74</sup> Nor, on the other hand, it is permissible, in an action by an employee against the master to recover for negligent injury, for the plaintiff to show the fact that the master is insured against accidents to his employees. It is said that such evidence is irrelevant to the issue.<sup>75</sup>

Attention is called in this connection to the State Employers' Liability Law,<sup>76</sup> which is applicable only to employees of railroads and not to street railways,<sup>77</sup> and which abolishes the doctrine of assumption of risk as to appliances, etc., but not as to the master's methods of doing business,<sup>78</sup> and which for the most part also abolishes the fellow-servant doctrine. Attention is also called to the Federal Employers' Liability Act, approved April 22, 1908, which is applicable only to employees of railroad companies engaged in interstate commerce, or operating in certain territory within the exclusive jurisdiction of the United States. The act must be consulted to ascertain its provisions, but it may be observed that it differs from the Virginia act in introducing the doctrine of comparative negligence, and in fixing the time at two years instead of one, within which the action must be brought, and in placing no limit on the amount of recovery in case of the death of the employee. Does this Act repeal or supersede the State Act as to the employees affected?<sup>78a</sup> It probably does.

### § 62. Undisclosed principal.

An undisclosed principal may be sued in his own name on an executory contract made by and in the name of his agent, if the contract be not under seal (and probably if it be not negotiable) and the consideration be executed. In like manner, he may, as a rule, sue in his own name on a similar contract made in the name of the agent, but the other contracting party cannot be

74. Cooley on Torts (Students' Ed.) 287.

75. *Va.-Car. Chem. Co. v. Knight*, 106 Va. 674, 56 S. E. 725.

76. Const. (1962), § 162; Code, § 1294k; 8 Va. Law Reg. 245.

77. *Norfolk, etc., Co. v. Ellington*, 108 Va. 245, 61 S. E. 779.

78. *Southern R. Co. v. Foster*, 111 Va. 763, 69 S. E. 972.

78a. *Atlantic & Tel. Co. v. Phila.*, 190 U. S. 162; *Fulgham v. Midland Valley R. Co.* (C. C.), 167 Fed. 660.

compelled to accept the undisclosed principal if the performance of the contract (being still executory) is dependent upon the solvency or skill of the agent, or upon some special confidence reposed in him. If a third party, in contracting with the agent, did not know of the agency, and the circumstances were such that he ought not to be charged with knowledge of it, he is entitled, when sued by the principal, to be placed in the same position as if the agent had been the real party in interest, and hence to assert any set-off he may have against such agent; but if he knew that the other party was acting as agent, though the name of the principal was not disclosed, no right to set-off claims against the agent can ordinarily be asserted against the undisclosed principal. In order to be entitled to set-off claims against the agent, the other contracting party must have dealt with him and believed him to be the principal in the transaction up to the time the right of set-off accrued.<sup>79</sup> It has been held in Virginia that "When a nonnegotiable simple contract is entered into between an agent of an undisclosed principal and a third person, the latter may, as a general rule, hold either the agent, or his principal when discovered, personally liable on the contract; but he cannot hold both. So, likewise, either the agent or his principal may sue upon such a contract; the defendant, when the principal sues upon it, being entitled to be placed in the same situation at the time of the disclosure of the real principal as if the agent had been the contracting party. If the agent is sued, the plaintiff recovers such damages as have resulted from the breach of the contract by him. If the agent sues he is entitled to recover (unless his principal interferes in the suit) the full measure of damages in the same manner as though the action had been brought by the principal."<sup>80</sup>

### § 63. Convicts.

At common law a convict was disabled from suing, but not from being sued. Confinement in the penitentiary did not change his place of residence, and does not now, and process could be served on him, it seems, in the penitentiary, and the case

79. Meachem on Agency, § 773; 55 Am. St. Rep. 916, 923.

80. Leterman v. Charlottesville L. Co., 110 Va. 769, 67 S. E. 281.

proceed to judgment.<sup>81</sup> Now in Virginia, if a person be sentenced to the penitentiary for a term longer than one year (no provision is made if he is sentenced for a year, or to be executed), a committee may be appointed for his estate, and such committee may sue and be sued in respect to *debts* due to or by such convict, and *any other of the convict's estate*, and where the action is against the committee judgment may be entered to be paid out of the personal estate of the convict in the hands of his committee.<sup>82</sup> Service upon the prisoner in person would seem to be the proper mode, but it is said that the more usual mode is by leaving a copy at his last and usual place of abode.<sup>83</sup>

#### § 64. Official and statutory bonds.

Bonds of this class are generally payable to the State or to some officer designated by statute. Statutes generally permit actions on such bonds at the relation of the person injured, but in the absence of statute, no such action can be maintained.<sup>84</sup> Usually such actions are brought in the name of the payee of the bond, suing at the relation and for the benefit of the party injured, but the statutes giving the right of action on such bonds generally prescribe how the action shall be brought. In Virginia, an action against a sheriff on his official bond should be brought in the name of the Commonwealth of Virginia, suing at the relation and for the benefit of ————— (the party injured). The bene-

81. Note, 76 Am. St. 540, 541, and cases cited; *Guarantee Co. v. Bank*, 95 Va. 480, 28 S. E. 909.

82. Code, §§ 4115, 4116, 2677.

83. 19 Encl. Pl. & Pr. 642. In *Neale v. Utz*, 75 Va. 480, the writ in the action at law was served on the defendant while being tried for felony and on the day of his conviction. There was judgment by default, while the defendant was serving his term in the penitentiary. In the chancery suit to subject his lands to the payment of the lien of the judgment, the writ was served on the defendant in the penitentiary. It was held that the judgment was valid until reversed in a proper proceeding for that purpose and that it could not be collaterally assailed.

84. *Penn. Iron Co. v. Trigg Co.*, 106 Va. 557, 56 S. E. 329. The principle of this case is admitted, but a different conclusion was reached on the merits by the U. S. Supreme Court in *Title Guaranty & Trust Co. v. Crane Co.*, 219 U. S. 24, 31 Sup. Ct. 140.

ficiary is generally called the relator, and is responsible for the cost.

### § 65. Change of parties.

Although an action may be rightly brought, a change may take place pending the action. Formerly, the most frequent cause of these changes were death, marriage, insanity, and conviction of felony. Since the emancipation of married women in Virginia, marriage no longer works a change, except that upon a mere verbal suggestion of the marriage of a *feme sole*, supported by evidence of the fact, the action should be directed to proceed in the new name, but such suggestion is not believed to be necessary. If a change occurs for any of the above reasons between verdict and judgment, judgment may, nevertheless, be entered as though it had not occurred.<sup>85</sup>

If there be several parties, plaintiffs or defendants, and the action be one which survives, upon the death or other incapacity of one, the cause of action survives to or against the survivor or survivors.

If there be a sole plaintiff or defendant, and he dies, becomes insane, or is convicted of felony, or if there be more than one plaintiff or defendant, and one or more dies, becomes insane, or convict, and it is desired to proceed for or against the estate of such decedent, insane person, or convict, in either case the action must be revived. The action, if revivable, may, *in all cases* be revived by *scire facias*. If the change is on the side of the defendant, the action cannot be revived in any other way, except by consent. If, however, the change is on the side of the plaintiff, the action may be revived by simple motion, *without notice*, or by *scire facias*. If the proceeding is by motion, such motion can only be made in term, and the defendant is entitled to a continuance as a matter of course, without showing cause, at that term of the court. If, however, the revival is by *scire facias* it may be matured during vacation, at Rules, and, in that event, the opposing party is not entitled to a continuance at the next succeeding term.<sup>86</sup> Where

85. Code, § 3305.

86. Code, §§ 3308, 3309; *Stearns v. Richmond Paper Co.*, 86 Va. 1034, 11 S. E. 1057.

a party whose powers cease is a defendant, the plaintiff may continue his action against him to final judgment.

If the change is on the side of the plaintiff, the defendant may have it suggested on the record, and unless the representative of the plaintiff at or before the second term of the court after that at which the suggestion is made causes the action to be revived, the action will be discontinued, unless good cause be shown to the contrary. This suggestion should always be supported by affidavit, or other proper evidence of the fact suggested. Suppose, for example, the plaintiff dies. The defendant, by counsel, says to the court, "I desire to have the death of the plaintiff suggested on the record." Before the court permits the suggestion to be entered of record it should have some proper evidence of the plaintiff's death.<sup>87</sup>

When once the order of discontinuance is entered for failure to revive, it can never be set aside after the adjournment of that term of the court.<sup>88</sup>

### § 66. Misjoinder and non-joinder of parties.

If a person is improperly made a party plaintiff or defendant, then there are "too many" parties and this is called a misjoinder. If a necessary party is omitted then there are "too few" parties, and this is called non-joinder. The mode of taking objection at common law and the present state of the law in Virginia is thus stated by Professor Graves in § 6 of his Notes on Pleading, and the note thereto.

"SECTION 6. TOO MANY OR TOO FEW PLAINTIFFS OR DEFENDANTS. MODE OF TAKING THE OBJECTION AT COMMON LAW.

#### I. ACTIONS EX CONTRACTU.

##### 1. *Parties Plaintiff.*

###### (a) Too many.

(1) When apparent on the record. Demurrer; arrest of judgment; writ of error.

(2) When not apparent on the record. Non-suit at the trial.

<sup>87</sup>. Code, § 3311.

<sup>88</sup>. For a general discussion of this subject, see *Gainer v. Gainer*, 30 W. Va. 390, 4 S. E. 424.

## (b) Too few.

(1) When apparent on the record. Demurrer; arrest of judgment; writ of error.

(2) When not apparent on the record. Plea in abatement, or non-suit.

2. *Parties Defendant.*

## (a) Too many.

(1) When apparent on the record. Demurrer; arrest of judgment; writ of error.

(2) When not apparent on the record. Non-suit at common law. But see now Code Va., sec. 3395, allowing judgment for one defendant, and against another. And see *Bush v. Campbell*, 26 Gratt. 403.

## (b) Too few.

(1) When apparent on the record, and it is also apparent that the party omitted is still living.

Demurrer; arrest of judgment; writ of error.

(2) When not apparent on the record.

Plea in abatement only. No ground for non-suit at trial. *Prunty v. Mitchell*, 76 Va. 169; *Wilson v. McCormick*, 86 Va. 995 [11 S. E. 976]. For amendment of declaration, see Va. Code, section 3263.

## II. ACTIONS EX DELICTO.

1. *Parties Plaintiff.*

## (a) Too many.

(1) When apparent on the record. Demurrer; arrest of judgment; writ of error.

(2) When not apparent on the record. Non-suit.

## (b) Too few.

(1) When apparent on the record. Abatement or apportionment.

(2) When not apparent on the record. Abatement or apportionment.

See 63 Am. Dec. 369; 67 Am. Dec. 256.

2. *Parties Defendant.*

## (a) Too many.

(1) When apparent on the record. Judgment against as many as are liable; others discharged.

- (2) When not apparent on the record. Judgment against as many as are liable; others discharged.
- (b) Too few.
- (1) When apparent on the record. No ground of objection.
- (2) When not apparent on record. No ground of objection.

But while *too few defendants* in an action *ex delicto* is, in general, no ground of objection, it seems that when detainee is brought for property jointly detained by several all should be made parties defendant; and if one is sued alone, he may plead the non-joinder in abatement. 14 Cyc. 265; National Fire Ins. Co. v. Catlin, 8 Va. Law Reg. 127, 130.<sup>89</sup>

**89. Too many plaintiffs or defendants—Virginia statute as to misjoinder.**—The above summary is still law in Virginia when there are *too few* plaintiffs or defendants, i. e., when there is *nonjoinder*. But when there are *too many* parties (misjoinder) it is now provided by Acts Va., 1893-4, p. 489, amended by Acts 1895-6, p. 453 (Code 1904, § 3258a): "Whenever it shall appear in any action at law or suit in equity, heretofore or hereafter instituted, by the pleadings or otherwise, that there has been a misjoinder of parties, plaintiff or defendant, the court may order the action or suit to abate as to any party improperly joined, and to proceed by or against the others, as if such misjoinder had not been made; and the court may make such provision as to costs and continuances as may be just." See *Lee v. Mutual, etc., Life Ass'n*, 97 Va. 160, 33 S. E. 556, where it is said: "The word 'may' in a statute of this kind, which is in furtherance of justice, means the same as *shall*." So, now in Virginia, misjoinder of parties is not good ground for either demurrer or non-suit. The remedy by statute is to move the court to abate the suit or action as to the party or parties improperly joined, and to proceed against the other or others as if such misjoinder had not been made. *Riverside Cotton Mills v. Lanier*, 102 Va. 148, 159, 45 S. E. 875.

In *Norfolk, etc., R. Co. v. Dougherty*, 92 Va. 372, 375, 23 S. E. 777, it was held that under the original Act of February 27, 1894, "this desirable addition to our statute law" was not retrospective; and this led to the addition of the words "heretofore or hereafter instituted" in the amended act of Feb. 26, 1896, as set out above."

## CHAPTER VII.

### ORDINARY ACTIONS AT LAW.

#### § 67. Classification of actions.

Real actions.

Mixed actions.

Personal actions.

Local and transitory actions.

Actions *ex contractu* and *ex delicto*.

#### § 67. Classification of actions.

*Ordinary actions* at law are variously classified by different authors. The most common classifications are: (1) Real, personal and mixed; (2) local and transitory; and (3) *ex contractu* and *ex delicto*. Each class is complete in itself, and embraces *all* ordinary actions.

*Real actions* are for the recovery of land *only*. At common law a *freehold* estate only, but by statutes generally a less estate than freehold may also be recovered. In Virginia the only real action is Unlawful Entry or Detainer, or Forcible Entry. This is purely statutory.

*Mixed actions* are for the recovery of land and damages, or land and rents and profits or both. Ejectment in Virginia is a mixed action.

*Personal actions* are for the recovery of money (whether debt, or damages), or other personal property.

The distinction between *local and transitory* actions is pointed out by Professor Graves as follows:<sup>1</sup> "At common law all actions are transitory except *real* and *mixed* actions for recovery of land, and the personal actions for injury to land, such as trespass (q. c. f.), case for nuisance and waste, or for wrongs done to ways, watercourses, and rights of common. To these must be added one more action, which was considered as local, viz., that for rent due when the action was brought against the assignee of a term, and was founded on privity of estate, and not on privity of contract.

"In Virginia only actions for the recovery of land are local; all personal actions are considered transitory. A local action

1. Graves' Notes on Pl. 38.

must be brought where the land lies; but a transitory action could be brought in England, no matter in what country the cause of action arose, if the defendant was found in England, and there personally served with process.<sup>2</sup> And it might be brought in any English *county* at the plaintiff's election, subject, however, to removal, on defendant's motion, to the county in which the cause of action arose."<sup>3</sup>

With reference to the third classification, it is said that all ordinary common-law actions are either founded on contract as the cause of action, or are not so founded. The former are called actions *ex contractu*, the latter *ex delicto*. They may be classified as follows:

<i>Ex Contractu</i>	}	Debt Covenant Assumpsit Account  Motion by statute	}	1. On bonds taken or given by officers. Code, § 3210. 2. For money recoverable by action on contract. Code, § 3211.
<i>Ex Delicto</i>	}	Unlawful Entry or Detainer, or Forcible Entry. Ejectment Detinue Interpleader Replevin Trespass <i>vi et armis</i> , or <i>trespass</i> , as it is usually called. Trespass on the case	}	1. Generally 2. In trover and conversion 3. In slander 4. In libel

2. *Mostyn v. Fabrigas*, Cowper 116; (2 Sm. L. C. 1024).

3. Stephens, § 191, pp. 379, 380.

## CHAPTER VIII.

### ACTION OF DEBT.

- § 68. Nature of action.
- § 69. What is a sum certain.
- § 70. Debt to recover statutory penalties.
- § 71. Debt on judgments and decrees.
- § 72. The declaration in debt.
- § 73. The general issues in debt.
  - 1. Nil debet.
  - 2. Non est factum.
  - 3. Nul tiel record.

#### § 68. Nature of action.

“The action of debt is designed to recover a specific sum of money due by contract, verbal or written, express or implied, where the amount is either ascertained, or from the nature of the demand is capable of being ascertained, whether due on legal liabilities (as penalties denounced by statute), on simple contracts, on specialties (or obligations under seal), on records (as recognizances, judgments, etc.), or otherwise.”<sup>1</sup> “Its distinguishing and fundamental feature consists in the fact that it lies for the recovery of *money*, or its equivalent, in sums certain, or that can readily be rendered certain by actual computation,”<sup>2</sup> while all other actions are for recovery of *damages*, or property, or both. It is the only action for the recovery of money, as such, *eo nomine et in numero*. Anciently the action was largely assimilated with detinue (which lies for the recovery of specific chattels together with damages for their detention), and was freely brought to recover chattels.<sup>3</sup> In modern times this usage has become obsolete, and now debt

1. 4 Min. Inst. 549, 550; Nottingham v. Ackiss, 110 Va. 810, 67 S. E. 351; Russell v. Louisville & N. R. Co., 93 Va. 322, 25 S. E. 99.

2. 5 Encl. Pl. & Pr. 896.

3. 2 Tucker's Commentaries, 100; Stephen's Pleading, 124, note 2. So, in Gibbons v. Jamesons' Exrs., 5 Call. 294, it was argued that debt lay to recover a horse, thus showing that the distinction between debt and detinue had not been entirely settled even then.

only lies to recover a specific *sum* of *money*. A trace of the old practice still survives, however, in the rule allowing the joinder in one declaration of a count in debt with one in detinue.<sup>4</sup>

Although debt is a common-law action, few precedents thereof can be found in the early reports. The reason for this lies in the application to debt of the quaint common-law trial *by wager of law*. In every action of debt *on simple contract* the defendant had the power simply to present himself in court, attended by eleven of his neighbors, and he having in open court taken an oath that he *did not owe the debt*, his eleven *compurgators* swore that they *believed him*, which, as being the verdict of the twelve men, was considered sufficient to discharge the defendant from the action. The defendant was said to wage his law, and the procedure was called *wager of law*. This liability to *wager of law* led to the general disuse of the action of debt on *simple contract*, and the substitution therefor of the action of *assumpsit*.<sup>5</sup> So also it was anciently held that the plaintiff had to recover the exact sum sued for or nothing. He could recover neither more nor less.<sup>6</sup> This is no longer the rule, but, according to the modern practice, the judgment need not correspond exactly with the claim. It may be for less than is demanded in the declaration, but not for more.<sup>7</sup> Moreover, *wager of law* has long since been abolished in England, and was never in use in this State,<sup>8</sup> and these common-law impediments which rendered the action unpopular no longer exist. But debt on simple contracts, except on promissory notes, is rarely brought even now on account of the greater flexibility of the action of *assumpsit*.<sup>9</sup> Next to *assumpsit*, debt is the most usual form of action *ex contractu*, and, among many other instances, it has been held to be the proper action in the following cases: To recover a sum certain, or for a money demand which can readily be reduced to a certainty; to recover money due on legal liabilities; upon simple contracts express or im-

4. 4 Min. Inst. 447, 448.

5. 4 Min. Inst. 449, and 815, 816.

6. 2 Tucker's Commentaries, 97; Stephen's Pleading, 123.

7. 5 Encl. Pl. & Pr., 933; Stephen's Pleading, 123.

8. 4 Min. Inst., 449, and 815-816.

9. 2 Tuckers' Commentaries, 117, note.

plied, whether verbal or written, and upon contracts under seal, or of record; upon statutes by a party aggrieved, or by a common informer, whenever the demand, as stated above, is for a sum certain, or capable of being reduced to a certainty; upon a replevin bond given by a testator; by a sheriff on a forthcoming bond payable to himself; on any writing acknowledging a debt in a certain sum; on an acknowledgment of indebtedness in a deed; on an instrument sealed as to some and not sealed as to others; on a sheriff's bond for his failure to pay over money collected by him and which he should have paid but did not; upon all conclusive records; by a landlord for rent; on simple contracts and legal liabilities, for money lent, paid, had and received; for fees; for goods sold and delivered. It lies against an executor to recover a legacy; when an unliquidated demand, which can readily be reduced to a certainty, is sought to be recovered; on a recognizance to the State in criminal proceedings; on a promissory note; on a bill of exchange; for any debt or duty created by common law or custom; upon an award to pay money; to recover money decreed to be paid as alimony; to recover the purchase price of land sold under articles of agreement; to recover of a turnpike company damages assessed for land taken; on policies of insurance under seal, on annuities and on mortgage deeds; upon an injunction bond; and upon the judgment of a superior or an inferior court of record.<sup>10</sup> In brief, upon any contract, sealed or unsealed, for the payment of a sum certain of money, or a sum readily rendered certain.

But it has been held that debt cannot be maintained for the recovery of an entire sum of money, payable by installments, until all the installments have fallen due.<sup>11</sup>

In early days the courts of England looked with great disfavor upon bills and notes, considering them in the light of innovations upon common-law principles, and consequently held

10. Hoggs' Pleading & Forms, 41, *et seq.*, and authorities cited. See, also, 5 Encl. Pl. & Pr. 896, *et seq.*; 4 Min. Inst. 180-183, 553, 554; 1 Barton's Law Practice, 134-175.

11. Peyton *v.* Harman, 22 Gratt. 643. And this seems to be the general rule, acknowledged by Prof. Minor, though he protests against it as founded upon no satisfactory reason. 4 Min. Inst. 550.

that neither debt nor assumpsit would lie upon them; but since the passage of the statute of 3 and 4 Anne, by which promissory notes were rendered negotiable, which statutes have either been re-enacted or form a part of our common law by adoption, the current weight of authority fully sustains debt as an appropriate action upon these instruments.<sup>12</sup> At common law, before the statute of Anne above mentioned, it was held that the action of debt allowed was not upon the *note* or other *unsealed writing*, but only upon the *contract witnessed by the note* or writing, and the action at common law was *on the promise*, averring and proving a valuable consideration, and not *on the writing*, if there were one.<sup>13</sup> But now it is provided by statute in this State that:

“An action of debt may be maintained upon any note or writing by which there is a promise, undertaking, or obligation to pay money, if the same be signed by the party who is to be charged thereby, or his agent. And in an action of assumpsit on any such note or writing, the rule as to averment and proof of consideration shall be the same as in any action of debt thereon.”<sup>14</sup>

It will be noted that the action is now brought *on the note or writing*, and not on the *contract* as at common law.<sup>15</sup> This has an important effect on the necessary allegations in the declaration, and in the evidence at the trial, which is noticed hereafter in treating of the declaration.<sup>16</sup>

Another very important statute provides: “Upon any note, check, bill of exchange, or other instrument which under the laws of the State is negotiable, whether the same be payable in or out of the State, an action of debt or assumpsit may be maintained and judgment given jointly against all liable by virtue thereof, whether drawers, indorsers, or acceptors, or against any one or any intermediate number of them for the principal and charges of protest if the same should be pro-

12. 5 Encl. Pl. & Pr. 899, 900; 4 Min. Inst. 550.

13. 4 Min. Inst. 550, 702; *Peasley v. Boatwright*, 2 Leigh 212.

14. Code, § 2852.

15. *Crawford v. Daigh*, 2 Va. Cases 521.

16. See *Infra*, § 72.

tested, with the interest thereon from the date of protest, and in case of such bills for damages also."<sup>17</sup>

It will be noted that the above statute applies only to *negotiable instruments*. As to such instruments it obviates many of the difficulties which had previously existed in this class of cases.

At common law, assumpsit did not lie on any *sealed* instrument, and hence, upon such instruments it was not a concurrent remedy with debt even where the promise was to pay a sum certain in money. But now it is provided by statute in Virginia that:

"In any case in which an action of covenant will lie there may be maintained an action of assumpsit."<sup>18</sup> Under this statute assumpsit lies on all *sealed* as well as unsealed instruments, and by reason of its greater flexibility and wider scope is frequently a preferable action. Under the statute last mentioned a special count on a sealed instrument may be united with the common counts in an action of assumpsit,<sup>19</sup> thus giving the plaintiff the advantage if he fail, for any reason, in his proof on the sealed instrument, of, nevertheless, recovering under the common counts in assumpsit, provided the evidence warrants such recovery.

### § 69. What is a sum certain.

Perhaps more confusion has arisen on the question of whether or not debt would lie on obligations which, though in terms of dollars and cents, were conditioned, in some event, to pay or to deliver commodities or something else than money, than on any other question as to the applicability of this action. The rules applicable to such cases are succinctly stated by Prof. Graves,<sup>20</sup> in effect, as follows: "When a certain sum of money is to be paid in a commodity, as, for example, in *wheat*, if the quantity of the commodity is not fixed, debt lies (if the defendant is in default) for the money; but if the quantity is fixed, then the essence of the contract is to deliver the com-

17. Code, § 2853.

18. Code, § 3246a.

19. *Grubb v. Burford*, 98 Va. 553, 37 S. E. 4.

20. *Graves' Notes on Pleading* (new) 18, 19.

modity, and debt does not lie, but assumpsit or covenant for the damages flowing from the breach of the contract. Thus if I promise to pay \$100.00 *in wheat* by a day certain, and do not do so, debt lies for the \$100.00; but not if my promise be to pay \$100.00 by the delivery of 100 *bushels* of wheat. Nor does debt lie on a promise to pay \$100.00 in bank notes, not a legal tender, such as those of the State banks before the War; for here the *quantity* is considered as fixed by the denomination of the notes, and they are of a fluctuating value. But though a sum of money payable by the delivery of a certain quantity of a commodity, or in bank notes not legal tender, will not sustain an action of debt, yet the contract may be for the payment of a certain sum of money, with the *privilege*, as an alternative, to deliver instead a fixed quantity of a commodity, or bank notes not legal tender, and then on the promisors' default debt lies for the money. For the option to deliver the goods or notes is considered terminated by reason of the promisors' default."<sup>21</sup>

The above principles are well illustrated by the following Virginia cases: In *Beirne v. Dunlap*<sup>22</sup> the court held that when, by a writing obligatory, the obligors promise, on or before a specified day, to pay the obligee eight hundred and thirteen dollars and seventy-nine cents in notes of the United States Bank, or either of the Virginia banks, *debt* would not lie because the obligation of the bond was simply for the delivery of a commodity; it being considered that such bank notes were not money, but simply a commodity of fluctuating value,<sup>23</sup> and

21. See, also, 4 Min. Inst. 551; 1 Barton's Law Practice, 136-139.

22. 8 Leigh 514.

23. Judge Tucker, in his opinion in the above case, states the *reasons* which govern in the decision of this class of cases very clearly. He says: "An obligation to deliver wheat or bullion, or bank notes, will not sustain such action. For it is determinate in its character, and does not generally lie where the amount of the recovery in money must be ascertained by evidence of value and by the intervention of a jury. It is true that it has been in some cases decided that an action of debt will lie on a promise to pay a sum of money in a collateral article, provided the time is past when the payment was to be made. Thus in the case cited at the bar, debt was held to lie upon a promise to pay £20 in watches. The

that the use of the terms "dollars and cents" was simply the method adopted of measuring the quantity of the commodity to be delivered. Indeed, it could not well be expressed in any other manner.

In the case of *Butcher v. Carlile*,<sup>24</sup> the court held that when by bond the obligor bound himself to pay a certain sum of money with interest "which sum may be discharged in notes or bonds due on good solvent men residing in the county of Randolph, Virginia," that this was a bond for the payment of money for which *debt* would lie. The reason given for the decision was that the right to discharge the obligation in notes or bonds of the kind mentioned was a mere *privilege* to the obligor, which he had his election to exercise or not at his pleasure on or before the day when the obligation became

debt was clearly ascertained and determinate. The defendant having failed to make payment in watches, which was an indulgence to him, became liable to pay money, for it is obvious that no action of any kind could lie for the watches themselves. Debt or covenant were the only remedies which the creditor could have, and in either he could only recover money, and in both he must have recovered identically the same sum, to-wit, £20. As then money only could be recovered, and the sum to be recovered was determinate, debt well lay for it." And further on he says: "I take the distinction, then, to be this: When the promise is to pay a determinate sum in an article of fluctuating or uncertain value, if the quantity is not fixed, so that the debtor must pay the full amount of the debt whether the price of the article be high or low, debt will lie for the demand. But if the quantity be fixed, so that at the day of payment it may fall short of the debt, then debt will not lie, because the essence of the contract was the delivery of the article, and the creditor can only recover the value. As if I acknowledged myself to owe 500 dollars payable in wheat at a certain day, and I fail to deliver the wheat at the day, debt will lie; for I owed the full sum of 500 dollars, whether I paid it in coin or wheat. But if I promise to pay 500 dollars by the delivery of 500 bushels of wheat, then debt will not lie, though the day be past; for peradventure the wheat at the day of payment was worth less than 500 dollars."

24. 12 Gratt. 520. Judge Moncure said in his opinion: "While, therefore, certain general rules have been adopted, as means of ascertaining the intention of parties; the end in view in every case is to ascertain the intention from the contract; and when so ascertained, effect will be given to it, if lawful."

due, but, having failed to exercise this *privilege*, he became liable absolutely for the money, and, of course, to an action of debt for its recovery.

In *Dungan v. Henderlite*<sup>25</sup> the court held that, when an obligation was to pay eight hundred dollars for the purchase money of land, "payable in the currency of Virginia and North Carolina money," this was a promise to pay this sum in the currency named, and an action of *debt could not* be maintained upon it. The court repudiated the theory advanced by counsel that this was a condition for an alternative payment in a commodity, but said that *payable* meant *to be paid* and not *may be paid*. In this case "currency" was held to mean nothing more than bank paper then currently passing as money and which was enumerated in dollars and cents as specie is, and the court said that, this being so, the *quantity* of the Virginia and North Carolina currency was *fixed*, and the contract was equivalent to an engagement to pay bank notes amounting to \$800.00, or so many bank notes as on their face would nominally make that sum, and was governed by the decision in *Beirne v. Dunlap, supra*.

That there is a difference between the contract to pay in *bank notes* and in some other commodity is illustrated by the case of *Lewis v. Long*.<sup>26</sup> In that case an action of debt was brought on a bond for \$250 "to be paid in trade, such as is to be had, deer-skins, furs, flax, snake-root, beef, pork, bacon, etc., for value received." No question seems to have been raised as to debt being the proper remedy. Judge Roane, on page 151, said: "This is an action of debt brought by the appellant against the appellee in the county court of *Harrison*. It was an action for *money*, although it was contemporaneously agreed and stipulated in the bill itself, that deer-skins and other articles would be received in payment. In 2 Bac. 278 we are told that in the case of a bill for £20 *to be paid in watches*, an action of debt must be brought for the money, and not for the watches, because they are of uncertain value."

In the case of *Dungan v. Henderlite, supra*, Judge Christian,

25. 21 Gratt. 149.

26. 3 Munf. 136.

on page 152, refers to the above case, and says that the only question raised was one of jurisdiction of the appellate court, but "it was evident, however, that upon such a contract the liability of the obligor was to pay money, with the privilege of paying in trade, etc., when the payment was due; and in default of his paying in the mode stipulated, the obligee had the right to demand money; and the action of debt would therefore lie," and so distinguished it from the case in which he was delivering the opinion.

Where a bond was executed conditioned to pay on demand \$2,400 "in gold or silver, or the equivalent thereof" it was held that this was a promise to pay \$2,400 in gold or silver coin, or the equivalent thereof, that what was meant was *money* not *bullion*, and that *debt* could be maintained upon the bond.<sup>27</sup> In *Minnick v. Williams*<sup>28</sup> the court held that where a bond is conditioned to pay \$350 "payable in monthly installments, either in goods at regular prices, or current money," and at the times the amounts are payable neither the goods are delivered nor the money paid, *debt* will lie, as this is an obligation to pay money, with the *privilege* to the obligor to discharge the money obligation by the delivery of the goods at regular prices in equal amount, on or before the time of payment, and having failed to exercise this privilege he was held liable absolutely for the money, and to an action of debt for its recovery.

In *Crawford v. Daigh*,<sup>29</sup> decided by the general court in 1826, it was held that debt will lie "on a note in writing for the payment of \$64 in good State Bank paper, payable one day after date, for value received." The opinion is very brief. Referring to the language "State Bank paper," it was said: "A note for the payment of so much money in a known commodity on a certain day is, after the day passed, a note for the payment of money. \* \* \* We think that State Bank paper was not here mentioned as contradistinguished from money, but from other paper in circulation then less valuable

27. *Turpin v. Sledd's Ex'r*, 23 Gratt. 238.

28. 77 Va. 758.

29. 2 Va. Cases, 521.

than money." The court did not notice the fact that the amount of this commodity was fixed by the language used, and that the contract with the parties was only for the delivery of a specific quantity of a given commodity, that is, for State Bank paper of the face value of \$64. This holding, as well as certain Kentucky cases taking a similar view, was distinctly disapproved in *Beirne v. Dunlap*, *supra*. It is true that it is cited in *Butcher v. Carlile*, *supra*., *Dungan v. Henderlite*, *supra*., and *Minnick v. Williams*, *supra*., but usually for the general proposition that debt will lie for a promise to pay money in a commodity, the amount of which is not fixed, and so far the case is sound. But in so far as it undertakes to decide that a promise to pay \$64 in State Bank paper is a promise to pay money in a commodity the quantity of which is not fixed, it is out of harmony with the later Virginia cases on the subject. On its face it is a promise to deliver a fixed quantity of a designated commodity at a particular time, for which an action of debt will not lie, and it would not seem to be material whether the undertaking to deliver the commodity was to be performed in one day or one year. The principle would be the same. It is true that Judge Moncure, in *Butcher v. Carlile*, *supra*, undertakes to distinguish *Crawford v. Daigh* from *Beirne v. Dunlap* by the fact that in one case the paper was payable one day after date, and in the other more than a year after date, and that the promise to deliver one day after date showed that the intention of the parties was that payment should be made in currency of equal value to money, and that the intention of the parties as gathered from the contract would govern the form of action, but this distinction does not seem to rest upon any sound basis. The same argument might be made with reference to a promise to deliver stocks, as, for example, to pay \$64 in the stock of the Western Union Telegraph Company, and yet we all know that at times the value of these stocks vary considerably from day to day. According to the Virginia holding, as indicated in the cases above cited, *Crawford v. Daigh* must be regarded as being unsound in principle, and as having been repudiated by the later cases. Upon paper of this class, the safer course to be pursued in Virginia is to bring *assumpsit*, and outside of

Virginia, either covenant or assumpsit, according to whether the paper is, or is not, sealed.

### § 70. Debt to recover statutory penalties.

It is provided by statute<sup>30</sup> that penalties provided for the violation of the license or revenue laws of the State may be recovered by action of debt, indictment, or information, and the procedure in the action of debt in such cases is outlined and prescribed; and, by another statute,<sup>31</sup> it is enacted that, when a fine without corporate punishment is prescribed, the same, if over \$20, may be recovered by action of debt, or action on the case, or by motion, the proceeding to be in the name of the Commonwealth.

But, independent of an express statutory sanction, debt is the peculiarly appropriate action to recover statutory penalties, and when a statute gives a penalty to be recovered by, "bill, plaint or information" the action of *debt* may be brought on the statute, it being comprehended in the word "bill."<sup>32</sup> So, also, it has been held<sup>33</sup> that under the statutory provision enacting that on a failure to construct cattle guards, a railroad company should pay the landowner \$5 for every day of such failure, the remedy of the landowner, in the event of a non-compliance with the statute on the part of the company, was an action of debt to recover the penalty, and that an action on the case would not lie. The court says: "When a statute imposes a penalty for the nonperformance of a duty prescribed, no part of which penalty can accrue to the commonwealth, and the statute provides no particular mode by which the person aggrieved may recover the penalty, the common-law action of debt may be maintained therefor, and is proper. \* \* \*

"The recovery in cases like this is not measured by the dam-

30. Code, §§ 575, 576.

31. Code, § 712. See, also, *Idem*, §§ 713, 714. See, also, § 3652a, providing for an action of debt to recover, in the case of laboring men, payments enforced by unlawful attachment or garnishment of exempted wages.

32. *Sims v. Alderson*, 8 Leigh 479; 1 Barton's Law Practice 200, 201; 5 Encl. Pl. & Pr., p. 907.

33. *Russell v. Louisville & N. R. Co.*, 93 Va. 322, 25 S. E. 99.

ages sustained. The verdict does not sound in damages, but is a sum *vo nomine* and *in numero*; otherwise in an action on the case. The common law action of debt lies whenever the demand is for a sum certain, or is capable of being readily reduced to a certainty, and is the appropriate action for the recovery of a statutory penalty, upon the ground of an implied promise which the law annexes to the liability."

On the other hand it has been held in West Virginia,<sup>34</sup> construing a mining statute, which provided that "if any person shall violate this section, he shall forfeit five hundred dollars to any person injured thereby who may sue for the same," that the penalty prescribed might be recovered by the person injured in an action of trespass on the case; that when, as in this case, the statute prescribes the penalty or the sum to be forfeited, but not the form of action, debt being the usual remedy will lie; or the form of action may be such as the particular nature of the wrong or injury may require, such as an action of assumpsit, or of trespass on the case. In the case last cited *damages* were not recovered, but simply the *penalty* prescribed by the *statute*; the court holding that the term "injured" used in the statute meant the wrong done the party by the violation of the statute. There seems to be no difference between this case and *Russell v. Louisville & N. R. Co.*, *supra.*, and the two cases seem to be in direct conflict on the point as to whether debt is the *exclusive* or simply a *permissive* action to recover statutory penalties like the above. The West Virginia case was decided April 1, 1896, and the Virginia case July 9, 1896, making no reference to the former. If both damages and a statutory penalty are claimed, a remedy therefor is given in Virginia by an action of trespass on the case by Acts 1901-2, p. 385, amending § 2900, Code of Virginia.<sup>35</sup>

34. *Mapel v. John*, 42 W. Va. 30, 24 S. E. 608, 32 L. R. A. 800, 57 Am. St. Rep. 839.

35. This section provides: "Any person injured by the violation of any statute may recover from the offender such damages as he may sustain by reason of the violation, although a penalty or forfeiture be thereby imposed, unless the same be expressly mentioned to be in lieu of such damages. And the damages so sustained, together with any penalty or forfeiture imposed for the violation of

Debt, however, may still be brought to recover the statutory penalty only. It will be observed that, under the above-mentioned statute, when an act results in actual injury to another, the latter is not precluded from recovering his real damages by reason of the fact that such injurious act is also penalized by statute. He may recover his actual damages and the statutory penalty all in one action of trespass on the case, setting them forth in separate counts. On the other hand, if an act be merely *malum prohibitum*, and its commission entails no actual damage to another, the fact that such act is penalized by statute and thereby rendered unlawful does not give to the one for whose benefit the penalty is provided a further right of action for *damages*. The purpose of the statute was merely to preserve to the person injured the right to maintain his action for the injury he may have sustained by reason of the wrongdoing of another, and to prevent the wrongdoer from setting up the defence that he had paid the penalty of his wrongdoing under a penal statute. It was not intended to create a new ground of action for damages.<sup>36</sup>

### § 71. Debt on judgments and decrees.

An action of debt is always the proper, and in most cases, the *exclusive* remedy, when an action is desired to be brought on a judgment.<sup>37</sup> Although judgments may be enforced within

the statute, may be recovered in a single action of trespass on the case upon proper counts when the same person is entitled to both damages and penalty: provided, that nothing herein contained shall affect the existing statutes of limitation applicable to the foregoing causes of action respectively."

36. *Connelly v. W. U. Tel. Co.*, 100 Va. 51, 40 S. E. 618, 56 L. R. A. 663, 93 Am. St. Rep. 919; *Hortenstein v. Va.-Carolina Ry. Co.*, 102 Va. 914, 923, 47 S. E. 996.

Debt lies on § 1292, Code, prescribing penalties against telegraph companies. *W. U. Tel. Co. v. Bright*, 90 Va. 778, 20 S. E. 146. For form of declaration see *Gregory's Forms No. 39*. For the essentials of such a declaration in debt, see *W. U. Tel. Co. v. Powell*, 94 Va. 268, 26 S. E. 828.

37. 5 Encl. Pl. & Pr. 904; 11 *Idem* 1113; *Clarke's Admr. v. Day*, 2 Leigh 187; *Drapers' Exr's v. Gorman*, 8 Leigh 628; *Kemp v. Muddell and Chapin*, 9 Leigh 12.

the jurisdictions wherein they are rendered by execution and other similar processes, actions on the judgment even in such jurisdictions are allowed, and *a fortiori* is this the case with judgments of other jurisdictions; but where execution is available as a remedy a second action *on the judgment* is not favored and the courts are disposed to discourage such actions by subjecting them to rigorous strictness.<sup>38</sup> A judgment is of higher dignity than a bond, note, account or other similar evidence of debt, and hence such evidences of debt are merged in the judgment thereon; but one judgment is of no higher dignity than another, and hence there is no merger.<sup>39</sup> There is no reason, therefore, why an action may not be maintained on a judgment, and another judgment thereon obtained, and the Virginia court has held that the vitality of a judgment is not exhausted by one action thereon, but the judgment creditor is entitled to pursue successive actions until satisfaction is obtained.<sup>40</sup>

The form of the action will depend somewhat on the nature of the judgment sued on, though it is a safe rule always to bring debt as in such case the pleader cannot fall into error. Under the "full faith and credit" clause of the Constitution of the United States<sup>41</sup> a judgment of a court of record of one State of the Union is not to be regarded in the other

38. 5 Encl. Pl. & Pr. 905, note; 11 Idem 1089, *et seq.*; Kaufman *v.* Richardson (Ala.), 4 Anno. Cases 168, and note; Cardwell *v.* Talbott (Corp. Ct. Danville, Va.), 5 Va. L. Reg. 182, and note.

39. 11 Encl. Pl. & Pr. 1087.

40. Kelly *v.* Hamblen, 98 Va. 383, 36 S. E. 491. In this case Judge Keith says: "Subject to the discretion of courts in the imposition of costs, as many successive actions may be brought upon a judgment as may be needful in the opinion of the plaintiff, but there can, of course, be but one satisfaction. \* \* \* We are of opinion that a suit brought to enforce the lien of a judgment, and prosecuted in good faith, though ineffectual, is not a bar to a subsequent suit by the same plaintiff against the same debtor to enforce satisfaction of the same judgment. In all such cases it will be the duty of the courts to see that the creditor does not exercise his right capriciously or oppressively, and make such orders and decrees with reference to the imposition of costs as will protect litigants against unnecessary and vexatious suits."

41. U. S. Constitution, Article 4, § 1.

States as a *foreign* judgment, but is in the *nature* of a *domestic* judgment in every other State, whose tribunals are to allow it the same force and efficacy which it has in the State where it is pronounced.<sup>42</sup> Such judgments, then, being treated as *domestic* judgments, are matters of *record*, and are regarded as of such a solemn nature that *assumpsit* will not lie; *debt only* being the remedy. It may, therefore, be stated that, by the great weight of authority, in the absence of statute, where an action is brought on a *domestic* judgment (in which class are included judgments of courts of record of sister States), the action must be *debt*, and no other.<sup>43</sup> But, as, according to the weight of authority, a *foreign* judgment is not a record but only *prima facie* evidence, either debt or *assumpsit* may be brought upon such *foreign* judgments.<sup>44</sup> So also debt lies on a justice's judgment rendered in a sister State, and, *a fortiori*, on judgments of justices in this State.<sup>45</sup> It would *seem* that *assumpsit* would also lie on such judgments, as judgments of a court not of record stand on a similar footing to foreign judgments,<sup>46</sup> and, as we have seen, *assumpsit* lies on foreign judgments. It is well settled that the judgment which will support an action of debt need not have been pronounced by a court of record. And hence debt will lie on judgments of surrogate courts and of probate or orphan's courts.<sup>47</sup> In earlier days there was doubt whether a decree in equity should be allowed to rank with a judgment at law, or whether it could be the basis of an action of debt, in a court of law, but there is no doubt on that question now for, according to the great weight of au-

42. Clarke's Adm'r *v.* Day, 2 Leigh 187; 11 Encl. Pl. & Pr. 1155.

43. 11 Encl. Pl. & Pr. 1114; Black on Judgments, § 873. See post, § 83.

44. 11 Encl. Pl. & Pr. 1115; 2 Black on Judgments, § 848; Draper's Exor's *v.* Gorman, 8 Leigh 628. In this case it was held that the District of Columbia is not a *State* within the provisions of Art. 4, § 1, U. S. Constitution, and that the judgments of its courts were to be treated as *foreign* judgments when an action of debt was brought on one of them in Virginia.

45. 11 Encl. Pl. & Pr. 1115, note; Idem, 1102; Idem, vol. 5, p. 906, note.

46. 5 Encl. Pl. & Pr. 906.

47. Idem.

thority, an action of debt can be maintained to enforce a final and unconditional decree of a court of equity, either domestic or foreign, for the payment of a specific sum of money.<sup>48</sup>

### § 72. The declaration in debt.

The declaration in this action is generally short and simple. A great variety of forms thereof will be found in the works mentioned in the margin.<sup>49</sup> The declaration in debt on a *simple contract* to pay money, whether oral or in writing, conforms to that in assumpsit save that it is alleged that the defendant *agreed* and not that he *promised* to pay.<sup>50</sup> When this promise is "specially declared on, that is, where, omitting the common counts of *indebitatus*, etc., the plaintiff sets forth the promise to pay as the ground of his action, *a valuable consideration must be stated*,"<sup>51</sup> and this was so at common law even as to promissory notes, as the theory was that the action was not *upon the note* but only *upon the contract* of which it was evidence.<sup>52</sup> But this is no longer the case in Virginia, for now by statute it is provided that "An action of debt may be maintained upon *any note or writing* by which there is a promise, undertaking, or obligation to pay money, if the same be signed by the party who is to be charged thereby, or his agent,"<sup>53</sup> and our court has held that this statute now allows the action of debt to be maintained *upon the note*, without averring or proving any consideration, although the defendant may disprove it; for if it were still needful to aver and prove a consideration in such action on the note itself, the statute just

48. See full note appended to the case of *Du Bois v. Seymour* (C. C. A.), 11 Anno. Cases 658; 5 Encl. Pl. & Pr. 1069, *et seq.*; *Cardwell v. Talbott* (Corp. Ct. Danville, Va.), 5 Va. L. Reg. 182, and note.

49. 4 Min. Inst. 1639-1671; 1 Barton's Law Practice 350-371; *Gregory's Forms*, 16-61. For form of declaration in three counts. on bond, note and open account, see 4 Min. Inst. 1643.

50. 4 Min. Inst. 701. For form of common counts in debt, see *Idem*, pp. 1640-1641. For a full discussion of the declaration in debt see *Idem*, pp. 701-705; 5 Encl. Pl. & Pr. 913, *et seq.*

51. 4 Min. Inst. 701; 5 Encl. Pl. & Pr. 914.

52. 4 Min. Inst. 702.

53. Code, § 2852.

cited would be inoperative.<sup>54</sup> It may also be mentioned that although at one time it was held that in order to recover interest it must be claimed in the declaration,<sup>55</sup> the contrary was held under the Virginia statute passed in 1805 authorizing the judgment for interest though not demanded,<sup>56</sup> and it is not now necessary in an action of debt to demand interest either in the writ or in the declaration. Interest follows the principal as the shadow follows the substance. If the judgment is rendered in such case by default, the clerk is by the present statute<sup>57</sup> directed to enter it for the principal sum due with interest thereon from the time it became payable (or commenced bearing interest) until payment, and if a jury be impanelled, whether to try an issue in the cause, or only to inquire of damages, it may at its discretion allow interest, and fix the period at which it shall commence.<sup>58</sup>

It should further be noted that in an action of debt upon an obligation to pay money in which the *privilege* is given to the debtor as an *alternative* to deliver something else than money, such as notes or goods, and the debtor has neither paid the money nor availed himself of the *alternative privilege* to deliver the commodity, it is not necessary, in declaring on the instrument, to notice the provision as to the alternative mode of payment in the declaration. As was said by Judge

54. Crawford v. Daigh, 2 Va. Cases 521; Peasley v. Boatwright, 2 Leigh 212; 4 Min. Inst. 702. In Crawford v. Daigh, *supra*, the court said: "The action is either founded on the note, or on the contract which caused it to be made. On the latter, debt lay at common law, and if it still is *needful* to state it in the declaration, the Act of Assembly, though it says so in so many words, does not give an action of debt on the note, and has no operation."

55. Hubbard v. Blow, 1 Wash. 70; Brooke v. Gordon, 2 Call. 212.

56. Wallace v. Baker, 2 Munf. 334; Baird v. Peter, 4 Munf. 76.

57. Code, § 3287.

58. Code, § 3390; Hatcher v. Lewis, 4 Rand. 152; 4 Min. Inst. 638-640. For a discussion of "debt on bond conditioned" under §§ 3393 and 3394 of the Code of Virginia, and for the *mode of assigning the breaches* of the condition in such action, see 4 Minor's Institutes 703-4, Graves' Notes on Pleading (old), pp. 126-127. See also, § 3377a of Code giving a right to an action at law or motion on lost bonds, notes, etc.; Grave's Notes on Pleading (old), pp. 127-128.

Moncure in *Butcher v. Carlile*:<sup>59</sup> "The privilege is in the nature of a defeasance, which need never be stated in a declaration, but is matter of defence, and ought to be shown in pleading by the opposite party."

The damages in debt on a *money-bond* or on a promissory note are in general merely nominal, and, therefore, the amount of damages stated in the process and declaration is immaterial. There are, however, two instances where the damages are material and should be laid at a sum sufficient to cover the case, namely, the action of debt on a *bond with collateral condition*, and on a *penal bond* where the principal and interest together exceed the penalty. In the last case the excess of interest can only be recovered as *damages*.<sup>60</sup>

### § 73. The general issues in debt.

The action of debt by reason of its wide application as a remedy, and the consequent diverse circumstances on which its use may be founded, has three general issues. These are as follows:

1. *Nil debet*;
2. *Non est factum*;
3. *Nul tiel record*.

These general issues differ widely both in the instances to which they are applicable, and in their respective scopes. It will, consequently, be proper to discuss each of them separately, and, briefly, to call attention to the salient rules which govern their use.

#### 1. NIL DEBET.

*Nil Debet* is the general issue in debt on *simple contracts*; that is, contracts *not under seal*. It is one of the *broad* general issues, and, as its form shows,<sup>61</sup> simply alleges that the defend-

<sup>59</sup>. 12 Gratt. 520. See also, *Minnick v. Williams*, 77 Va. 758.

<sup>60</sup>. 4 Min. Inst. 639, 713; 1 Barton's Law Practice 260; Allison v. The Farmers' Bank of Virginia, 6 Rand. 204; Tennant's Executor v. Gray, 5 Munf. 494; Baker v. Morris, 10 Leigh 311.

<sup>61</sup>. The plea of *nil debet*, as given by Prof. Minor (4 Institutes, p. 770), omitting the entitlements, is as follows: "And the said de-

ant *does not owe* the money claimed by the plaintiff, without indicating in any manner *why* he does not owe it, thus leaving the plaintiff in the dark as to the real defence, and giving to the defendant the fullest possible scope as to what defences he will bring forward to avoid the payment of the claim. As said by Prof. Minor:<sup>62</sup> "Under the plea of *nil debet* the defendant may prove at the trial coverture when the promise was made,<sup>63</sup> lunacy, duress, infancy, release, arbitrament, accord and satisfaction, payment, a want of consideration for the promise, failure or fraud in the consideration, a former judgment for the same cause of action, illegality in the contract, as gaming, usury, etc.; or that the contract was void by the statute of parol agreements; and, in short, anything which shows that there is *no existing debt due*. \* \* \* The statute of limitations, bankruptcy, and tender are believed \* \* \* to be the only defences which may not be proved under the plea, and they are excepted because they do not contest that the *debt is owing*, but insist only that *no action can be maintained* for it." But while, as stated above, payment may be shown under *nil debet* this will not be permitted unless a list of payments be filed.<sup>64</sup> That accord and satisfaction can be given in evidence under a plea of *nil debet*, seems to be settled in Virginia (notwithstanding an early case to the contrary), and by the weight of authority elsewhere.<sup>65</sup> While an award may be shown under *nil debet*, an agreement to submit cannot, although

defendant, by his attorney, comes and says that he does not owe the said sum of ——— dollars, or any part thereof, in manner and form as the said plaintiff hath above complained; and of this the said defendant puts himself upon the country."

62. 4 Min. Inst. 770. See, also, Va. Fire, etc., Ins. Co. v. Buck, 88 Va. 517, 13 S. E. 973; Columbia Accident Ass'n v. Rockey, 93 Va. 678, 25 S. E. 1009. While probably not necessary to the decision, each of these cases adopts the statement of Prof. Minor.

63. This would no longer be a defence. See Code, § 2286a, giving to married women full power to contract.

64. Code, § 3298; Richmond, etc., R. Co. v. Johnson, 90 Va. 775, 20 S. E. 148.

65. See authorities cited in note 62, *ante*, and Stephen on Pleading, § 147; 5 Encl. Pl. & Pr. 922; 1 Encl. Law & Practice (the discontinued work); 656. See, however, M'Guire v. Gadsby, 3 Call. 204, and 7 Robinson's Practice 549-550, where the matter is discussed.

it be irrevocable. Such an agreement is a matter of abatement only, and must be so pleaded.<sup>66</sup> If the submission and award be made in a pending suit, the award cannot be given in evidence under *nil debet*, as all pleadings speak as of the date of the writ, and at that time there was no award.<sup>67</sup> *Nil debet* is, ordinarily, a bad plea to debt on a specialty. If the acknowledgment of indebtedness is under seal this imports, or dispenses with, a consideration, and hence if the action were debt on a bond the defendant could not plead *nil debet*, which plea allows a denial of consideration, because this is a defence forbidden by the seal. He cannot plead what he would not be allowed to prove.<sup>68</sup> As Mr. Tucker says, in the reference given in the margin, "the bond acknowledges the debt, and, being under seal, the defendant is estopped to deny the debt, unless he denies the deed," in other words, unless he pleads *non est factum*. But it is said that when the specialty is only inducement to the action, and matter of fact its foundation, *nil debet* is the proper plea. A prominent illustration of this is an action of debt for rent under a sealed lease.<sup>68a</sup> However, as is well said by Mr. Barton: "The distinction is too refined for ordinary practice, and the safe rule is never to plead *nil debet* to a specialty."<sup>68b</sup>

As we have seen, a judgment of this State or of a sister State is regarded as a *conclusive record*, and, consequently, it is held that *nil debet* is not a good plea to an action of debt on such judgments. The reason given is that *nil debet* assumes that the matter is still in dispute and the judgment not conclusive, and if issue were taken on that plea the plaintiff would waive the conclusive effect of his judgment.<sup>68c</sup> But it is a good plea to an action of debt on a foreign judgment, and in such action on a judg-

66. *Riley v. Jarvis*, 43 W. Va. 43, 26 S. E. 366.

67. *Austin v. Jones*, Gilmer 341; *Harrison v. Brock*, 1 Munf. 22.

68. 5 Encl. Pl. & Pr. 924; 2 Tucker's Commentaries 103; *Supervisors v. Dunn*, 27 Gratt. 608.

68a. 5 Encl. Pl. & Pr. 924; 2 Tucker's Commentaries 103, 108; Stephen's Pleading 280, 281, notes.

68b. 1 Barton's Law Practice 491.

68c. *Clarke's Admr. v. Day*, 2 Leigh 187; *Kemp v. Mundell and Chapin*, 9 Leigh 12; 5 Encl. Pl. & Pr. 925-926; 11 *Idem*, 1154-1155.

ment recovered before a justice of the peace of a sister State.<sup>68d</sup> If, after judgment, a new action (not on the judgment) is brought for the same cause, this fact (which would defeat the second action by reason of the merger of the cause of action in the first judgment) may be shown under the general issue of *nil debet*.<sup>69</sup> As the action of debt is in so many cases brought on writings, the signatures to which, in the absence of statute, it would be necessary for the plaintiff to prove, attention is called to the Virginia statute which provides that "Where a bill, declaration, or other pleading alleges that any person made, indorsed, assigned, or accepted any writing, no proof of the fact alleged shall be required, unless an affidavit be filed with the pleading putting it in issue, denying that such endorsement, assignment, acceptance, or other writing was made by the person charged therewith, or by any one thereto authorized by him."<sup>70</sup> It has been held that the effect of this statute is to dispense with the proof of handwriting in actions on writings not under seal; nothing more.<sup>71</sup> By a similar statute<sup>72</sup> it is enacted that: "Where plaintiffs or defendants sue or are sued as partners, and their names are set forth in the declaration or bill, or where plaintiffs or defendants sue or are sued as a corporation, it shall not be necessary to prove the fact of the partnership or incorporation, unless with the pleading which puts the matter in issue, there be an affidavit denying such partnership or incorporation."

68d. 11 Encl. Pl. & Pr. 1158. In *Draper's Ex'rs v. Gorman*, 8 Leigh 628, it was held that the District of Columbia is not a *State*, and that the judgment of one of its courts was to be treated as a *foreign* judgment, in an action on which in this State *nil debet* was a proper plea.

69. 2 Black on Judgments, § 785.

70. Code, § 3279. See *Chestnut v. Chestnut*, 104 Va. 539, 52 S. E. 348.

71. *Phaup v. Stratton*, 9 Gratt. 619; *Clason v. Parrish*, 93 Va. 24, 24 S. E. 471, 2 Va. Law Register 188, and note. See annotations to the above section of the Code in Pollard's Code of Virginia, and in Justis' Annotations to the Code of West Virginia, p. 802. As to proof of signature evidencing release, payment, or set-off, see Code of Virginia, § 3250. If the instrument were under seal its execution could only be denied by a plea of *non est factum* which is required to be verified by oath. Code, § 3278.

72. Code, § 3280. See Annotations in Pollard's Code of Virginia, and in Justis' Annotations to the Code of West Virginia, p. 803.

It is not the practice to write out the plea of *nil debet*, but when the case is called for trial, or at the rules if the defendant prefers, the counsel for the defendant simply instructs the clerk to enter a plea of *nil debet*, and, under the above statutes requiring affidavits, it would seem to be sufficient for the defendant to enter his plea of *nil debet* orally and, at the same time, to offer his affidavit, in which event the clerk receives it, endorses it and puts it with the other pleadings, etc., in the case.<sup>73</sup>

The broad general issues, including *nil debet*, are so general in their character, and the defences which may be introduced under them are so numerous, that a plea of *nil debet* gives to the plaintiff no intimation of what the actual defence is, and he is required to be prepared to meet all of the defences which may be made under such a plea. This often resulted in the plaintiffs' being taken by surprise. This objection is in some degree obviated by the statute providing that the court may order a statement to be filed of the grounds of defence, and, on a failure to comply with such order, may, on the trial, exclude evidence of any matter not described in the plea so plainly as to give the adverse party notice of its character.<sup>74</sup> But, while a statement of grounds of defence which is so indefinite and general that it gives the plaintiff no more notice of the defence than the general issue, is insufficient,<sup>75</sup> yet, on the other hand, the defendant may allege in such statement as many different grounds of defence as his imagination may suggest, and, if he includes among such grounds his actual defences, he is safe. So, even with the aid of § 3249 the plaintiff may still be left to conjecture in determining what the real defence is.

## 2. NON EST FACTUM.

This is the general issue in debt on a *sealed instrument*. Unlike *nil debet* the plea of *non est factum* is a *narrow* general is-

73. *Moreland v. Moreland*, 108 Va. 93, 60 S. E. 730. This case was an action of *assumpsit* and the affidavit required was under § 3286 of the Code, but the same reasoning would apply to an action of *debt* and the affidavits above discussed.

74. Code, § 3249.

75. *Chestnut v. Chestnut*, 104 Va. 539, 52 S. E. 348. See as to proper practice *Columbia Accident Association v. Rockey*, 93 Va. 678, 25 S. E. 1009.

sue, and under it no defence may properly be given in evidence which does not render the instrument sued on *void* as distinguished from *voidable*.<sup>76</sup> By the express provisions of the statute no plea of *non est factum* may be received unless it be verified by oath.<sup>77</sup> It will be seen by reference to the form of the plea that the defendant simply alleges that the instrument sued on "is not his deed," and it is not usual to file this plea unless it is intended to dispute the validity of the instrument sued on; payment being the plea most frequently used, or a *sworn equitable plea* under § 3299 of the Code.<sup>78</sup> As said by Prof. Minor:<sup>79</sup> "Under this plea the burden of proof is upon the plaintiff, who affirms the execution of the bond, to prove it, and if at the trial he fails to do so satisfactorily, the verdict should be against him. But the defendant, on his part, may show at the trial either that he *never executed* the writing, or that it is *absolutely void* in law; *e. g.*, for coverture or lunacy; or because since its execution and before the commencement of the suit, it has been erased or altered fraudulently, or in a material part by the *opposing party* in interest. But he cannot show under it any matter which makes the deed simply *voidable*, but not absolutely void; *e. g.*, infancy, duress, fraud in the consideration, or any statutory illegality, such as gaming, etc. These must be the subject of *special pleas*, that is, in an action on a sealed instrument; but in an action of debt or assumpsit on an *unsealed* contract, all these things may be proved under the general issues of *nil debet* and *non assumpsit* respectively." If a defendant admits the execution of the sealed instrument, and intends to rely upon some fact rendering it void, the usual and better practice is to plead *non est factum* and to accompany it with a special affidavit setting out specifically the facts rendering the instrument void.

"Though gaming consideration and usury rendered a bond void, yet it has always been held that they must be specially

76. Graves' Notes on Pleading (old) 79; Stephen's Pleading, § 146; 5 Encl. Pl. & Pr. 923.

77. Code, § 3278. For forms of plea and affidavit, see 4 Min. Inst. 768; Gregory's Forms 328.

78. 1 Barton's Law Practice 494; 2 Tucker's Commentaries 104, 116.

79. 4 Min. Inst. 769.

pleaded.<sup>80</sup> As to *lunacy*, it is doubtful whether this renders a contract *void*, and there are many cases to the contrary."<sup>81</sup> So, as *non est factum* goes to the execution of the instrument, alleging it to be *void* in law, under such plea fraud in the *factum* may be shown, but not fraud in the *procurement*.<sup>82</sup> Failure in the consideration of the contract, or fraud in its procurement, or breach of warranty of the title or soundness of personal property although not *provable* under *non est factum* are, nevertheless, good defences, and may be shown by a *special plea* under § 3299 of the Code.<sup>83</sup>

### 3. NUL TIEL RECORD.

The general issue in debt on a judgment or other record is *nul tiel record*, a narrow general issue disputing the existence of any such record. So, *nul tiel record* is the general issue in an action of debt on a judgment of a court of record of the State in which it is rendered, or of a sister State.<sup>84</sup> Under such plea it may be shown that there is no such judgment, or that there is a variance between the judgment set forth in the declaration and that described in the record, and as a general rule these are the only questions raised by the plea. However, if want of jurisdiction affirmatively appears on the face of the record, such defence is available under this plea, and if the record fails to show jurisdiction, it cannot be aided by other evidence.<sup>85</sup> When the declaration vouches the record the burden is on the plaintiff to show

80. Graves' Notes on Pleading (old) 79-80, and authorities cited.

81. Graves' Notes on Pleading (old) 80; Gould Pl. 300; Bishop on Contracts (2nd ed.) 181; Allis v. Billings (Mass.), 6 Metc. 415, 39 Am. Dec. 749, and note; Clark on Contracts, 268; see, however, Stephen's Pleading, 280.

82. Hayes v. Va. Mutual Protective Ass'n, 76 Va. 225; Graves' Notes on Pl. (old) 80; Columbia Accident Ass'n v. Rockey, 93 Va 678, 25 S. E. 1009.

83. Columbia Accident Ass'n v. Rockey, 93 Va. 678, 25 S. E. 1009. The plea of *non est factum* bars the action only as to him who pleads it, and does not affect the liability of the other defendants. Bush v. Campbell, 26 Gratt. 403; Trust Co. v. Price, 103 Va. 298, 49 S. E. 73.

84. 11 Encl. Pl. & Pr. 1149, 1150.

85. 11 Encl. Pl. & Pr. 1150-1153; Wood v. Comm., 4 Rand. 329.

its existence, and the record itself is the only evidence receivable to prove its contents.<sup>86</sup> The plea of *nul tiel record* is not applicable to a declaration on a judgment of a court not of record, or of a foreign country, or, it is *said* to a decree in chancery, because such decrees are said not to be records.<sup>87</sup> The proper plea in such cases would be *nil debet*.<sup>88</sup> In the United States Supreme Court and many of the States it is held that *nil debet* may be pleaded to an action on a domestic judgment, or a judgment of a sister State, for the purpose of denying the jurisdiction of the Court which rendered the judgment, but the plea would not be allowed the broad scope usually given it. However, this is not the rule in the majority of the States, but, on the contrary, it is held that where want of jurisdiction in a domestic court, or a court of a sister State, is available as a defence it should be made by a *special plea* showing with particularity such want of jurisdiction,<sup>89</sup> and certainly this would always be

86. 4 Min. Inst. 814; 11 Encl. Pl. & Pr. 1152-1153.

87. 11 Encl. Pl. & Pr. 1150.

88. *Idem*, p. 1158.

89. *Idem*, pp. 1156, 1157, 1159-1164; 5 Encl. Pl. & Pr. 925, 927; *Thompson v. Whitman*, 18 Wall. 462.

In *Clarke v. Day*, 2 Leigh 172, and in *Kemp v. Mundell*, 9 Leigh 12, it was specifically held that *nil debet* was not a good plea to an action of debt on a judgment of a court of record of a sister State. In *Draper's Exrs. v. Gorman*, 8 Leigh 628, it was held that a judgment of a District of Columbia Court was a *foreign* judgment, because said district was not a *State* under the provisions of the "full faith and credit" cause of the Constitution of the United States, and that, therefore, *nil debet* was a proper plea. The court evidently considered that on a *foreign* judgment under a plea of *nil debet* the jurisdiction of the court could be inquired into. Judge Parker said, on p. 636: "There are defences which may be made to foreign judgments without trenching upon any rule of sound policy; such as want of jurisdiction, or that the defendant had no notice of the suit, or that the judgment was obtained by fraud or founded in mistake, or was irregular and void by the local law; and there ought to be some general issue to let in these defences, without driving the defendant to a special plea. Therefore I think the plea of *nil debet* ought to have been received." This was only as to *foreign* judgments, however, and it was specifically held in *Bowler v. Huston*, 30 Gratt. 266, that want of jurisdiction of a court of record of a sister State must be *specialy pleaded* and *cannot be shown under nil debet*. The opinion in the case is full and exhaustive.

the safe procedure. Want of jurisdiction of a *foreign court* may be shown under *nil debet*.<sup>90</sup> No matters which are simply in *discharge* of a judgment, such as payment, accord and satisfaction, or other matters arising subsequent to the judgment, can be shown under *nul tiel record*. They must be specially pleaded.<sup>91</sup> Fraud, if relied on, must be specially pleaded, and the facts constituting the fraud must be distinctly averred in the plea.<sup>92</sup> The form of the plea may be found in the reference given in the margin.<sup>93</sup> The plea concludes with a verification, and the replication must state that there is such a record and conclude *prout patet per recordum*, with a prayer that it be inspected by the court.<sup>94</sup>

The plea raises no issue as to the validity of the declaration, the justice of the original judgment, its payment or satisfaction, its assignment, fraud in its procurement, nor clerical error in taxing costs.<sup>95</sup>

The issue made upon a plea of *nul tiel record* is to be tried by the court on a simple inspection of the record produced, and not by the jury. Of course, a duly authenticated copy of the record is sufficient, and, if it be destroyed, secondary evidence of it may be admitted.<sup>96</sup> If there are other issues besides the one made by this plea, the issue on the plea of *nul tiel record* should be tried first.<sup>97</sup>

90. Draper's Exrs. v. Gorman, 8 Leigh 628; 5 Encl. Pl. & Pr. 925.

91. 11 Encl. Pl. & Pr. 1164.

92. 11 Encl. Pl. & Pr. 1166. But as to *foreign* judgments see quotation from Draper's Exrs. v. Gorman, *supra*.

93. 4 Min. Inst. 1757.

94. 11 Encl. Pl. & Pr. 1154 and 1166; Eppes v. Smith, 4 Munf. 466.

95. 11 Encl. Pl. & Pr. 1153.

96. 11 Encl. Pl. & Pr. 1153, 1154; 4 Min. Inst. 814.

97. Eppes v. Smith, 4 Munf. 466; Burks' Exrs. v. Treggs' Exrs., 3 Wash. 215; Gee v. Hamilton, 6 Munf. 32.

## CHAPTER IX.

### ACTION OF COVENANT.

- § 74. Nature of the action.
- § 75. When covenant lies.
- § 76. When covenant does not lie.
- § 77. Who may bring covenant.
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- § 82. Assumpsit as a substitute for covenant.

#### § 74. Nature of the action.

The action of covenant is the appropriate remedy for the recovery of damages occasioned by the breach of a covenant or contract in writing under seal.<sup>1</sup> As said by Prof. Minor: "The action of *covenant* is employed to recover damages sufficient to make amends for a *breach of covenant*, that is, of a contract *under seal*. The covenant may be to *pay money* or to *do a collateral thing*. If it is to *pay money* the damages which the covenantee is entitled to recover by way of compensation or amends for the breach, is *the money* covenanted to be paid, with interest from the time that it ought to have been paid. When the covenant is *not to pay money*, but to *do some collateral thing*, there is no uniform standard of damages, but they must be estimated by a jury, according to the circumstances of each case. Where the covenant is to *pay money*, it is obvious that the action of debt and the action of covenant are *concurrent remedies*, and may either of them be resorted to. Thus in the case of a common *money bond*, the action of *debt* will lie, because it is a promise to pay a *specific sum of money*, and the action of *covenant* may be brought because it is a *contract under seal*. The amount recovered in either action is the same; but there is a difference in the light in which the transaction is regarded in reference to the two actions respectively. When *debt* is brought,

1. 5 Encl. Pl. & Pr. 343.

the plaintiff demands the specific sum *eo numero*, which the defendant engaged to pay, and he recovers accordingly. When the action is *covenant*, the plaintiff complains that the defendant, having made a very solemn promise *under his seal*, has recklessly violated it, whereby the complainant has suffered damage to an amount which he names, and which a jury must be called to assess, although, as we have seen, the invariable criterion of amount *in practice* is the sum which the defendant ought to have paid, with interest."<sup>2</sup> In the one case he recovers money *eo nomine*; in the other, damages; but the amounts are the same. The covenant may be express or implied.<sup>3</sup> As said in Tucker's Commentaries:<sup>4</sup> "Covenants are either express or implied, or (which is the same thing) in deed or in law. Express covenants are set forth in terms in the deed; and no particular form of words is necessary to constitute them. Implied covenants are those which the law raises from the character of the transaction, or from certain technical expressions used in the instrument. Thus, the word 'demise' implies a covenant for quiet enjoyment; and the words 'yielding and paying,' a covenant to pay rent."<sup>5</sup> But it should be carefully borne in mind that for a *covenant* to be *implied* so that an *action of covenant* will lie, the instrument from which the implication is sought to be drawn must have been *signed and sealed* by the party sought to be held as the covenantor. Such *signature and seal* is a *sine qua non*. Thus when in a deed poll a promise or undertaking is imposed upon the grantee (who does not sign the deed), the grantee by accepting the deed is held to be liable for the performance of such promise or undertaking, on the ground of an *implied contract* arising from such acceptance. But this implied contract is in the nature of an *assumpsit*, and is a *simple contract* on which, indeed, *assumpsit* will lie, but not *covenant*. Such an agreement is not

2. 4 Min. Inst. 426.

3. 5 Encl. Pl. & Pr. 346; 2 Tucker's Com. 121.

4. 2 Tucker's Com. 121.

5. So, in a note in 4 Va. Law Register 459, the editor says: "It seems that an acknowledgment of a debt, under seal, when not made *diverso intuitu*, is regarded as a specialty, though the promise is merely implied. *Powell v. White*, 11 Leigh 309, 322; 3 Min. Inst. 347. See *Wolf v. Violet*, 78 Va. 57."

a specialty or contract *under seal*, and *covenant* will only lie when the instrument is actually signed and sealed by the party or by his authority.<sup>6</sup>

### § 75. When covenant lies.

Covenant has been held to be well brought in the following instances: To enforce awards, when the submission is under seal; to recover damages for breach of a promise to pay money when the promise is under seal, the *damages* being the *debt due, with interest*; to recover damages for the non-performance of collateral agreements under seal;<sup>7</sup> upon a bond payable in instalments, a part of which alone are due (and in this case debt will not lie);<sup>8</sup> on annuity and mortgage deeds; on leases under seal at the suit of the lessee; by the lessor for the non-payment of rent, or for not repairing; on a sealed guaranty; for breach of a covenant to save harmless from a judgment; to do repairs, to reside on the premises, or to cultivate them in a particular manner; not to carry on a particular trade; to deliver boards; and on a bond for the delivery of goods; upon a penal bond, or an attachment bond; always remembering that the action lies on all obligations under seal to pay money or to do anything else, but that it lies upon no contract unless it be in writing and under seal, and against no person save he who, by himself, or his duly authorized agent acting in his behalf, has executed the sealed instrument.<sup>9</sup>

6. *Taylor v. Forbes*, 101 Va. 658, 44 S. E. 888; *Barnes v. Crockett's Admr.*, 111 Va. 240, 68 S. E. 983; *Harris v. Shields*, 111 Va. 643, 69 S. E. 933; *West Virginia, etc., R. Co. v. McIntire*, 44 W. Va. 210, 28 S. E. 696; note to *Dawson v. Western Maryland R. Co.*, 15 Anno. Cases 683. There is some conflict in the authorities on this point, but the statement in the text is believed to be supported by the great weight of authority.

7. 4 Min. Inst. 181-185; *Idem*, 551, 552.

8. *Peyton v. Harman*, 22 Gratt. 643. And in all cases where the damages are unliquidated, covenant is the peculiar remedy, and debt will not lie. 1 Barton's Law Practice 177; 5 Encl. Pl. & Pr. 344; Hogg's Pleading & Forms 44.

9. Hogg's Pleading & Forms, 43-45; 1 Barton's Law Practice 176-177; 5 Encl. Pl. & Pr. 345, *et seq.*; *Taylor v. Forbes*, 101 Va. 658, 44 S. E. 888.

### § 76. When covenant does not lie.

In general it may be stated that the action of covenant will not lie upon any unwritten contract, nor upon a contract in writing unless it is under seal and executed by the defendant or his duly authorized agent.<sup>10</sup> And where an agreement under seal has been modified by a subsequent parol agreement upon some point essential to the liability of the defendant, covenant will not lie, but *assumpsit* is the proper remedy.<sup>11</sup>

It has also been held that an action of covenant will not lie on a deed of trust executed merely for the collateral security of promissory notes. The trust deed does not raise the *note* to the dignity of a *specialty*, and a promise under seal cannot be implied from a deed executed, not as an evidence of indebtedness, but simply to create a security. The bare recital of the debt in the deed of trust does not suffice to convert the simple contract debt secured by the deed of trust into a *specialty*. A deed of trust is but an *incident* to the debt; it is not the debt itself.<sup>12</sup>

### § 77. Who may bring covenant.

As a general rule, the covenantee is the proper person to maintain an action on a covenant for its breach.<sup>13</sup> At common law an indenture or deed *inter partes* was only available between the parties to it and their privies, and a third person could maintain no action on a covenant therein, although named in the instrument and the covenant was made for his benefit.<sup>14</sup> The rule stated, however, did not apply to deeds poll, and at common law

10. 5 Encl. Pl. & Pr. 350.

11. 5 Encl. Pl. & Pr. 351; 3 Rob. Pr. 369; Hogg's Pleading & Forms 45; 11 Cyc. 1027.

12. Wolf v. Violet, 78 Va. 57.

13. 5 Encl. Pl. & Pr. 352, 357; Bullock v. Sebrell, 6 Leigh 560; Poindexter v. Wilton, 3 Munf. 183; Ross v. Milne, 12 Leigh 209; Stuart v. James River, etc., Co., 24 Gratt. 294; Newberry Land Co. v. Newberry, 95 Va. 120, 27 S. E. 899; Jones v. Thomas, 21 Gratt. 96. See also monographic note on the Action of Covenant, 1 Wash. (Va. Rep. Anno.) 308.

14. See cases cited *ante*, note 13, especially Ross v. Milne; also, Willard v. Worsham, 76 Va. 392; Johnson v. McClung, 26 W. Va. 659; 5 Encl. Pl. & Pr. 357.

a person, though not a party to a deed poll, could sue upon it if the instrument showed upon its face that it was made for his benefit.<sup>15</sup>

But the common-law rule has been so far modified by statute in many States that it is now generally provided that the real party in interest may bring an action in his own name on the covenant.<sup>16</sup> In Virginia it is provided by § 2415 of the Code that "if a covenant or promise be made for the sole benefit of a person with whom it is not made, or with whom it is made jointly with others, such person may maintain in his own name any action thereon, which he might maintain in case it had been made with him only, and the consideration had moved from him to the party making such covenant or promise." However, it has been held<sup>17</sup> that, under this statute, in order for one not a party nor a privy to such party to sue upon an indenture or deed *inter partes*, he must be named or definitely pointed out in the instrument itself as beneficiary, and that extrinsic evidence is not admissible to show that the covenant sued on was made solely for his benefit.<sup>18</sup> Of course, the original right to sue in the name of the contracting party is not destroyed by the new remedy allowed by this statute, but, on the contrary, remains in full force.<sup>19</sup>

### § 78. The declaration.

Prof. Minor, in his Institutes<sup>20</sup> says: "As the action of covenant can only be supported on a *deed*, there is less variety

15. See cases cited in two preceding notes.

16. 5 Encl. Pl. & Pr. 352; *Idem*, p. 358.

17. *Newberry Land Co. v. Newberry*, 95 Va. 120, 27 S. E. 899. See also *McIlvane v. Big Stony Lumber Co.*, 105 Va. 613, 54 S. E. 473.

18. See § 2860 of the Code of Virginia for a somewhat similar statute. Mr. Pollard in his notes to § 2415, Code, makes the query whether the action held improper in *Newberry Land Co. v. Newberry*, *supra*, would not lie under § 2860. See 4 Va. Law Register 616, where the editor seems to think that it would. See also, *ante*, § 47.

19. *Mutual B. Life Ins. Co. v. Atwood's Admr'x*, 24 Gratt. 497, 509-510.

20. 4 Min. Inst. 706.

in the declarations in this action than in debt, and, therefore, but few observations will here be necessary, especially as most of the rules to be observed in framing a declaration in *assumpsit* or debt equally apply to covenant.

"The doctrine touching the statement of the *inducement* or introductory matter to the material averments; the mode of setting out the deed; the *profert* of it; the *averments* of conditions and their performance, of notice, etc., and the statement of the breach or breaches of the covenant, are essentially the same in this action as in *assumpsit* and debt. It is usual after stating the breaches of the covenant declared upon, to conclude by alleging: 'And so the said plaintiff says, that the said defendant (although often requested so to do), hath not kept his said covenant, but hath broken the same,' etc.; but this is a merely formal allegation, and may be omitted." Various forms of the declaration in this action will be found in the works referred to in the margin.<sup>21</sup>

As covenant lies only on sealed instruments and as the seal imports a consideration, it is held that the covenant should be set out without any intermediate inducements or statement of the consideration.<sup>22</sup> A promise, or words equivalent to a promise, must be averred or asserted in the declaration.<sup>23</sup>

The covenant, of course, must be recited, but it is sufficient to set out in the declaration the substance and legal effect only of such parts of the deed as are necessary to entitle the plaintiff to recover, and the whole of the agreement need not be recited.<sup>24</sup> As the action lies on sealed instruments only, the declaration must state that the contract sued on was under seal; but there are certain words such as "indenture," "deed," or "writing obligatory," which of themselves import that the instrument is sealed, and the use of such words will be suffi-

21. 4 Min. Inst. 1691-1697; 1 Barton's Law Practice 409-415; Gregory's Forms, 9-15; Hogg's Pleading & Forms 305-309. See generally, as to the declaration in covenant, the last-named work, 99-104; and also 5 Encl. Pl. & Pr. 362-376; 2 Tucker's Com. 126, 127.

22. Jones v. Thomas, 21 Gratt. 96; 5 Encl. Pl. & Pr. 365.

23. 5 Encl. Pl. & Pr. 365.

24. Buster's Exr. v. Wallace, 4 H. & M. 82; Backus v. Taylor, 6 Munf. 488; 5 Encl. Pl. & Pr. 365, 366.

cient.<sup>25</sup> Although a delivery of the instrument should generally be alleged, the authorities are conflicting as to whether such an allegation is necessary.<sup>26</sup>

It may be stated as a general rule with respect to the statement by the plaintiff of the covenant and its breach that, as he is suing for the breach of a contract, he must, of course, show by his pleading that the defendant *has broken* the contract, and that he, himself, is in no default, but has performed, or has been excused from performing, all acts which were in the nature of conditions precedent to his right to hold the defendant liable.<sup>27</sup> Thus in an action by the lessee against the lessor to recover damages for a refusal to renew the lease, the lessee must aver and prove performance on his part, at the time and in the manner stipulated for, of all that was required of him by the terms of the lease, as a condition of such renewal, or give some valid excuse for his nonperformance.<sup>28</sup> The breach of the covenant should be clearly stated. The common-law method of doing this was to negative the words of the covenant, and this is generally sufficient. But it may be well assigned in other words coextensive with the covenant's import and effect, and as general as the words of the covenant, or by stating the covenant's legal effect, provided that the facts stated in the declaration necessarily show that the covenant is broken.<sup>29</sup> All that can ever be required is that the declaration shall state a breach which is clearly within the covenant declared upon.<sup>30</sup> The object of this action being to recover damages, they should always be stated in a sum sufficiently large to cover any possible recovery, but are usually averred in the most general manner.<sup>31</sup>

25. 5 Encl. Pl. & Pr. 366.

26. 5 Encl. Pl. & Pr. 366.

27. See, on this general subject, *Harris v. Lewis*, 5 W. Va. 575; *Clark v. Franklin*, 7 Leigh 1; *Buster v. Wallace*, 4 H. & M. 82; *Austin v. Whitlock*, 1 Munf. 487; note on the Action of Covenant, 1 Wash. (Va. Rep. Anno.) 532-533; 5 Encl. Pl. & Pr. 365-374.

28. *Grubb v. Burford*, 98 Va. 553, 37 S. E. 4.

29. 5 Encl. Pl. & Pr. 369, 370; *Hogg's Pleading & Forms* 102.

30. *Austin v. Whitlock*, 1 Munf. 487; 5 Encl. Pl. & Pr. 370.

31. *Hogg's Pleading & Forms* 102; 5 Encl. Pl. & Pr. 376.

### § 79. Pleas in action of covenant.

Although Prof. Minor speaks of *non est factum* as being the general issue in covenant,<sup>32</sup> it is said that strictly speaking there never was any general issue in the action of covenant, as the plea of *non est factum* only puts in issue the execution of the deed sued on, as in debt on specialty, and not the breach of covenant, or any other defence.<sup>33</sup> *Non est factum* pleaded alone admits all the material averments of the declaration, except the execution of the instrument declared upon, or other matters rendering the instrument void,<sup>34</sup> and, in such case, the plaintiff is not put to proof of any thing else contained in his declaration, except to show the amount of damages. "In order that other defences may be relied upon, they must be pleaded specially."<sup>34a</sup> Thus all pleas to a declaration in covenant are in effect special pleas.<sup>35</sup> Among such matters which must be specially plead may be mentioned performance of the covenant, or excuse for nonperformance; matters of discharge such as bankruptcy, accord and satisfaction after breach, or arbitration and award; former recovery, foreign attachment, release, tender, payment, set-off, and *non damnificatus*.<sup>36</sup>

### § 80. Covenants performed and covenants not broken.

A plea of "*covenants performed*" or one of "*covenants not broken*" is a proper plea to an action alleging the breach of covenants. If the allegation in the declaration is of the existence of an affirmative covenant, the plea should be "*covenants performed*" for the declaration would be an *allegation* of an *affirmative* covenant with a *negation* of its performance, and

32. 4 Min. Inst. 772.

33. 5 Encl. Pl. & Pr. 377, 378; Hogg's Pleading & Forms 183. In the reference given to Minor's Institutes, above, it is said that the rules as to the scope and effect of the plea of *non est factum* are the same in *covenant* as in *debt*, so it will be unnecessary to enter into detail here with respect to this plea. See *ante*, § 73.

34. See *ante*, § 73.

34a. 5 Encl. Pl. & Pr. 378.

35. 5 Encl. Pl. & Pr. 379.

36. Hogg's Pleading & Forms 195; 5 Encl. Pl. & Pr. 379-385.

the plea being affirmative, i. e., "*covenants performed*," would make an issue. For like reasons if the covenant be negative, as that the defendant would refrain from doing a thing, the plea should be "*covenants not broken*."<sup>37</sup>

Sometimes the action is on a bond with *condition* to do or not to do a particular thing. Then the same principle applies, and the plea would be "*conditions performed*," or "*conditions not broken*" as the case may be, merely substituting the word "condition" for the word "covenant" in the pleas first above mentioned.<sup>38</sup> The plea of "*covenants performed*," as a general rule, must show specially the time, place and manner of performing each covenant, and if it fails to do so it should be rejected.<sup>39</sup> The issue presented by the plea of "*covenants performed*" is a narrow one, limited to the defences indicated by the language of the plea. The plea can only be supported by evidence which shows that the defendant *has* performed his covenant, and not by evidence *excusing* his performance thereof, such as a failure on the part of the plaintiff to perform a condition precedent to his right to recovery, waiver of performance, or impossibility or inability to perform. All such matters must be the subject of special pleas.<sup>40</sup>

If the declaration is upon both affirmative and negative covenants, then *covenants performed* should be pleaded to the former, and *covenants not broken* to the latter. The usual practice is to offer both pleas wherever either would be applicable.<sup>41</sup>

37. *Chewning v. Wilkinson*, 95 Va. 667, 29 S. E. 680; 5 Rob. Prac. 668; 1 Barton's Law Practice 501-502; Hogg's Pleading & Forms 183-184, 310, note 1; 5 Encl. Pl. & Pr. 380-382; 2 Tucker's Com. 127.

38. *Poling v. Mattox*, 41 W. Va. 779, 24 S. E. 999; *Archer v. Archer*, 8 Gratt. 539; *Supervisors v. Dunn*, 27 Gratt. 620; *Elam v. Commercial Bank*, 86 Va. 95, 9 S. E. 498; *Chewning v. Wilkinson*, 95 Va. 667, 29 S. E. 680.

39. *Norfolk & C. R. Co. v. Suffolk Lumber Co.*, 92 Va. 413, 23 S. E. 737; *Arnold v. Cole*, 42 W. Va. 663, 26 S. E. 312; 4 Min. Inst. 1202.

40. *Chewning v. Wilkinson*, 95 Va. 667, 29 S. E. 680; *Scraggs v. Hill*, 37 W. Va. 706, 17 S. E. 185; 5 Encl. Pl. & Pr. 380-381, notes; *Fairfax v. Lewis*, 2 Rand. 40. See also original article, 5 Va. L. Reg. 586.

41. 1 Barton's Law Practice 502; Hogg's Pleading & Forms 184; 2 Tucker's Com. 127.

It would seem that in this action the plaintiff will only be required to prove such matters as are put in issue by the defendant's special plea or pleas, and that where the defendant puts in the plea of *covenants performed* and *covenants not broken* but does not plead *non est factum*, he admits the execution of the instrument sued on, and the warranty or covenant therein contained, and no proof of such matters will be required.<sup>42</sup> Where issue is joined on the defendant's plea of performance the burden of proof is on him.<sup>43</sup> It is stated that a plea of *covenants performed*, being an affirmative plea, should conclude with a *verification*,<sup>44</sup> and this would seem to be true in view of the rule that such plea must show the time, place and manner of performance, and thus introduce new matter.<sup>45</sup>

### § 81. Plea of non damnificatus.

The plea of *non damnificatus* is in the nature of a plea of performance and is applicable only to an action on a bond with condition, or covenant, to *indemnify* and *save harmless*.

These or equivalent words must be contained in the bond, and a general plea is allowed simply denying that the plaintiff has been damnified, and he can make the issue more specific by his replication, pointing out how, when, and wherein he was damnified. The plea is not applicable (1) where the bond sued on does not contain the words indemnify and save harmless, or one of them, or their equivalent, (2) where the bond is not to indemnify and save harmless, but to perform some *specific act*, although it may *pro tanto* amount to indemnity. A plea that the defendant has *saved harmless* the plaintiff is

42. Code, § 3279; Riddle & Core, 21 W. Va. 530; Arnold *v.* Cole, 42 W. Va. 663, 26 S. E. 312; Hogg's Pleading & Forms 310, note; 5 Encl. Pl. & Pr. 379; Austin *v.* Whitlock, 1 Munf. 487. For forms of these pleas, see Hogg's Pleading & Forms 309; Gregory's Forms 350-351; 4 Min. Inst. 1742-1744.

43. 5 Rob. Prac. 671.

44. 5 Encl. Pl. & Pr. 381, 382. And see forms in references given in note 1, *supra*.

45. As to the rule when *new matter* is introduced, see Stephen's Pleading, § 168.

bad, unless it specifically points out *how* he has saved him harmless.<sup>46</sup>

### § 82. Assumpsit as a substitute for covenant.

In the year 1897, the Legislature of Virginia by one short statute made a revolutionary change in the law, which very intimately affects the action of covenant. This statute provides that "In any case in which an action of covenant will lie there may be maintained an action of assumpsit."<sup>47</sup>

The full effect of this statute on the rules of pleading subsequent to the declaration has not as yet been settled. But it is certain, as said by Prof. Graves, that "The effect of this important statute is to bridge the gulf which at common law exists between covenant and assumpsit, and to allow assumpsit to take the place of both actions." The two actions, however, are not interchangeable. "Covenant does not lie when assumpsit may be maintained, but assumpsit lies when covenant may be maintained. Covenant remains as at common law. It is the scope of assumpsit that is enlarged."<sup>48</sup>

It has been held, under the above statute, that in an action of *assumpsit*, a *special* count on a sealed instrument may be united with the *common counts* in assumpsit,<sup>49</sup> and that a *special* count in assumpsit can be joined with a *special* count on a contract under seal, as both are counts in assumpsit.<sup>50</sup>

46. 4 Min. Inst. 1203, 1204, 1219, 1220; Stephen's Pleading, § 224; 5 Encl. Pl. & Pr. 383; Archer v. Archer, 8 Gratt. 539; Supervisors v. Dunn, 27 Gratt. 608; Poling v. Mattox, 41 W. Va. 779, 24 S. E. 999. Where the defendant has already pleaded "conditions performed," the court may refuse to permit him to plead *non damnificatus* as the two pleas are equivalent. See cases cited and also Elam v. Commercial Bank, 86 Va. 95, 9 S. E. 498. This plea is more often used in debt on a bond with condition than in any other case, because *debt* is more frequently brought on such bonds than *covenant*. But *covenant* may be brought on such bonds (Ward v. Johnston, 1 Munf. 45); and also there may be a *covenant* to indemnify and save harmless, in which case the plea would be proper. See 5 Encl. Pl. & Pr. 383, note 2.

47. Code, § 3246a.

48. Graves' Notes on Pleading (new) 21.

49. Grubb v. Burford, 98 Va. 553, 37 S. E. 4.

50. American Bonding Co. v. Milstead, 102 Va. 683, 47 S. E. 853.

The chief embarrassment to which this statute has given rise is, not as to the form of the declaration, but as to what effect the statute has on the form in which the *defenses* to sealed instruments must be presented. Are sealed instruments put on the same footing with simple contracts so that failure of consideration, fraud in the procurement, want of consideration, breach of warranty, etc., may be put in evidence under *non assumpsit*, or must such defenses to a specialty still be pleaded specially in an action of assumpsit on the instrument?

It seems clear that the declaration must show whether the instrument sued on is under seal or not, and one very potent reason for this is that the defendant may know whether to plead the statute of limitations, or what limitation of the statute is applicable.<sup>51</sup> But it is quite doubtful if, even upon a liberal interpretation of the statute, it would be allowable, under a plea of *non assumpsit* to an action on a specialty, to make all defenses permissible under such plea in an action on a simple contract. Under such a theory a sealed instrument would be stripped of its every attribute, save only its longer life with respect to the act of limitations, and, contrary to immemorial practice, its consideration could be inquired into, recoupment could be claimed, and fraud and breach of warranty could be marshaled to its defeat under the mere unsworn statement of the defendant of "*non assumpsit*."

It is not meant to intimate that the Legislature could not with propriety make this the rule, nor to impugn the *policy* of such a rule. In many ways it might be desirable. But it is not believed that the Legislature *has* done this in the statute under consideration, whatever its intention may have been. The statute must be strained beyond legitimate interpretation, based on a *presumed* but not *expressed* intention, before such a result is attained. The legislature dealt with the form of the action only. It left untouched the nature of sealed instruments, and the defendant's pleading to the enlarged action. When the statute allowed case to be brought wherever trespass would lie, no such difficulty was encountered, as the two actions, were closely assimilated, and

51. 3 Va. Law Reg. 829.

frequently the plaintiff had his election which he would bring. The general issue was the same in each. But here the situation is entirely different. The two forms of action were never interchangeable, and the plaintiff never had an election between them. It is believed that in *assumpsit* as in *debt* there should be, since this statute, two general issues, *non assumpsit* in actions on simple contract, and *non est factum* on specialties; or, at least, under the plea of *non assumpsit* no proof should be allowed of any matter which would contradict the nature of the instrument; and, that, in *assumpsit* as in *debt* such defenses to a specialty as failure or want of consideration, fraud in the procurement, misrepresentation, or breach of warranty should be made by a sworn plea under § 3299 of the Code. If the general issue of *nil debet* is inapplicable (as it is) to an action of debt on a sealed instrument, for exactly the same reason the general issue of *non assumpsit* should be held inapplicable to *assumpsit* on a sealed instrument.<sup>52</sup>

52. See 10 Va. Law Reg. 766. It should be noted, however, that in the case of *Grubb v. Burford*, *supra*, the only plea filed was *non assumpsit*, but the facts proved in no wise contradicted the nature of the instrument or impugned its consideration; and in *American Bonding, etc., Co. v. Milstead*, *supra*, which was *assumpsit* on a guaranty company's bond *non assumpsit* was pleaded, and, at page 690 of 102 Va., Judge Cardwell said: "The Court is further of opinion that the court below did not err in refusing to allow plaintiff in error to file the three special pleas offered at the February term of court, 1903, when the cause was tried. Plaintiff in error had pleaded at the prior term the general issue, and not only were the matters set up in the special pleas such as could have been proved under the general issue, but the privilege was expressly reserved to it, in the order rejecting the pleas, to offer any evidence under the general issue that was proper to be offered under the pleas tendered. and there is no suggestion anywhere in the record that plaintiff in error was prevented from introducing any evidence which it desired in support of matters stated in the pleas, or prejudiced by their rejection." It does not appear what the defenses offered by the special pleas were, and in view of the reservation made, it would seem that what was said as to what was provable under the general issue in that case was not necessary to its decision, even if the court meant to pass upon the question now under consideration.

## CHAPTER X.

### ASSUMPSIT.

- § 83. History of the action and when it lies.
- § 84. When assumpsit does not lie.
- § 85. Waiving tort and suing in assumpsit.
- § 86. Of general and special assumpsit.
  - Difference between general and special assumpsit.
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- § 87. When necessary to declare specially.
- § 88. Nature and constitution of special counts.
- § 89. Account to be filed with the declaration.
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- § 92. Misjoinder of tort and assumpsit.
- § 93. Nonassumpsit.
- § 94. Special pleas.

#### § 83. History of the action and when it lies.

As said by Chitty, "A minute inquiry into the history of this action would at this time be matter of curiosity rather than of practical utility."<sup>1</sup> Suffice it to say that, originally, the action of assumpsit was a tort action, pure and simple, to recover damages for a wrong done. It was given first for *malfeasance*, the doing of a thing a man had no right to do, then it was extended to acts of *misfeasance*, doing what a man had a right to do, but doing it in an improper manner, and was finally extended to *nonfeasance*, the failure to do what one ought to do, and hence, the breach of an executory contract.<sup>2</sup> Its nature is well suggested by its name, *assumpsit*, he has agreed or promised, which is descriptive of the defendant's undertaking.<sup>3</sup> It is the broadest in its scope and the most used of all the *ex contractu* actions, and is employed to recover damages, by way of amends, for the breach or nonperformance of a con-

1. 1 Chitty 99.

2. 2 Encl. Pl. & Pr. 988; Pollack on Contracts 127-128; Robinson v. Welty, 40 W. Va. 385, 22 S. E. 73.

3. 1 Chitty 98.

tract not under seal nor of record. The contract for the breach of which it lies may be *implied* as well as *express*, and it lies as well on a promise to do a *collateral thing*, as on one to *pay money*.<sup>4</sup> *Assumpsit* now lies in Virginia on *sealed* as well as *unsealed* contracts, since the enactment of the statute which provides that "In any case in which an action of covenant will lie there may be maintained an action of *assumpsit*."<sup>5</sup> Prior to this statute, it did not lie on contracts of *record*, such as domestic judgments or judgments of the courts of sister States, because these are of higher dignity than *simple contracts*, and the generality of the pleadings in *assumpsit* would permit of defences which are, in such cases, inadmissible.<sup>6</sup> Whether the statute has made any change in this respect has not been determined. The action of *assumpsit* as it now exists in Virginia is broader than *covenant*, for it lies on both sealed and unsealed contracts; it is more comprehensive than debt for it may be employed to recover uncertain sums and unliquidated demands as well as sums certain of money; and its scope is more extended than the statutory remedy by motion, as the latter may only be employed to recover money due *on* contract, and not damages flowing from the breach of contract. The attempt to enumerate, even partially, the instances in which this action is the appropriate form of remedy would be of no practical value. It is sufficient to say that the scope of its relief is coextensive with the realm of contract, and its applicability is only limited by the prerequisite that damages shall have resulted from the breach of contractual relations. It is pre-eminently an *equitable action*, that is to say, it is flexible, untechnical, and lends itself as a remedy under the

4. 4 Min. Inst. 428; Stephens' Pleading 133, 134; 2 Encl. Pl. & Pr. 988. As to the implied contract on the part of a grantee in a deed poll, arising from his acceptance of such deed, to perform a promise or undertaking imposed upon him in such deed, see *ante*, § 74, where it is shown that such contract is enforceable in *assumpsit*.

5. Sec. 3246a Code of Virginia. The scope of the above statute, the changes made by it in the law, and the uncertainties to which it has given rise are fully treated in the discussion of the action of *Covenant*, § 82, and the observations there made need not be repeated here.

6. See *ante*, § 71.

most diverse circumstances. As said in a case wherein it was held that assumpsit lay for money paid under a mistake, or upon a consideration which happened to fail: "The action of assumpsit is essentially an equitable action. It always lies to recover money which the defendant *ex æquo et bono* ought not to retain in his hands. It is a general rule that where one man has in his hands money, which, according to the rules of equity and good conscience, belongs to and ought to be paid to another, an action will lie for such money as money received by defendant to plaintiff's use."<sup>7</sup> Or, as differently phrased in another case: "The action for money had and received may generally be maintained where the money of one man has without consideration got into the pockets of another; or, as it is sometimes expressed, a man cannot have something for nothing; a man shall not be allowed to enrich himself unjustly at the expense of another."<sup>8</sup> To name, by way of illustration, but a very few instances where the action is appropriate, it has been held that it lies to recover compensation for services and work of different descriptions; for the sale, use, or hire of property, personal or real; upon bills of exchange, checks, promissory notes, or policies of insurance; upon awards; for a breach of promise to marry; for not delivering goods bought; for not accepting goods sold; and upon warranties express or implied.<sup>9</sup>

#### § 84. When assumpsit does not lie.

Assumpsit does not lie in any case except where damages are sought for the breach of a contract express or implied. At common law (and in Virginia before the enactment of § 3246a of the Code) it did not lie on *sealed instruments*. It does not lie nor does any other form of action lie for money paid for an

7. *Garber v. Armentrout*, 32 Gratt. 235. See also *Jackson v. Hough*, 38 W. Va. 390, 18 S. E. Rep. 575.

8. *Robinson v. Welty*, 40 W. Va. 385, 22 S. E. 73. See also *Thompson v. Thompson*, 5 W. Va. 190; *Mankin v. Jones* (W. Va.), 69 S. E. 981.

9. 1 *Chitty* 101-102. As to assumpsit on negotiable instruments against all or any intermediate number of those liable, see Code, § 2853.

illegal purpose, such as compounding a crime;<sup>10</sup> nor does it lie, as we have seen, independently of statute, to recover on judgments of a court of this State or of a sister State.<sup>11</sup>

### § 85. Waiving tort and suing in assumpsit.

We have seen that *assumpsit* is exclusively an action *ex contractu*, and that it lies only for the breach of a *contract*. What might at first glance appear an anomaly, the founding of an action of assumpsit on what was originally a *tort*, is explained by the *conclusive legal presumption* of an *implied contract* in such cases. The rule is thus stated: "Wherever a person commits a wrong against the estate of another, with the intention of benefiting his own estate, the law will, at the election of the party injured, imply a contract on the part of the wrongdoer to pay the party injured the full value of all benefits resulting to such wrongdoer; and, in such case, the injured party may elect to sue upon the implied contract for the value of benefits received by the wrongdoer."<sup>12</sup> The legal presumption of the implied contract being *conclusive*, the defendant will not be permitted to set up his tort in order to defeat the implied promise.<sup>13</sup>

Thus, the tort involved in a conversion and appropriation of one's property by another to his own use may be waived, and the injured party may bring *indebitatus assumpsit* for the value of the property on the wrongdoer's implied contract to pay for the property converted and appropriated by him.<sup>14</sup> Where there has been a tortious taking of goods, the owner may bring trespass for the taking, or waiving the trespass, he may bring trover for the conversion, or if the goods have been sold and money received, or the goods otherwise appropriated or consumed, he may waive tort altogether and bring assumpsit

10. 1 Barton's Law Practice 128.

11. See *ante*, § 71.

12. 1 Jaggard on Torts 296, 297.

13. Cooley on Torts (Students' Ed.) 130.

14. *Tidewater Quarry Co. v. Scott*, 105 Va. 160, 52 S. E. 835. See also *King v. McDaniel*, 4 Call 451. And in such case, the common count for goods bargained and sold is sufficient. *Walker v. N. & W. Ry. Co.*, 67 W. Va. 273, 67 S. E. 722.

for their value.<sup>15</sup> In *Sangster v. Com.*, Judge Moncure says: "When A wrongfully takes the property of B and sells it, B may bring trespass, trover, detinue, or assumpsit for money had and received, against A at his election. \* \* \* By bringing assumpsit he waives all claim for the wrongful detention and conversion, affirms the sale, and makes the proceeds of it money had and received to his use."<sup>16</sup> But the remedy is not restricted to the instances above mentioned. "Since one has the right to recover the proceeds of property wrongfully converted and sold, it necessarily follows that, where the plaintiff's money has been tortiously obtained by the defendant, the tort may be waived, and an action for money had and received be brought. \* \* \* For where the defendant has obtained the plaintiff's money from him by fraud and deceit, the law implies a promise by the wrongdoer to restore it because *ex æquo et bono* the defendant ought to refund the money, and to enforce such obligation the action of assumpsit lies," and the common counts are sufficient.<sup>17</sup> Where a trespasser cuts and sells, or converts to his own use, trees growing on land, the owner of the land may waive the tort, and, instead of bringing an action for the tort, sue in assumpsit and recover on the common counts for money had and received, or on a *quantum valebant* for their value; but he cannot maintain assumpsit where the title to the land is in contest between the parties, because title to real estate cannot be tried in an action of assumpsit.<sup>18</sup>

As appears by the general statement of the rule given earlier in this section, the fiction of an *implied promise* proceeds on the idea that the defendant's *estate* has been enriched and the plaintiff's diminished by the wrongful act of the defendant.<sup>19</sup>

15. *Maloney v. Barr*, 27 W. Va. 381; *McDonald v. Peacemaker*, 5 W. Va. 439.

16. 17 Gratt. 132, quoted with approval in *Booker v. Donohoe*, 95 Va. 359, 28 S. E. 584.

17. *Robinson v. Welty*, 40 W. Va. 385, 22 S. E. 73.

18. *Parks v. Morris*, 63 W. Va. 51, 59 S. E. 753; *Stephen's Pleading* 89, 90.

19. See also 15 Am. & Eng. Encl. of Law 1115; *Clark on Contracts* (2nd Ed.) 767-768.

Hence the implied *assumpsit*. It follows that where the tort in question is a mere *naked trespass*, such as an assault and battery, or an injury (unknown to the owner) done by trespassing cattle, there is no ground for any implication of a contract. Such acts would be simple wrongs, nothing more, and the plaintiff's only remedy would be in a tort action.<sup>20</sup> The fact that the tort may also be a crime, e. g., a theft, does not affect the plaintiff's right to bring *assumpsit*.<sup>21</sup> But in actions based on the conversion of property which has been sold by the defendant, it is said that the plaintiff in order to maintain *assumpsit* must have such an interest in the property as entitles him to the proceeds of the sale.<sup>22</sup>

Where the property converted has not been sold, but has been used or consumed by the tortfeasor, the authorities are in conflict as to the right of the owner of the property to waive the tort and bring *assumpsit*. The cases denying the right hold that there is no legal presumption of an implied *assumpsit* raised in such cases, and that the plaintiff's remedy is *trover*.<sup>23</sup> But the rule supported by the great weight of authority, and certainly by *reason*, is that in such cases *assumpsit* will lie; not for *money* had and received, because the defendant has received no money, but for the value of goods sold and delivered.<sup>24</sup> The Virginia and West Virginia cases accord with this majority rule.<sup>25</sup> Where *assumpsit* is brought there is no recovery of damages on account of the tort, but the recovery is limited to the amount received from the sale, or to the

20. 15 Am. & Eng. Encl. of Law 1112; Cooley on Torts (Students' Ed.) 131-132; Clark on Contracts (2nd Ed.) 767-768; Stephen's Pleading, § 47.

21. Clark on Contracts (2nd Ed.) 768; 15 Am. & Eng. Encl. of Law 1114, note; Stephen's Pleading, § 47.

22. 15 Am. & Eng. Encl. of Law 1114.

23. 15 Am. & Eng. Encl. Law (2nd Ed.) 1116; Clark on Contracts (2nd Ed.) 780; note to *Woodruff v. Zaban* (Ga.), 17 Anno. Cases 975.

24. Note to *Woodruff v. Zaban* (Ga.), 17 Anno. Cases 975 (where the Virginia and West Virginia courts are given as supporting the majority rule); Stephen's Pleading 88, 89.

25. *Tidewater Quarry Co. v. Scott*, 105 Va. 160, 52 S. E. 835; *Maloney v. Barr*, 27 W. Va. 381; *Walker v. N. & W. R. Co.*, 67 W. Va. 273, 67 S. E. 722; *McDonald v. Peacemaker*, 5 W. Va. 439.

actual value of the goods used or consumed.<sup>26</sup> The plaintiff's election to waive the tort, once made, is final; he is bound by it, and if he brings assumpsit he will not afterwards be permitted to sue in tort.<sup>27</sup>

### § 86. Of general and special assumpsit.

*The Common Counts—Why So Called.*—As said by Mr. Tucker: "The declaration in assumpsit is either upon an express or an implied contract. And in the same declaration may be joined several counts, some of which may be founded upon a special or express agreement, and others merely upon the agreement which is implied by law from the transaction between the parties. That upon the express agreement is called the special count, and the others are called the general counts."<sup>28</sup> The *common counts* are so called because they are the counts applicable to the causes of action most commonly arising, and, consequently, the ones most commonly used. The common counts are also spoken of as *general assumpsit* for the same reason.<sup>29</sup> They are short general forms, very comprehensive in their scope, and founded upon an alleged indebtedness.<sup>30</sup> The whole discussion of *general* and *special* assumpsit simply resolves itself into the inquiry whether in the particular instance the general *formulae* known as *common counts* may be used as the declaration, or the case is such that they are inapplicable, and the plaintiff will have to distinctly state his cause of action according to the general rules of pleading, i. e., declare *specially*. The common counts are always substitutional and never exclusive in their use, and in every case where assumpsit is brought it is perfectly *proper* to declare *specially*; the common counts, where applicable, are adopted for convenience and brevity, or as a sort of *tabula in naufragio* to support a recovery in the event of the special count proving defective or inapplicable to the case which de-

26. 15 Am. & Eng. Encl. of Law 1115; Note in 17 Anno. Cases, at page 977.

27. 15 Am. & Eng. Encl. of Law 1112; Stephen's Pleading, § 49.

28. 2 Tucker's Com. 143; 2 Encl. Pl. & Pr. 990.

29. Stephen's Pleading, § 82, note; 2 Encl. Pl. & Pr. 1002.

30. 2 Encl. Pl. & Pr. 1002; 4 Min. Inst. 694.

velopes on the trial. A form of declaration containing them is given in the margin.<sup>31</sup>

31. CIRCUIT COURT FOR \_\_\_\_\_ COUNTY, TO-WIT:—  
\_\_\_\_\_ RULES, 19—.

C. C. complains of D. D. of a plea of trespass on the case in assumpsit; for this, to-wit: that heretofore, to-wit, on the \_\_\_\_\_ day of \_\_\_\_\_, in the year of our Lord nineteen hundred and \_\_\_\_\_, the said defendant was indebted to the said plaintiff in the sum of \_\_\_\_\_ dollars, for goods, wares and merchandise before that time by the said plaintiff sold and delivered to the said defendant, and at his special instance and request; and also in the further sum of \_\_\_\_\_ dollars for the work and labor, care and diligence of the said plaintiff before that time done, performed and bestowed in and about the business of the said defendant, and for him, and at his special instance and request; and also in the sum of \_\_\_\_\_ dollars, for money before that time lent and advanced to and paid, laid out, and expended for the said defendant, and at his like special instance and request; and also in the further sum of \_\_\_\_\_ dollars, for other money by the said defendant before that time had and received to and for the use of the said plaintiff; and being so indebted, the said defendant, in consideration thereof, afterwards, to-wit, on the day and year aforesaid, undertook and faithfully promised the said plaintiff to pay him the said several sums of money in this count mentioned, when the said defendant should be thereunto afterwards requested.

And for this also, that heretofore, to-wit, on the day and year last aforesaid, the said defendant accounted with the said plaintiff of and concerning divers other sums of money before that time due and owing to the said plaintiff, and then in arrear and unpaid; and upon such accounting, the said defendant was found in arrear, and indebted to the said plaintiff in the further sum of \_\_\_\_\_ dollars, and being so found in arrear and indebted, he, the said defendant, in consideration thereof, undertook and then faithfully promised the said plaintiff to pay to him the said sum of money in this count last mentioned, when he, the said defendant, should be thereunto afterwards requested.

Nevertheless the said defendant, not regarding his said several promises and undertakings, hath not as yet paid to the said plaintiff the said several sums of money, or any or either of them, or any part thereof, although often requested so to do; but to pay the same hath hitherto wholly neglected and refused, and still doth neglect and refuse, to the damage of the said plaintiff of \_\_\_\_\_ dollars. And therefore he brings his suite.

*H. C. C., p. q.*

The above form is taken from 4 Min. Inst. 1671, 1672.

Prof. Graves has very tersely, and at the same time completely, stated the general form and nature of the common counts in assumpsit as follows: "By the common-law system of pleading there are in *assumpsit* four kinds of general counts, or *common counts*, as they are usually called, viz: (1) the *indebitatus assumpsit* count; (2) the *quantum meruit* count; (3) the *quantum valebant* count; and (4) the account stated. The *indebitatus assumpsit* count alleges that the defendant was, at a certain time and place, indebted to the plaintiff *in a named sum of money* for goods sold, work done, money lent, money paid at the defendant's request, or for money had and received by the defendant for the plaintiff's use; and that *being so indebted*, the defendant, in consideration thereof, at a certain time and place, *promised* the plaintiff to pay him the said sum of money on request. The *quantum meruit* count, instead of stating that the defendant was indebted to the plaintiff in a *certain sum* of money for work, etc., as in the *indebitatus* count, states that in consideration that the plaintiff had done work at the request of the defendant, he, the defendant, promised the plaintiff to pay him *so much money as he reasonably deserved to have (quantum meruit)*; and the count then avers that the plaintiff deserved to have a named sum, whereof the defendant had notice. The *quantum valebant* count is applicable to a sale of goods, and alleges that the defendant promised to pay the plaintiff for certain goods sold and delivered by him to the defendant *so much as the goods were reasonably worth (quantum valebant)*, and concludes with an averment that they were reasonably worth a named sum, and that the defendant had notice thereof. The *account stated* alleges that the defendant at a certain time and place accounted with the plaintiff (*insimul computassent*) of and concerning divers sums of money before then due from the defendant to the plaintiff, and then in arrear and unpaid, and that upon such accounting the defendant was found to be in arrear to the plaintiff in a named sum, and that being so found in arrear and indebted, the defendant, in consideration thereof, undertook and faithfully promised the plaintiff to pay him the same on request."<sup>32</sup> The common

32. Graves' Notes on Pleading (old) 108-109. See also 1 Chitty 339-342; 1 Barton's Law Practice 335-336; 4 Min. Inst. 698-701; 2 Tucker's Com. 146-147.

breach alleged to all these counts may be noted in the form of declaration hereinbefore given.

Of the counts of *quantum valebant* for goods sold, and *quantum meruit* for work and labor, Prof. Graves says: "In modern practice it is not necessary or usual to insert them. Their employment originated in the idea that where the *indebitatus assumpsit* alone was employed no recovery could be had unless the plaintiff proved the *exact sum* in which he alleged the defendant to be indebted to him. \* \* \* But it is now settled that under the *indebitatus* count, or counts, for goods sold, work done, etc., the plaintiff may recover what may be due him, although no specific price or sum was agreed upon; while, on the other hand, it is held that under the *quantum valebant* and *quantum meruit* counts no recovery can be had if the evidence shows that the goods were sold or the work done *for a certain price or compensation*. Since, therefore, the *indebitatus* counts are necessary to meet the contingency of a certain sum due by express contract, and as the *quantum meruit* and *quantum valebant* counts are not needed to accompany the *indebitatus* counts even when no sum certain has been agreed on, the result has been that the *quantum meruit* and *quantum valebant* counts are now rarely used."<sup>33</sup>

In practically every declaration in assumpsit where the cause of action is declared on specially, it is advisable to *include* the common counts. The reason is that if the plaintiff fail in his proof of the special and express contract declared on, he may, in many instances, nevertheless recover under the common counts on an implied contract.<sup>34</sup> An illustration is afforded by the case of *Davison v. Ford*,<sup>35</sup> in which, in assumpsit, on a special count, the declaration alleged that for the dead carcasses of certain cattle sold to defendant by plaintiff defendant was to pay plaintiff *the value of the cattle before they had been killed*. The evidence showed that for the *carcasses* defendant promised to pay \$30 a head. It was held that this was a

33. Graves' Notes on Pleading (old) 110. See also 4 Min. Inst. 700; 1 Chitty 341, 342.

34. See 4 Min. Inst. 695, for illustrations of cases where this might occur.

35. 23 W. Va. 617.

fatal variance; but that if there had been a common *indebitatus assumpsit* count in the declaration, plaintiff could have recovered on such proof. The rule is thus stated: "Where a party declares on a special contract, seeking to recover thereon, but fails in his right so to do altogether, he may recover on a general count, if the case be such that, supposing there had been no special contract, he might still have recovered for money paid, or for work and labor done, or for use and occupation, or for money had and received."<sup>36</sup>

The recitals in the common counts are sometimes slightly varied from those given in the form in the margin, *supra*, in order to meet cases which come within the scope of general assumpsit but not within the letter of the usual forms. Thus, it is held, that, while rent is recoverable in general assumpsit, there must be included a common count for *use and occupation of land*, as the other common counts do not justify a recovery for rent.<sup>37</sup>

A demurrer to the common counts in assumpsit, in the usual form, will be overruled. And this is true although there be joined with the common counts special counts on a contract which it is contended is not admissible in evidence under the common counts. Whether a written agreement can be introduced to sustain a recovery under the common counts must be determined when the evidence is offered. The question cannot be raised by a demurrer to said counts.<sup>38</sup>

36. 1 Chitty 340, note; *Bannister v. Coal & Coke Co.*, 63 W. Va. 502, 61 S. E. 338; *Lord v. Henderson*, 65 W. Va. 321, 64 S. E. 134.

37. *Lawson v. Williamson Coal & Coke Co.*, 61 W. Va. 669, 57 S. E. 258; *Sandusky v. Gas Co.*, 63 W. Va. 260, 59 S. E. 1082. Under a common count for use and occupation of land, a written agreement to pay rent is admissible to prove the amount due. *Goshorn v. Steward*, 15 W. Va. 657; *Lawson v. Williamson Coal & Coke Co.*, *supra*. For the form of a common count for use and occupation of land, see 2 Chitty 40. For forms of various other common counts adapted to different circumstances, see *idem*, 36-90.

38. *Portsmouth Refining Co. v. Oliver Refining Co.*, 109 Va. 513, 64 S. E. 56; *Bannister v. Coal & Coke Co.*, 63 W. Va. 502, 61 S. E. 338. And where the common counts in a declaration in assumpsit are good, a demurrer to the entire declaration will be overruled. *Grubb v. Burford*, 98 Va. 553, 37 S. E. 4.

*General Assumpsit on an Implied Liability.*

As we have seen, the distinguishing feature of general assumpsit is that it lies exclusively on *implied* contracts, and, in those instances where the declaration may be general even though there has been a special and express contract, the cause of action is the *implied legal liability*, and the recovery is based thereon; the special contract being but evidence of the measure of damages. It is proposed, in this connection, to discuss briefly some of the instances in which the law, in the absence of an actual contract, will imply an obligation to pay, enforceable by general assumpsit. Any extended discussion of this principle would involve a treatment of the law of *quasi* contracts. This would be out of place here, and only some of the general principles enunciated by the courts of Virginia and West Virginia will be noticed.

In general, where the plaintiff shows that he, either by compulsion of law, or to relieve himself from liability, or to save himself from damage, has paid money which the defendant ought to have paid, the count for money paid will be supported; and where money has been paid for the use of the defendant, the request necessary to sustain a recovery may be either express or implied; and the request, as well as the promise, will be implied where the consideration consists in the plaintiff's having been compelled to do that to which the defendant was legally compellable, or where the defendant has adopted and enjoyed the benefit of the consideration.<sup>39</sup> Wherever one person requests or allows another to assume such a position that the latter may be compelled by law to discharge the former's legal liabilities, the law imports a request and promise by the former to the latter—a request to make the payment and a promise to repay—and the obligation thus created may be enforced by assumpsit for money paid, laid out, and expended.<sup>40</sup> So also, the common counts may be supported by evidence that the defendant obtained the plain-

39. *Nutter v. Sydenstricker*, 11 W. Va. 535; *Lee v. Va. Bridge Co.*, 18 W. Va. 299.

40. *Barrett v. Armstrong*, 56 W. Va. 293, 49 S. E. 140; *Teter v. Teter*, 65 W. Va. 167, 63 S. E. 967.

tiff's money by fraud, false color, or pretense;<sup>41</sup> for "wherever one person has in his hands money equitably belonging to another, that other person may recover it by *assumpsit* for money had and received."<sup>42</sup> The action of *assumpsit* lies in almost every case where one receives money which in equity and good conscience belongs to another, or ought to be refunded. While it lies upon an express promise, such a promise is not necessary. It may be maintained wherever anything is received or done from the circumstances of which the law implies a promise of compensation. The implied promise creates all the privity necessary to support the action.<sup>43</sup> Such implication, moreover, does not alone arise from the payment or receipt of money. Where one renders services for another at the latter's request, the law, in the absence of an express agreement, implies a promise to pay what the services are reasonably worth, unless it can be inferred from the circumstances that the services were to be rendered without compensation.<sup>44</sup>

However, an action of *assumpsit* does not lie for money voluntarily paid for another, without either the request or the ratification of the one for whom the money is paid; for no *assumpsit* is raised by the mere voluntary payment of the debt of another.<sup>45</sup> So, also, as there is no privity of contract between the payee or holder of a check and the bank upon which it is drawn, unless the bank has in writing accepted or certified such check, there can be no recovery by such payee against the bank under a count in *assumpsit* for money had and received, where the payee's agent has endorsed and collected the check and misap-

41. *Robinson v. Welty*, 40 W. Va. 385, 22 S. E. 73.

42. *Langhorne v. McGhee*, 103 Va. 281, 49 S. E. 44.

43. *B. & O. R. Co. v. Burke*, 102 Va. 643, 47 S. E. 824.

44. *Briggs v. Barnett*, 108 Va. 404, 61 S. E. 797. Such an inference that services were to be rendered without compensation is legally drawn in the case of persons living together as members of the same family. In such cases the law implies no promise of remuneration for services rendered to each other. *Stoneburner v. Motley*, 95 Va. 784, 30 S. E. 364; *Beale v. Hall*, 97 Va. 383, 34 S. E. 53; *Coons v. Coons*, 106 Va. 572, 56 S. E. 576; *Riley v. Riley*, 38 W. Va. 283, 18 S. E. 569.

45. *Briggs v. Barnett*, 108 Va. 404, 61 S. E. 797; *Crumlish v. Central Imp. Co.*, 38 W. Va. 390, 18 S. E. 456.

propriated the proceeds, although such agent was not authorized to endorse or collect the check, and the bank therefore paid the money to an unauthorized person.<sup>46</sup>

*Difference between General and Special Assumpsit.*

There is nowhere else in the books so clear a discussion of the subjects of general and special assumpsit as that contained in the note of Hare & Wallace to the case of *Cutter v. Powell*.<sup>47</sup> The authority of the work of these annotators is evidenced by the frequency of its citation by the courts, and they have treated the subject so clearly that, as has been said, "there is little left but to give them the proper credit."<sup>48</sup> In the following pages their work has been freely drawn from, with the endeavor, in each instance, to give them the proper credit.

They say:<sup>49</sup> "The confusion and obscurity which exist in the books, in relation to this matter of special and general assumpsit, have arisen from an erroneous impression that, when there has been a special contract, and the plaintiff brings general assumpsit, the special contract of the defendant is in some degree, or to some extent, the ground of the plaintiff's recovery. This impression arises from an error as to the legal nature and ground of general assumpsit, which rest only on a *legal* liability springing out of a consideration received; and the difficulty clears away if it is kept always in mind, that in no case in which general assumpsit is brought, though there may have been a special agreement, does the plaintiff legally ground his claim at all upon the special agreement or promise, nor derive any right from it, nor make it any part of his case: he proceeds exclusively upon the implied legal engagement or obligation of the defendant, to pay the value of services ordered or received by him. In special assumpsit, the express promise of the defendant is an integral essential part of the plaintiff's right and of his declaration, *because* it fixes the measure of damage to which he is entitled: but in general assumpsit; he claims, *not* the conventional,

46. *B. & O. R. Co. v. Bank*, 102 Va. 753, 47 S. E. 837.

47. 2 *Smith's Leading Cases* (5th Am. Ed.) 22-53.

48. *Stephen's Pleading* (2nd Edition by Andrews), note to § 82.

49. Note to *Cutter v. Powell*, 2 *Smith's Leading Cases* (5th Am. Ed.) 51.

but the legal measure of damages belonging to the consideration which he proves, and that is the actual value of the consideration; and the promise or express contract can have no weight in the proceeding, except as *evidence* of the fact of consideration or of its value. Whenever, therefore, the plaintiff brings general assumpsit, he grounds his claim *not* upon the special contract. *But*, the rule of law is that, if the defendant can show that there has been a special contract in relation to the matter, he will defeat the plaintiff's general assumpsit, for the law will not imply a promise where there has been an express one; that is to say, where there has been a conventional measure of damages, foreshadowed by mutual agreement, the plaintiff shall not cut loose from it, and claim the legal measure of damages."<sup>50</sup>

*When General Assumpsit Will Not Lie.*

In general, it may be stated that "while a special contract remains open, i. e., unperformed, the party whose part of it is unperformed cannot sue in *indebitatus assumpsit* to recover a compensation for what he has done, until the whole is completed."<sup>51</sup> So it is held that damages for the breach of a special unexecuted contract are not recoverable under the common counts in assumpsit.<sup>52</sup>

50. So, in *Buena Vista Co. v. McCandlish*, 92 Va. 297, 23 S. E. 781, it was held that in such cases the special contract is not introduced to support the form of action, but as evidence to prove the plaintiff's case and that it makes no difference that the special contract is *under seal*. See also *Newberry Land Co. v. Newberry*, 95 Va. 111, 27 S. E. 897. In *Houston v. McNeer*, 40 W. Va. 365, 22 S. E. 80, the court said: "In no case in which general assumpsit is brought, though there may have been a special agreement, does the plaintiff legally ground his claim at all upon the special agreement or promise (or warranty), nor derive any right from it, nor make it any part of his case. He proceeds exclusively upon the implied legal engagement or obligation. See *Cutter v. Powell*, 2 Smith's Lead. Cas. (8th Ed.), pt. 1, p. 48. Whenever, therefore, the plaintiff brings general assumpsit, he grounds his claim, not on the special contract \* \* \*, but upon an existing precedent debt or liability."

51. Note to *Cutter v. Powell*, 2 Smith's Leading Cases (5th Am. Ed.) 27; Stephen's Pleading, § 82, note; 2 Encl. Pl. & Pr. 991, note. The above proposition is subject to many exceptions and limitations set forth in the following pages.

52. *Mankin v. Jones* (W. Va.), 69 S. E. 981.

*When General Assumpsit Will Lie, Though There Has Been a Special Contract.*

(1) *Special Contract Fully Executed.*—"Where there has been a special contract, the whole of which has been executed on the part of the plaintiff, and the time of payment on the other side is past, a suit may be brought on the special contract, or a general assumpsit may be maintained; and in the last case the measure of damages will be the rate of recompense fixed by the special contract."<sup>53</sup>

The above rule only applies to those cases where the contract calls for the payment of *money* by the defendant. "When the remuneration was not to be in money, but was to be in any other kind of personal property, or in personal services, or in the doing any collateral act (as the delivery of a bond or the like), there the general *indebitatus assumpsit* count is not sufficient, but the declaration must be special."<sup>54</sup>

As a corollary of the above rule, it is held that the holders of bills of exchange, notes, checks, bonds, or orders, may recover on the money counts. In such cases the action is not founded on the bill, note, or other instrument, but upon the implied undertaking, and the bill or note is only evidence of that undertaking. The above is stated to be the rule as to the immediate parties to the instrument, and also as to actions by an endorsee

53. Note to *Cutter v. Powell*, 2 Smith's Leading Cases (5th Am. Ed.) 41; 2 Encl. Pl. & Pr. 991, note.

Where a plaintiff has done everything which has to be executed on his part, and nothing remains to be done but the performance of a duty on defendant's part to pay money due the plaintiff under contract, the plaintiff may recover on the common counts in assumpsit, and need not declare specially, however special the contract which has been performed may have been. But in such cases, the measure of damages is fixed by the special contract. *B. & O. R. Co. v. Polly, Woods & Co.*, 14 Gratt. 447; *Brooks v. Scott*, 2 Munf. 344; *Brown v. Ralston*, 9 Leigh 532; *Jackson v. Hough*, 38 W. Va. 390, 18 S. E. 575; *Empire Coal & Coke Co. v. Hull Coal & Coke Co.*, 51 W. Va. 474, 41 S. E. 917; *Lawson v. Williamson Coal & Coke Co.*, 61 W. Va., 669, 57 S. E. 258; *Lord v. Henderson*, 65 W. Va. 321; 64 S. E. 134; *Bannister v. Coal & Coke Co.*, 63 W. Va. 502, 61 S. E. 338; *Mankin v. Jones* (W. Va.), 69 S. E. 981.

54. *Brooks v. Scott*, 2 Munf. 344 (where the remuneration was to be in *tobacco*).

or assignee against a remote endorser or assignor, or the payee, of a note or bond. But the rule is otherwise where it is shown that the defendant has actually never received any consideration, as, e. g., that the money was lent or paid to a third person on the defendant's credit, or where the defendant is simply a surety and no consideration passed to the defendant from the plaintiff, and they had not had any dealings together, or where the defendant was a mere accommodation endorser, and had really received no money. In such cases the obligation of the defendant is a mere collateral one and there should be a special count on the instrument. The fact that the note was not given for *money*, but for *land* or *work*, will not defeat the action on the common counts.<sup>55</sup> Thus, an unpaid check may be offered in evidence under the money counts in an action against the drawer; and if there is no other evidence in the case, it is of itself sufficient to entitle the plaintiff to recover on those counts.<sup>56</sup>

(2) *Special Contract Deviated from by Common Consent.*—“If there has been a special contract which has been altered or deviated from in particulars, by common consent, general assumpsit will lie when the work has been performed; and, in such case, if the original contract has not been wholly lost sight of in the work as executed, the rates of recompense fixed by it, shall be the measure of damages as to those parts in which it can be traced in the performance; and for the new or extra work, the recovery shall be upon a *quantum meruit*.”<sup>57</sup>

55. 4 Rob. Prac. 547-554; *Bank of the U. S. v. Jackson*, 9 Leigh 221; *Drane v. Scholfield*, 6 Leigh 386 (opinion of Judge Tucker); *Mackie v. Davis*, 2 Wash. 219; *Hughes v. Frum*, 41 W. Va. 445, 23 S. E. 604; *Walker v. Henry*, 36 W. Va. 100, 14 S. E. 440; *Butterworth v. Ellis*, 6 Leigh 106; *McWilliams v. Willis*, 1 Wash. 199; *Anderson v. Kanawha Coal Co.*, 12 W. Va. 526. See, however, *Merchants' & Mechanics' Bank of Wheeling v. Evans*, 9 W. Va. 373, where it was held that on the common counts for *money loaned*, in an action of assumpsit, the plaintiff may recover of all the makers of a promissory note, though the money for which the note was given was received by one of them only, and the others were sureties.

56. *Blair v. Wilson*, 28 Gratt. 165.

57. Note to *Cutter v. Powell*, 2 Smith's Leading Cases (5th Am. Ed.) 42.

Of the two classes [(1) and (2)] above mentioned, the authors of the note say :

The defendant "shall not be permitted to defeat a just claim by setting up a contract which he himself has broken; and the law, at the same time, secures justice to him by receiving as evidence of the value of the consideration as between the parties, the prices agreed to be paid."<sup>58</sup>

(3) *Work Not Done According to Special Contract, But Accepted—Deviations.*—"If there has been a special contract which remains unaltered, and the work has been performed, but not according to the terms of the contract, so that the plaintiff could recover nothing in a special assumpsit on the contract, the question whether he can recover, in a *quantum meruit*, the value which the work is of to the defendant will depend substantially upon the question, whether the work done is by the defendant's consent or against it. If he has accepted and retained the work, when finished, his consent is clear: if he has rejected the performance when completed, or has done nothing by which he adopts, or benefits himself, of the work, still, it seems, that if he knew of the altered work going on, and did not dissent, prohibit, or stop the workman, his assent is to be presumed; for when the defendant knows that the plaintiff is going on, *bona fide*, under an honest impression that he is entitling himself to a recompense, it is fraud in him to lie by, and suffer the plaintiff to lose his labor, and then get the work for nothing; for in many of these cases, the work will become the property of the defendant necessarily; as in the case of an article made out of his materials, or a house built upon his ground."<sup>59</sup>

Of the class above mentioned the authors say :

"The plaintiff derives no right from the express contract, he grounds his claim upon the consideration rendered, and the defendant's request implied from his acquiescence or acceptance: the defendant cannot defeat him by setting up the express contract, for that is a totally different contract from the one declared on: that express contract remains untouched, and if it

58. *Idem*, 51.

59. *Idem*, 42.

be not actually waived or abandoned, will sustain an action by the defendant for the breach of it.”<sup>60</sup>

Thus, a plaintiff having done work under a special contract, but not in full compliance therewith, and the same having been accepted by defendant, who was thereby benefited, may recover the contract price therefor under a *quantum meruit*, less compensation for imperfections of the work or material; and in such a case the special contract would furnish the criterion for the measurement of remuneration. The acceptance of work done admits benefits, and that remuneration is due therefor.<sup>61</sup> But “One, unwilling, ought not to be made liable for a debt, or when ignorant of facts making him liable. There ought to be a request, or, if he is to be made liable because he derives benefit, he ought to have knowledge of such circumstances as would tell him that in law he would be liable.”<sup>62</sup> On this principle where A contracted with B, a contractor, to furnish all materials for, and build complete, a house, and C furnishes some material used in construction, A knowing of his doing so, but not knowing but that C was furnishing such material for B, the contractor, and the building, when completed, was accepted by A from B, no implied contract arose in favor of C to compel A, the owner of the house, to pay for such material. There is no privity either in fact or law between A and C.<sup>63</sup>

(4) *Special Contract Partly Performed*.—“If there has been a special contract, and the plaintiff has performed a part of it according to its terms, and been prevented by the act or consent of the defendant, or by the act of the law, from performing the residue, he may, in general assumpsit, recover compensation for the work actually performed, and the defendant cannot set up the special contract to defeat him.”<sup>64</sup>

Of the above class the authors say: “It would be obviously

60. *Idem*, 51, 52.

61. *Smith v. Packard*, 94 Va. 730, 28 S. E. 586; *Railroad Company v. Lafferty*, 2 W. Va. 109; *Empire Coal & Coke Co. v. Hull Coal & Coke Co.*, 51 W. Va. 474, 41 S. E. 917.

62. *Limer v. Trader's Co.*, 44 W. Va. 175, 28 S. E. 730.

63. *Limer v. Trader's Co.*, *supra*.

64. Note to *Cutter v. Powell*, 2 *Smith's Leading Cases* (5th Am. Ed.) 43.

unjust to allow him (the defendant) to defeat the plaintiff by alleging the special agreement which he has violated and rejected."<sup>65</sup>

In accordance with the above principle, the Virginia court has said: "If a party is prevented from fully performing his contract by the fault of the other party, it is clear that the party thus at fault cannot be allowed to take advantage of his own wrong, and screen himself from payment for what has been done under the contract. The law will thereby imply a promise on his part to remunerate the other party for what he has done at his request, and upon this promise an action may be brought."<sup>66</sup> So, where a common carrier contracted to deliver a crop of wheat at an agreed price per bushel, and a large proportion of the crop was delivered in good order; but from the unavoidable effects of a storm—inevitable accident—a small part was delivered in a damaged condition, and another small portion was lost, it was held that in an action by the carrier for the freight, he was entitled to recover, under the common *indebitatus* count, the agreed price for the whole quantity so delivered or lost.<sup>67</sup>

Where the contract, though partly performed, has been abandoned by mutual consent, the plaintiff may resort to the common counts alone for remuneration for what he has done under the special agreement.<sup>68</sup>

If money be paid on a contract of sale, which is wholly rescinded, either by the mutual consent of the parties, or by virtue of a clause contained therein, or the consideration of which wholly fails, the party making such payment, if he has been guilty of no fraud or illegal conduct in the transaction, may recover the money under the common counts for money had and received; and this is the usual and better mode of declaring in such cases, though a special count may be used. In such cases

65. *Idem*, p. 52.

66. *Smith v. Packard*, 94 Va. 730, 27 S. E. 586 (quoting from 2 Parson's on Contracts 522). See also *Barrett v. Raleigh Coal & Coke Co.*, 51 W. Va. 416, 41 S. E. 220 (common counts appropriate means of recovery).

67. *Galt v. Archer*, 7 Gratt. 307.

68. *Railroad Co. v. Lafferty*, 2 W. Va. 109; *Empire Coal & Coke Co. v. Hull Coal & Coke Co.*, 51 W. Va. 474, 41 S. E. 917.

the special contract is not introduced to support the form of action, but as evidence to prove the plaintiff's case, and it makes no difference that the special contract is under seal.<sup>69</sup>

(5) *Part Performance, and Abandonment of Residue.*—“But if there has been an entire executory contract, and the plaintiff has performed a part of it, and then willfully refuses, without legal excuse and against the defendant's consent, to perform the rest, he can recover nothing either in general or special assumpsit.”<sup>70</sup>

The above rule, however, only applies “where the contract is entire and indivisible, and by the nature of the agreement, or by express provision, nothing is to be paid till all is performed; but an agreement, embracing several particulars, though made at one time and about one affair, may yet have the nature and operation of several different contracts. \* \* \* It seems therefore, that if, by operation of law, or by the terms of the agreement, certain sums become due upon the performance of certain separate parts of the work, the consideration then is severable, and distinct legal assumpsits arise, and an action for such particular sums may be maintained on performance of such parts of the work. And in construing the consideration as entire and distributed, the law will be guided by a respect to general convenience and equity, and by the good sense and reasonableness of the particular case; for it must be supposed that it was the intention of the parties that such construction should take place in the occurrence of contingencies not contemplated and provided for at the making of the contract. \* \* \* And even

69. *Johnson v. Jennings*, 10 Gratt. 1; *Buena Vista Co. v. McCandlish*, 92 Va. 297, 23 S. E. 781; *Newberry Land Co. v. Newberry*, 95 Va. 111, 27 S. E. 897; *Robinson v. Welty*, 40 W. Va. 385, 22 S. E. 73. If the consideration wholly fails, and the plaintiff *does* declare specially, a special count to recover the payments made (on the purchase price of a tract of land) which avers a state of facts which, if true, shows that the plaintiff never received anything under the contract of sale, and that the defendant cannot convey what he contracted to convey, sufficiently avers a substantial, if not a total failure of consideration, and is a good count. *Riverside Co. v. Husted*, 109 Va. 688, 64 S. E. 958.

70. Note to *Cutter v. Powell*, 2 Smith's Leading Cases (5th Am. Ed.) 44.

though the consideration and the contract be entire, by the apparent terms of the agreement, yet the circumstances may be such as to entitle the plaintiff in law to recover a ratable recompense upon partial performance; for as the question of dependent and independent entire promises depends wholly on intention and equity, it is obvious that there may be an intermediate class of cases, where partial performance entitles to partial recovery and entire performance must be precedent to a recovery of the whole." And, in relation to this point, it is the rule "that where an entire work is to be done, for a certain sum, of which parts are to be paid at fixed periods, during the time in which the work should be going on, here the performance is neither wholly dependent, nor wholly independent; but the plaintiff may recover an instalment, at the period fixed, by showing a ratable performance, but not the whole until performance is complete."<sup>71</sup>

The case of a servant hiring himself for a certain period, as for an entire year, at a fixed sum for the year, and then quitting, the employment before the contract period of his service has expired, furnishes an illustration of the above rule. In such cases, as a general rule, at any rate where the servant is a mere menial or ordinary one, "the court may well infer or the jury find from the general and known practice and usage in such cases, that, though the contract is entire, yet the compensation is payable by instalments at certain periods, as, a week, month, or quarter, according to the kind of service, except where there is a clear understanding that nothing shall be due till the year of service is wholly ended. The servant then may recover a ratable recompense for what service he has rendered, and the master will have his cross action for breach of the entire contract: and thus justice will be reached, and no legal principle disturbed."<sup>72</sup>

(6) *Special Contract Void, Voidable, or, by Defendant's Fault, Impossible to Perform.*—"If the special contract under which partial service is performed be void or voidable, and voided, or from the defendant's fault impossible to be per-

71. Note to *Cutter v. Powell*, 2 Smith's Leading Cases (5th Am. Ed.) 45, 46.

72. *Idem*, 47. See, as well illustrating this principle, the case of *Matthews v. Jenkins*, 80 Va. 463.

formed, it, of course, cannot be set up to defeat the plaintiff's *quantum meruit*."<sup>73</sup>

Of this class, the authors say: "Where the special contract is not legally binding, of course it cannot stand in the way."<sup>74</sup>

Thus, in *McCrowell v. Burson*,<sup>75</sup> defendant employed plaintiff by parol contract to furnish labor and materials to build a house, and agreed to pay him in money, merchandise and *land*. Plaintiff incurred expense in preparing for the work, and defendant refused to let him do it. Plaintiff brought an action of assumpsit, with a count on the special contract, and with common counts for labor done and materials furnished at defendant's request. The court held that the special contract could not be enforced because, though it was intended to pass ownership of real estate it was not in writing and signed by the defendant; but that, though the special contract was unenforceable yet the defendant was liable under a new implied contract for the work done and materials furnished. So, it is said in *Clark on Contracts*,<sup>76</sup> "Where an agreement is not illegal, but merely void, or unenforceable, and one of the parties refuses to perform his promise after performance or part performance by the other, the law will create a promise to pay for the benefits received." Illustrations given are cases of contracts which are unenforceable because of noncompliance with the statute of frauds.

### § 87. When necessary to declare specially.

"Special assumpsit is the *only* appropriate remedy to recover what is due upon or for the breach of an express simple contract when the plaintiff grounds his cause of action upon the contract."<sup>77</sup>

Where the special agreement continues in force the plaintiff must ground his action thereon and, consequently, must always declare specially.<sup>78</sup> Thus where the action is for a breach of

73. Note to *Cutter v. Powell*, 2 Smith's Leading Cases (5th Am. Ed.) 48.

74. *Idem*, 52.

75. 79 Va. 290.

76. P. 552 (2nd Ed.).

77. Stephen's Pleading, note to § 82; 2 Encl. Pl. & Pr. 990.

78. 2 Encl. Pl. & Pr. 991, note; Graves' notes on Pleading (old) 112.

promise to marry, for failure to perform stipulated services, or for failure to accept and pay for goods sold, it is apparent that in order to recover the plaintiff must show a special contract and rely on it as the basis of his action; and, under the rule above stated, this necessitates a special count on the contract.<sup>79</sup> So, *damages* for the breach of a special unexecuted contract are not recoverable under the common counts in *assumpsit*;<sup>80</sup> and general *indebitatus assumpsit* does not lie for the breach of an express contract of warranty.<sup>81</sup> It is obvious that in such cases the plaintiff must ground his action upon the express contract.

It is also to be remembered that general *indebitatus assumpsit* only lies where the remuneration is to be in money. "When the remuneration was not to be in money, but was to be in any other kind of personal property, or in personal services, or in the doing any collateral act, (as the delivery of a bond or the like), there the general *indebitatus assumpsit* count is not sufficient, but the declaration must be special."<sup>82</sup>

### § 88. Nature and constitution of special counts.

*General Observations.* With the aid of the liberal statutes in this State, one of which provides that: "No action shall abate for want of form, where the declaration sets forth sufficient matter of substance for the court to proceed upon the merits of the cause,"<sup>83</sup> and the other that, on a demurrer, the court shall not regard any defect or imperfection in the declaration unless there be omitted something so essential to the action that judgment according to law and the very right of the cause cannot be given,<sup>84</sup> there should be no difficulty; in most cases, in drawing a good special count in *assumpsit*. If the pleader but keep in mind that he is endeavoring to state the *breach* of a *contract*, and his *damages* sustained as a consequence, and is careful to so state his

79. Graves' Notes on Pleading (old) 112; 1 Chitty 348.

80. Mankin v. Jones (W. Va.), 69 S. E. 981.

81. Robinson v. Welty, 40 W. Va. 385, 22 S. E. 73; Houston v. McNeer, 40 W. Va. 365, 22 S. E. 80.

82. Brooks v. Scott, 2 Munf. 344 (where the remuneration was to be in *tobacco*).

83. Code, § 3246.

84. Code, § 3272.

case as to show that the contract was a valid one, and the manner in which its *provisions* have been violated by the defendant, he cannot go far wrong. He must bear in mind the essentials of a valid contract in order that he may properly declare. These, briefly stated, are as follow: An executory contract is a *mutual agreement*, between two or more competent parties, *for a valuable consideration, touching a lawful subject matter, to do or not to do a particular thing*, and in the form required by law, if any. For the purposes of *pleading* the portions of the above definition in italics are the important ones. The plaintiff seeks to recover the damages he has sustained by the breach of a lawful specific promise, supported by a valuable consideration, and if his count recites these essentials he is safe. The simpler and less technical and involved the statement is, the better.<sup>85</sup> The text-books abound in forms which are applicable to all except the most exceptional cases, and it is always both easier and safer to consult and use an approved form where it is applicable.<sup>86</sup>

*Essential Averments.*—The specific averments which are, in general, essential to the validity of a special count in assumpsit

85. In *Bank of the U. S. v. Jackson*, 9 Leigh, Judge Tucker says, on page 239, as to certain defective special counts in assumpsit: "Had the pleader been content to set forth those facts simply as they occurred, he could not have failed to draw a good declaration. But in attempting to mould the transaction into a technical form, he has unfortunately altogether failed." In *Kennaird v. Jones*, 9 Gratt. 184, Judge Lee says that a special count in assumpsit which sets out the promise and undertaking of the defendant, the consideration upon which it was founded, the breach of his promise by the defendant, and the loss to the plaintiff occasioned thereby, is undoubtedly good. To the same effect, see *Payne v. Grant*, 81 Va. 164; *C. & O. Ry. Co. v. Stock*, 104 Va. 97, 51 S. E. 161; *Mutual Life Ins. Co. v. Oliver*, 95 Va. 445, 28 S. E. 594; *Union Stopper Co. v. McGara*, 66 W. Va. 403, 66 S. E. 698. The declaration need not state whether the contract is in writing, and even if it does not a written agreement may be introduced in evidence. *McWilliams v. Willis*, 1 Wash. 199; *Brooks v. Scott*, 2 Munf. 344; *Butcher v. Hixton*, 4 Leigh at p. 571; *Eaves v. Vial*, 98 Va. 134, 34 S. E. 978. But see 5 Va. L. Reg. 794, and cases cited.

86. 4 Min. Inst. 696. For forms of special counts in assumpsit, see 4 Min. Inst. 1672-1691; 1 Barton's Law Practice 339-347; 2 Chitty 114-383.

are (1) The Promise; (2) The Consideration; (3) The Breach; (4) The Damages. Others which are in some cases, but not usually, necessary are (5) The Notice; (6) The Demand or Request; (7) Non-Payment.

(1) *The Promise*.—There can be no contract without a promise, express or implied, and hence in every declaration in assumpsit the *promise* is the very *gist* of the action, and must be positively averred.<sup>87</sup> It will not do to leave the promise to inference merely, and even setting out in the declaration *in hæc verba* a contract which contains a promise will not satisfy the above rule.<sup>88</sup> There is no difference in *pleading* between an express and an implied promise; all promises are averred as though express.<sup>89</sup> The general mode of stating the promise is that the defendant “undertook and faithfully promised,” or simply that he “promised,” but it is not necessary to use the word *promise* as any other equivalent word, such as *agreed*, will be sufficient.<sup>90</sup>

(2) *The Consideration*.—There can be no enforceable nor binding promise unless it be based upon a valuable consideration. The want of a statement of a consideration for a promise is a capital defect in a declaration, not to be supplied by intendment, and renders the declaration demurrable; and the averment of consideration must be direct and explicit, and not by way of inducement merely.<sup>91</sup> There are some cases, however, in which

87. *Winston v. Francisco*, 2 Wash. 187; *Sexton v. Holmes*, 3 Munf. 566; *Waid v. Dixon*, 55 W. Va. 191, 46 S. E. 918; *Penn. R. Co. v. Smith*, 106 Va. 645, 56 S. E. 567.

88. *Cooke v. Simms*, 2 Call. 39; *Woody v. Flournoy*, 6 Munf. 506; *Wheeling, etc., Co. v. Wheeling, etc., Co.*, 62 W. Va. 288, 57 S. E. 826.

89. *Morgantown Bank v. Foster*, 35 W. Va. 357, 13 S. E. 996; *Waid v. Dixon*, 55 W. Va. 191, 46 S. E. 918; *Payne v. Grant*, 81 Va. 164; *Robinson v. Welty*, 40 W. Va. 385, 22 S. E. 73; *Bannister v. Coal & Coke Co.*, 63 W. Va. 502, 61 S. E. 338; *Wheeling, etc., Co. v. Wheeling, etc., Co.*, *supra*.

90. 4 Min. Inst. 697; *Hogg's Pl. & Forms*, 72, 73; *Stephen's Pleading*, § 82, note; *Union Stopper Co. v. McGara*, 66 W. Va. 403, 66 S. E. 698; *Bannister v. Coal & Coke Co.*, *supra*.

91. *Southern R. Co. v. Willcox*, 98 Va. 222, 35 S. E. 355; *Penn. R. Co. v. Smith*, 106 Va. 645, 56 S. E. 567; *Hall v. Smith*, 3 Munf.

by reason of the peculiar nature of an instrument sued on, or by statute, no consideration need be averred in the declaration. In actions founded upon bills of exchange, promissory notes, and other legal liabilities which *import* a consideration, the declaration need allege no consideration.<sup>92</sup> And it is provided by statute in Virginia that an action of assumpsit may be maintained upon any note *or writing* by which there is a promise, undertaking, or obligation to pay money, if the same be signed by the party to be charged thereby or his agent, and that the rule as to averment and proof of consideration shall be the same as in an action of debt thereon.<sup>93</sup> Hence, when, upon written promises to pay money, assumpsit is brought, no averment of consideration is, in Virginia, necessary in the declaration.<sup>94</sup>

(3) *The Breach*.—Of course, the declaration must show that the defendant has broken his contract. There is no difference in the rules governing the allegations of the breach in the action of *covenant* and those which obtain in assumpsit,<sup>95</sup> and it will be sufficient to refer to a discussion of the breach in the chapter on *covenant*, without here repeating what is there said.<sup>96</sup>

(4) *The Damages*.—The object of this action being to recover damages, they should always be stated in a sum sufficiently

550; *Mosely v. Jones*, 5 Munf. 23; *Jackson v. Jackson*, 10 Leigh 467; *Beverley v. Holmes*, 4 Munf. 95; *Morgantown Bank v. Foster*, 35 W. Va. 357, 13 S. E. 996. The averment, in a declaration against a common carrier, that the defendant, in consideration of the delivery to it of certain goods, issued its bill of lading, by which it "undertook, promised, and agreed" to carry the goods to their destination is not such an averment of consideration as is necessary in assumpsit. *Penn. R. Co. v. Smith*, *supra*. See *C. & O. Ry. Co. v. Stock*, 104 Va. 97, 51 S. E. 161, where the court quotes *Hutchinson on Carriers* as to the proper mode of stating a *consideration* in actions of *assumpsit* against common carriers.

92. *Penn. R. Co. v. Smith*, *supra*; *Morgantown Bank v. Foster*, *supra*; 2 Encl. Pl. & Pr. 993.

93. Code, § 2852. In *debt* under this statute no consideration need be alleged. See *ante*, § 72.

94. See *Penn. R. Co. v. Smith*, *supra*; *Graves' Notes on Pleading (new)* 20.

95. 4 Min. Inst. 706, 707.

96. See *ante*, § 78. See also 2 Encl. Pl. & Pr. 1001, 1002; *Hogg's Pl. & Forms* 81, 82.

large to cover any possible recovery, but are usually averred in the most general manner. "A general allegation at the end of the declaration, that the plaintiffs have sustained damages by the failure of the defendant to perform his several promises named in the declaration, to a certain amount, is sufficient."<sup>97</sup> Damages need not be claimed at the end of each count of a declaration in *assumpsit*, but may be claimed at the conclusion of the declaration for all the causes of action in the several counts; and it is both unusual and unnecessary to insert the claim for damages at the end of each count.<sup>98</sup>

"It is said that the omission to lay damages in the declaration is cured by verdict and cannot be taken advantage of by a motion in arrest of judgment, but the Court will supply the omission by reference to the writ, or the declaration may be amended by an insertion of the plaintiff's claim where the court has jurisdiction of the case."<sup>99</sup>

Generally a plaintiff cannot recover in an action sounding in damages any greater amount than he has laid in his declaration, and if the verdict is for a larger sum than is claimed in the declaration and writ, it will either be set aside and a new trial awarded,<sup>1</sup> or the plaintiff may remit the excess and take judgment for the amount claimed in the writ and declaration,<sup>2</sup> or, in very exceptional cases, the trial court may permit the plaintiff to amend the *ad damnum* clause so as to cover the amount of the verdict,<sup>3</sup> but the last mentioned is rarely allowed. If, however, *no damages* are claimed in the declaration, in an action sounding in damages, although claimed in the writ, the omission is a matter of substance and the defect is neither waived nor

97. Hogg's Pl. & Forms, 85.

98. *American Bonding Co. v. Milstead*, 102 Va. 683, 47 S. E. 853; *Postlewaite v. Wise*, 17 W. Va. 1; *Hoffman v. Dickinson*, 31 W. Va. 142, 6 S. E. 53.

99. 5 Encl. Pl. & Pr. 706, 707; *Craighill v. Page*, 2 Hen. & Munf. 446; *Diggs v. Norris*, 3 Hen. & M. 268; *Stephens v. White*, 2 Wash. 203.

1. *Cloud v. Campbell*, 4 Munf. 214.

2. *Lindell v. Monroe*, 67 Mo. 619; *White v. Cannadee*, 25 Ark. 41; 5 Encl. Pl. & Pr. 715.

3. 5 Encl. Pl. & Pr. 716.

cured by the verdict where a demurrer has been interposed, but overruled.<sup>3a</sup> It has been held in Virginia that while greater damages cannot be awarded than are claimed in the declaration, this restriction is confined to the principal of the recovery and does not affect the interest which may be allowed thereon.<sup>4</sup> It has been held in West Virginia that if the trial court renders judgment for a greater amount than that claimed in the writ the judgment is not subject to review unless such excess is sufficient to give the appellate court jurisdiction.<sup>5</sup>

(5) *The Notice*.—When the matter alleged in the declaration may be considered as lying more properly in the knowledge of the plaintiff than of the defendant, when the defendant must have notice before he can be charged with any default, or when the defendant could not perform his contract without receiving notice, in all such cases there must be a special notice alleged.<sup>6</sup> Thus, “The averment of notice is especially necessary in actions on dishonored bills and checks against the maker or drawer, and on protested negotiable notes, and on other negotiable paper against the endorsers.”<sup>7</sup> In a declaration on a collateral promise, the plaintiff should aver notice to the guarantor, of the performance of the act contemplated by the promise, and, perhaps, of a failure to pay by the person in whose favor the undertaking was made, because the defendant could not know otherwise either whether it was his duty to pay, nor, if so, what to pay.<sup>8</sup> But where notice to a defendant of any fact is not necessary to fix the alleged liability on him, it need not be averred in stating

3a. *McGlamory v. Jackson* (W. Va.), 68 S. E. 105.

4. *Georgia Home Ins. Co. v. Gould*, 95 Va. 751, 30 S. E. 366.

5. *Giboney v. Cooper*, 57 W. Va. 74, 49 S. E. 939.

6. 2 Encl. Pl. & Pr. 1000; *Hogg's Pl. & Forms*, 81; *Austin v. Richardson*, 3 Call 201. In the last-named case, Judge Lyons said: “The difference is where the party cannot perform the thing without receiving notice from the person to whom it is to be performed, and where he may perform it without such notice from the other side. In the first case a special notice and demand is necessary, but not in the other.”

7. 1 *Barton's Law Practice* 319; *Security Loan Co. v. Fields*, 110 Va. 827, 67 S. E. 342.

8. *Pasteur v. Parker*, 3 Rand. 458.

the case.<sup>9</sup> Where a notice is necessary, the failure of the declaration to allege it is fatal on demurrer.<sup>10</sup>

(6) *The Demand or Request*.—In every case where a formal demand or request is essential to the cause of action, the declaration must state such demand or request.<sup>11</sup> The object of such demand is to enable the defendant to perform his contract without a suit,<sup>12</sup> and wherever the terms of the contract require the plaintiff to request the defendant to perform his contract, such request or demand must be averred.<sup>13</sup> But no demand or request need be averred where the action is simply one to enforce a precedent indebtedness and the obligation to pay is complete.<sup>14</sup> Where a demand is necessary the general averment "although often requested," etc., will not do; the time and place of the demand, and by whom and to whom made must be stated.<sup>15</sup>

(7) *Non-Payment*.—Wherever an action is brought for a debt, the declaration must allege the non-payment of the sum of money claimed, at any time or to any person to whom it might legally have been paid. But no formal allegation of non-payment is required, and any averment of nonpayment is sufficient unless it be so defective that the court cannot give judgment on the verdict according to the very right of the case.<sup>16</sup> Thus in *Cobbs v. Fountaine*<sup>17</sup> a declaration which charged only that the defendant "hath and does refuse to pay," without alleging that he *had not paid*, was held good upon general demurrer. And in no case where the action is not based upon a promise or undertaking to pay money is an allegation of non-

9. *Union Stopper Co. v. McGara*, 66 W. Va. 403, 66 S. E. 698; *Hogg's Pl. & Forms*, 81; 2 *Tucker's Com.* 144.

10. 2 *Encl. Pl. & Pr.* 1000, note; *Hogg's Pl. & Forms* 81.

11. 2 *Encl. Pl. & Pr.* 1001.

12. *Hogg's Pl. & Forms* 79. For instances where demand is necessary and should be averred, see *idem*, 78-80; 1 *Barton's Law Practice* 320.

13. 2 *Encl. Pl. & Pr.* 1001, note.

14. *Idem, ubi supra*; *Hogg's Pl. & Forms* 80.

15. *Hogg's Pl. & Forms* 80.

16. *Hogg's Pl. & Forms* 83, 84.

17. 3 *Rand.* 484.

payment necessary. Thus the non-payment of *damages* for not performing an act contracted for need not be averred.<sup>18</sup>

### § 89. Account to be filed with the declaration.

It is provided by § 3248 of the Code of Virginia that: "In every action of assumpsit the plaintiff shall file with his declaration an account stating distinctly the several items of his claim, unless it be plainly described in the declaration." The object of such account is to give a fuller and more particular specification of the matter contained in the declaration, and to give the defendant full notice of any claim which might be insisted on before the jury under general counts in the declaration.<sup>19</sup> Where a sufficient account is not filed, the proper practice is to apply to the court to require the plaintiff to file an amended and sufficient account of his claim; and, if he fails to do so, to move the court to exclude evidence of any matter not sufficiently described to give the defendant notice of its nature and character.<sup>20</sup> The account is to be read in connection with the declaration, but *is not a part of the declaration* and is not the subject of a demurrer, however defective it be.<sup>21</sup> It cannot perform the function of a count in the declaration, and where there is no count in the declaration appropriate to the account filed therewith the latter answers no purpose. It cannot specify something different from what is in the declaration, and the account alone would not admit the evidence.<sup>22</sup>

18. Hogg's Pl. & Forms 84; *Davisson v. Ford*, 23 W. Va. 618.

19. *Geo. Campbell Co. v. Angus*, 91 Va. 438, 22 S. E. 167; *Moore v. Mauro*, 4 Rand. 488.

20. *Geo. Campbell Co. v. Angus*, *supra*.

21. *Geo. Campbell Co. v. Angus*, *supra*; *Booker v. Donohoe*, 95 Va. 359, 28 S. E. 584. These two cases overrule *Wright v. Smith*, 81 Va. 777. The rule is the same in West Virginia under a similar statute. *Sandusky v. Gas Co.*, 63 W. Va. 260, 59 S. E. 1082. But a bill of particulars under § 3249 of the Code (and it seems an account under § 3248 thereof) may be considered as a part of the declaration where the parties agree in writing that the case made by the declaration may be supplemented by the bill of particulars (or account). *King v. N. & W. R. Co.*, 99 Va. 625, 39 S. E. 701.

22. *Sandusky v. Gas Co.*, *supra*.

Of course, where the claim is plainly described in the declaration, the statute does not apply and no account need be filed. But it is obvious that in nearly all cases where the declaration contains the common counts the account is necessary, as these are so indefinite and general in their nature.<sup>23</sup> In *Federation Window Glass Co. v. Cameron Glass Co.*,<sup>24</sup> it was held that the account required to be filed with the declaration under Code of West Virginia, 1899, ch. 125, § 11 (substantially the same as § 3248, Code of Virginia), need not necessarily be filed at the time the declaration is filed, but may be filed at a subsequent time.

23. Hogg's Pl. & Forms 87. An account filed with a declaration in assumpsit for *goods sold*, charging goods sold "per account rendered," with proof that the account *was* rendered is sufficient. And where the *insimul computassent* count (account stated) is the one relied on in the case there is no need to file *any* account as this count *in itself* gives the defendant sufficient notice. In such case, however, the plaintiff could not prove any of the *particulars* of the account which was stated. *Fitch v. Leitch*, 11 Leigh 492; *Robinson v. Burks*, 12 Leigh 387. Where the date of the account is stated in the declaration with which it was filed, and the account was presented as a debt due at the institution of the suit, and verdict was rendered accordingly, it was no error that the account was not dated. *Kenefick v. Caulfield*, 88 Va. 122, 13 S. E. 348. It was held in *Moore v. Mauro*, 4 Rand. 488, (under 1 Rev. Code 1819, p. 510, § 86, the language of which was somewhat different from § 3248 as it now reads) that an item in an account reading "merchandise per bill, three months due, 10th of July, 1819, \$480.60" was a sufficient compliance with the statute, and the plaintiff was allowed to prove the particulars of the bill, the court stating that the *character* of it was rendered sufficiently plain by the statement above quoted. While matters of evidence are not required to be stated in the account (*Geo. Campbell Co. v. Angus*, *supra*), yet where the declaration does not plainly describe the items, and the account filed therewith merely mentions the sums paid without giving any information about them, the account is insufficient. *Johnson v. Fry*, 88 Va. 695, 12 S. E. 973. So, on a count for money had and received, where the account filed with the declaration was simply "to plaintiff as admr. for money received, \$300.00," the count and the account filed were held insufficient to admit proof of an admission by the defendant that he had received from a third person a certain sum due the plaintiffs intestate. *Minor v. Minor*, 8 Gratt. 1.

24. 58 W. Va. 477, 52 S. E. 518.

**§ 90. Avoiding writ of inquiry.**

It is provided by § 3285 of the Code of Virginia that there need be no writ of inquiry of damages "In any action upon an account wherein the plaintiff shall serve the defendant at the same time and in the same manner that the process or summons to commence the suit or action is served, with a copy (certified by the clerk of the court in which the suit or action is brought) of the account on which the suit or action is brought, stating distinctly the several items of his claim, and the aggregate amount thereof, and the time from which he claims interest thereon, and the credits, if any, to which the defendant may be entitled. But this section shall not apply to any action on an account in which the process is served by publication." In an action of assumpsit, if the plaintiff proceeds under the above statute, the copy of the account sued upon, served on the defendant, must be intelligible to him and inform him of the precise nature of the claim of the plaintiff and its extent.<sup>25</sup>

The above procedure is seldom adopted in practice for the reason that the statute quoted is in large measure superseded by § 3286 of the Code of Virginia (discussed in § 91, *post*) under which the plaintiff may not only avoid the writ of inquiry but put the defendant to the necessity of making a sworn defence.<sup>26</sup>

**§ 91. Avoiding writ of inquiry and putting defendant to sworn plea.**

It is provided by § 3286 of the Code of Virginia that: "In any action of assumpsit on a contract, express or implied, for the payment of money (except where the process to answer the action has been served by publication), if the plaintiff file with his declaration an affidavit made by himself or his agent, stating therein, to the best of the affiant's belief the amount of the plaintiff's claim, that such amount is justly due, and the time from which the plaintiff claims interest, no plea in bar shall be received in the case, either at rules or in court, unless the defendant file with his plea the affidavit of himself

25. *Burwell v. Burgess*, 32 Gratt. 472.

26. See Graves' Notes on Pleading (new) 97.

or his agent, that the plaintiff is not entitled, as the affiant verily believes, to recover anything from the defendant on such claim, or stating a sum certain less than that set forth in the affidavit filed by the plaintiff, which as the affiant verily believes, is all that the plaintiff is entitled to recover from the defendant on such claim. If such plea and affidavit be not filed by the defendant, there shall be no inquiry of damages, but judgment shall be for the plaintiff for the amount claimed in the affidavit filed with his declaration. If such plea and affidavit be filed, and the affidavit admits that the plaintiff is entitled to recover from the defendant a sum certain less than that stated in the affidavit filed by the plaintiff, judgment may be taken by the plaintiff for the sum so admitted to be due, and the case be tried as to the residue."<sup>27</sup>

The effect of the above statute is twofold. It prevents mere formal pleas, such as the general issue, being filed simply to delay the hearing, where there is no real defense, and it makes it possible for the plaintiff to avoid a writ of inquiry when his action is upon a claim not evidenced by writing.<sup>28</sup> The statute's "obvious purpose is to prevent delay, and, with that object in view, to simplify and shorten the proceedings."<sup>29</sup>

Particular care should be taken when the affidavit, under the above statute, is made by an *agent* of either the plaintiff or the defendant that the affiant be described in the affidavit as *agent*, and not as secretary and treasurer, bookkeeper, vice president, director, etc., as it has been held in several recent cases that such terms do not *ex vi termini* import *agency*, whatever may be the true status of the affiant, and that under statutes requiring affidavits by "*agents*," the affiant must be described as *agent*.<sup>30</sup> And such affidavit should state "the time

27. For form of affidavit and counter affidavit under the above statute see annotations thereto in Pollard's Code of Virginia.

28. Graves' Notes on Pleading (new) 98-100; Judge Burk's Address (Rep. Va. State Bar Ass'n, 1891, p. 130).

29. Gregg v. Dalsheimer, 88 Va. 508, 13 S. E. 993; Jackson v. Dotson, 110 Va. 46, 65 S. E. 484.

30. Merriman Co. v. Thomas, 103 Va. 24, 48 S. E. 490, ("bookkeeper"); Taylor v. S. M. Tob. Co., 107 Va. 787, 60 S. E. 132 ("secretary and treasurer"); Damron v. Bank, 112 Va. —, 72 S. E. 153 ("vice president," "director").

from which the plaintiff claims interest.”<sup>31</sup> As to the *manner* of pleading under the above statute it has been held that, as pleas of the general issue are not required to be in writing, and, in practice, seldom are written out, it is a sufficient compliance with the statute under discussion for the defendant *orally* to direct the clerk to enter a plea of *non assumpsit* at the time of filing his written affidavit; it not being necessary that the *plea itself* should be in writing.<sup>32</sup> An affidavit accompanying a plea of *non assumpsit* “that the matters stated in the annexed plea are true” is a substantial compliance with the provisions of the statute, as the plea of *non assumpsit* puts in issue the entire claim of the plaintiff, and the affidavit states that the plea is true.<sup>33</sup> The affidavit is no part of the plea, and a *demurrer* to an unverified plea does not bring to the attention of the court the lack of the affidavit. The plaintiff should object to the reception of the plea when tendered because not so verified, or, if the plea has been filed, should move to strike it out.<sup>34</sup>

A plea in bar unaccompanied by affidavit (when the plaintiff has complied with the provisions of the above statute) is, in legal effect a nullity. The effect is the same as though *no* plea were entered, and, if such plea be filed at rules, the clerk should disregard it, and enter a judgment at rules for the plaintiff.<sup>35</sup> In such case the clerk, at the rules following the filing of the declaration, should place the case on the office judgment docket for the next succeeding term of his court, to become final along with other office judgments at the time required by law or unless defendant files a plea in bar accompanied by affidavit as required by the statute.<sup>36</sup> If, through error, the case is placed on the writ of inquiry docket, and unsworn pleas be filed, and the case continued to another term,

31. Merriman *v.* Thomas, *supra*.

32. Moreland *v.* Moreland, 108 Va. 93, 60 S. E. 730.

33. Jackson *v.* Dotson, *supra*.

34. Lewis *v.* Hicks, 96 Va. 91, 30 S. E. 466; Gregg *v.* Dalsheimer, *supra*.

35. Gregg *v.* Dalsheimer, *supra*.

36. Price *v.* Marks, 103 Va. 18, 48 S. E. 499; Gring *v.* Lake Drummond Canal & Water Co., 110 Va. 754, 67 S. E. 360.

and the plaintiff then moves to strike the pleas out because not sworn to, but the trial court overrules the motion and compels a trial on the pleas, which results in a verdict and judgment for the defendant, the Court of Appeals will, on a writ of error awarded to the plaintiff, set aside the verdict and judgment, strike out the pleas, and enter final judgment for the plaintiff.<sup>37</sup> If the defendant does not plead at all at the next term following the entry of the office judgment, but is permitted to plead at a subsequent term the judgment of the lower court allowing the defendant to enter such plea will be reversed and the Court of Appeals will render final judgment for the plaintiff.<sup>38</sup>

The provision in the statute that the defendant's plea shall be verified by affidavit is solely for the benefit of the plaintiff, who may waive it, or by his conduct be estopped from asserting it.<sup>39</sup> The plaintiff does waive his right to object to an unverified plea if he takes issue, either in law or in fact, on such plea, without objection to it for the lack of the affidavit;<sup>40</sup> or where he not only makes no objection when the plea is tendered without a sufficient affidavit, but, though present by counsel, assents to, or accepts without objection, a continuance of the case until the next term of the court, "with leave to the defendant to file within fifteen days his grounds of defense."<sup>41</sup> But where pleas in bar have been filed unaccompanied by affidavit, on which the plaintiff takes issue without

37. *Price v. Marks*, *supra*.

38. *Gring v. Lake Drummond Canal & Water Co.*, *supra*.

39. *Lewis v. Hicks*, *supra*; *Spencer v. Field*, 97 Va. 38, 33 S. E. 380; *Price v. Marks*, *supra*; *Jackson v. Dotson*, *supra*.

40. *Lewis v. Hicks*, *supra*.

41. *Jackson v. Dotson*, 110 Va. 46, 65 S. E. 484. The court said in this case that there was nothing in its holding in conflict with *Price v. Marks*, *supra*. In the *Dotson* case the record showed that plaintiff's counsel was present when the order of continuance was entered, and either consented or made no objection thereto; whereas in the *Marks* case it appears that the only continuance had before objection to the pleas was one without an order of continuance, and the opinion does not indicate that counsel for the plaintiff was present when the defective pleas were filed, or in any way consented to the continuance.

objection, and such pleas are *withdrawn* and *new pleas* are tendered by the defendant, the plaintiff may insist on the lack of an affidavit as a valid objection to such *new pleas*; his conduct as to the *former* pleas not constituting a waiver as to the *new pleas*, and the latter being subject to all proper objections.<sup>42</sup> The mere taking of depositions in the case, it not having been set for hearing, cannot be considered as a waiver of the plaintiff's right to require sworn pleas.<sup>43</sup>

### § 92. Misjoinder of 'tort and assumpsit.

It is a general principle of pleading that causes of action in *tort* cannot be joined in the same declaration with causes arising *ex contractu*. Hence counts in assumpsit cannot be joined in the same declaration with counts in trespass, trespass on the case, trover, detinue, or other tort actions. "The general doctrine is that demands may be joined when they are *of the same nature*, and the *same judgment is to be given* in all, notwithstanding the *pleas may be different*."<sup>44</sup> This excludes the joining of *tort* and *assumpsit*, for they are not of the same nature. And it makes no difference that each count may be perfect in itself; if there is a misjoinder the declaration is bad on general demurrer, though not on motion in arrest of judgment, or writ or error, *if no demurrer has been interposed*.<sup>45</sup> That such misjoinder is fatal is illustrated by a number of Virginia cases.<sup>46</sup>

This principle of pleading is an important one to remember, not only to avoid a deliberate misjoinder, but also in order to

42. *Spencer v. Field, supra.*

43. *Price v. Marks, supra.*

44. 4 Min. Inst. 446, 447; 1 Barton's Law Practice 303, 304; Hogg's Pl. & Forms, 138-140. Nor can different *species* of action be so joined though all are *ex contractu*. Thus *assumpsit* cannot be joined with *debt*, *account*, or (at common law) *covenant*. 4 Min. Inst. 447.

45. 4 Min. Inst. 448; *Gary v. Abingdon Pub. Co.*, 94 Va. 775, 27 S. E. 595; *Norfolk & W. R. Co. v. Wysor*, 82 Va. 250.

46. See *Spencer v. Pilcher*, 8 Leigh 584; *Southern Express Co. v. McVeigh*, 20 Gratt. 264; *Creel v. Brown*, 1 Rob. 265; *Gary v. Abingdon Pub. Co.*, *supra*; *Grubb v. Burford*, 98 Va. 553, 37 S. E. 4; *Penn. R. Co. v. Smith*, 106 Va. 645, 56 S. E. 567.

make sure that all of the counts in what the pleader *means* for a declaration in *assumpsit* are actually *contract* and not *tort* counts. For it is immaterial that the pleader may denominate his action *assumpsit*; if the court upon an examination, on demurrer, of the actual averments of the declaration decides that one count thereof does not measure up to the requirements of a special count in *assumpsit*, it will frequently be held to be in tort, and the declaration will be bad.

The error most frequently committed is a failure to properly allege a *promise* and the *consideration* therefor. Thus, the averment in a declaration against a common carrier, that the defendant, in consideration of the delivery to it of certain goods, issued its bill of lading, by which it "undertook, promised and agreed" to carry the goods to their destination is not such an averment of consideration as is necessary in *assumpsit*, and renders the count one in *tort* and not in *assumpsit*, and this is so though it is apparent that the plaintiff meant the count to be in *assumpsit* and not in *tort*.<sup>47</sup> To avoid this error the rules set forth in a preceding section as to the *essential averments* in special *assumpsit* should be constantly borne in mind. In discussing the subject certain general principles of guidance have been laid down by our Court of Appeals. Thus Judge Tucker said that to constitute a count in *assumpsit* "there must be an agreement laid *between* the parties, or a promise from the defendant to the plaintiff for a consideration."<sup>48</sup> And, more recently, Judge Cardwell said: "In an action in *assumpsit* the promise is the legal cause of action, and where a count states that the defendant agreed or undertook, these words import a promise, and the count, therefore, is in form *assumpsit*."<sup>49</sup> Where a count in a declaration is in *assumpsit*,

47. Penn. R. Co. v. Smith, *supra*. This difficulty frequently arises in declarations against common carriers for loss of goods, etc., as in such cases, the allegations in the *tort* forms of action and in those *ex contractu* bear to each other great similarity. As to the proper mode of stating a consideration in actions of *assumpsit* against common carriers, see C. & O. Ry. Co. v. Stock, 104 Va. 97, 51 S. E. 161.

48. Spencer v. Pilcher, 8 Leigh 584.

49. American Bonding, etc., Co. v. Milstead, 102 Va. 683, 47 S. E. 853.

the mere fact that it complains of defendant "of a plea of trespass in the case," instead of trespass on the case in assumpsit, cannot change the form of action. It is still assumpsit.<sup>50</sup>

### § 93. Non assumpsit.

The general issue in assumpsit is *non assumpsit*.<sup>51</sup> This is one of the broad general issues, and in *Va. Fire & Marine Ins. Co. v. Buck*,<sup>52</sup> the court said: "The fact is undeniable that for more than a century past there has been admitted, under the plea of *non assumpsit*, in all actions of *assumpsit*, whether founded on an implied or express promise, any matter of defence whatever (the same as in the case of *nil debet*) which tends to deny his (the defendant's) liability to the plaintiff's demands. \* \* \* Under the plea of *nil debet* the defendant may prove at the trial coverture when the promise was made, lunacy, duress, infancy, release, arbitration, and accord and satisfaction, payment, a want of consideration for the promise, failure or fraud in the consideration, and, in short, anything which shows there is no existing debt due. The statute of limitations, bankruptcy, and tender are believed to be the only defences which may not be proved under this plea, and they are excepted because they do not contest that the debt is owing, but insist only that no action can be maintained for it."<sup>53</sup>

50. *Gray v. Kemp*, 88 Va. 201, 16 S. E. 225.

51. The form of the plea, omitting the entitlements, as given in 4 Min. Inst. 773, is as follows: "And the said defendant, by his attorney, comes and says, that he did not undertake or promise in manner and form as the said plaintiff hath above complained. And of this the said defendant puts himself upon the country." A plea of "not guilty" in an action of assumpsit though an improper plea, and subject to demurrer, presents a substantial issue, and such mispleading and misjoinder of issue thereon will, after verdict, be cured by the statute of jeofails. *Bannister v. Coal & Coke Co.*, 63 W. Va. 502, 61 S. E. 338; *Gray v. Kemp*, 88 Va. 201, 16 S. E. 225; 2 Tucker's Com. 160.

52. 88 Va. 517, 13 S. E. 973.

53. See also *Morgantown Bank v. Foster*, 35 W. Va. 357, 13 S. E. 996; 4 Min. Inst. 770, 773-775; 1 Barton's Law Practice 500, 501; 2 Tucker's Com. 160; Hogg's Pl. & Forms 176-178; *First National Bank v. Kimberlands*, 16 W. Va. 555. "Under it the defend-

Thus, in an action of *assumpsit* on a fire insurance policy, the defendant may, under the plea of *non assumpsit* show a breach of the conditions of the policy avoiding it;<sup>54</sup> and in an action of *assumpsit* to recover a sum of money in gold which had been delivered by the plaintiff to the defendant for safe-keeping, the defendant was allowed to show under *non assumpsit* that he had been robbed of it.<sup>55</sup> This general issue is a denial that covers the whole declaration and puts the plaintiff to the proof of every material fact.<sup>56</sup> The plea is not required to be in writing, and, in practice, is seldom written out; the defendant's attorney simply giving the clerk oral direction to enter the plea of *non assumpsit*.<sup>57</sup> The general issue of *nil debet* is identical in its scope and effect with that of *non assumpsit*,<sup>58</sup> and, as the various defences proper to be made under the former have been fully discussed in the chapter on the action of *Debt*, and nearly the whole of such discussion is equally applicable to *non assumpsit*, it would be useless to repeat here the observations there made. The reader is referred to that chapter for a treatment of much that is pertinent to this section.<sup>59</sup>

#### § 94. Special pleas.

Any discussion of special pleas in *assumpsit*, must, by reason of the great latitude allowed in the defences under the general issue of *non assumpsit*, resolve itself into an effort rather

ant is generally entitled to give evidence of anything which shows that, *ex æquo et bono*, the plaintiff ought not to recover." 2 Encl. Pl. & Pr. 1029.

54. *Rochester Ins. Co. v. M. S. Ass'n*, 107 Va. 701, 60 S. E. 93.

55. *Danville Bank v. Waddill*, 31 Gratt. 469.

56. *Morgantown Bank v. Foster*, *supra*; Graves' Notes on Pleading (new) 99-100; 1 Barton's Law Practice 500.

57. *Moreland v. Moreland*, 108 Va. 93, 60 S. E. 730.

58. Graves' Notes on Pleading (old) 81.

59. See *ante*, § 73, and note particularly the great utility of § 3249 of the Code of Virginia, giving to the plaintiff the right to call for the grounds of defence, in preventing surprise under the broad general issues. For a treatment of the scope of *non assumpsit*, and its applicability, when the action of *assumpsit* is brought on a sealed instrument (under § 3246a of the Code of Virginia) see *ante*, § 82.

to particularize those defences which *may* be the subject of special pleas, than to enumerate what *must* be pleaded specially. As we have seen, bankruptcy, tender and the statute of limitations are the only defences which *must* be specially pleaded.<sup>60</sup> The rule is that every defence which *amounts* to the general issue *must* be shown under the general issue, and *cannot* be the subject of a *special plea*. But defences which are simply *provable* under the general issue do not of necessity *amount* thereto; and, if such defences do not *amount* to the general issue they may be pleaded separately, subject to the discretion of the trial court, even though they could have been availed of under the general issue.<sup>61</sup> Judge Phlegar says of such pleas: "Unless some improper advantage is sought to be obtained by filing them, the plaintiff is usually benefited rather than injured by special pleas which give him full and specific notice of the defences."<sup>62</sup>

The safer manner of making objection to such special pleas is, not to demur, but to move to reject them when offered, or to strike them out when they have been entered on the record.<sup>63</sup>

60. See *ante*, § 93. As a general rule all matters of defence which arise after the action is brought must be the subject of special pleas and are not provable under the general issue. Hogg's Pl. & Forms 193. As to when a plea amounts to the general issue, see *post*, § 198.

61. B. & O. R. Co. v. Polly, Woods & Co., 14 Gratt. 447; 4 Va. Law Register, 769-772; C. & O. R. Co. v. Rison, 99 Va. 18, 37 S. E. 320; Graves' Notes on Pleading (old) 83.

62. Ches. & O. R. Co. v. Rison, 99 Va. 18, 37 S. E. 320.

63. Va. Fire & Marine Ins. Co. v. Buck, 88 Va. 517, 13 S. E. 973; 4 Min. Inst. 1262.

## CHAPTER XI.

### PROCEEDINGS BY WAY OF MOTION.

- § 95. Scope of chapter.
- § 96. Proceedings under § 3211 of the Code.
- § 97. Policy of the statute—Construction of notice.
- § 98. When motion lies under § 3211 of Code.
- § 99. When motion does not lie under § 3211 of Code.
- § 100. The manner of making defence to motions.
- § 101. Against whom judgment may be given on motion.
- § 102. The trial of the motion.
- § 103. Motions to recover money otherwise than under § 3211 of the Code.

#### § 95. Scope of chapter.

In this chapter only motions for the recovery of money will be treated. Other motions, which are merely incidental to various proceedings and modes of relief in actions, but not for the recovery of money, e. g., motions to abate attachments, to correct errors in proceedings, in arrest of judgment, for new trials, etc., are treated elsewhere. The motions treated in this chapter are motions to recover money on official bonds, certain motions on statutory bonds, and motions under § 3211 of the Code to recover money due by contract. The species of motion last mentioned is the most important, and will be first treated.

#### § 96: Proceedings under § 3211 of the Code.<sup>1</sup>

The procedure by motion (after notice) for a judgment is practically what is known as "Code Pleading," plain and simple, and is destitute of all of the formalities usual in common-law actions. The notice takes the place of both the writ and declaration in common-law actions. It takes the place of the writ

1. Section 3211 of the Code is as follows: "Any person entitled to recover money by action on any contract may, on motion before any court which would have jurisdiction in an action otherwise than under section thirty-two hundred and fifteen, obtain judgment for such money after fifteen days' notice, which notice shall be re-

by notifying the defendant when and where he is to appear, and of the declaration by setting out the contract upon which judgment is asked, and alleging its breach. The notice is, in legal contemplation, presumed to have been prepared by the plaintiff himself, or some layman, and hence great liberality of construction is indulged by the courts in determining its sufficiency. It is wholly informal, and, as it is always returnable to some day of a term of court, there are no proceedings at the rules. The notice prior to its return to the clerk's office is not an official document, and the clerk makes no note of it generally until it has been executed and returned to his office.

turned to the Clerk's office of such court within five days after the service of the same, and after such fifteen days notice the motion shall be docketed. In the case of a motion for judgment upon any contract upon which under the rules of pleading an action of *assumpsit* would lie if the plaintiff shall serve the defendant at the same time and in the same manner as the notice is served with a copy, certified by the clerk of the court to which the notice is returnable, of the account on which the motion is to be made, stating distinctly the several items of his claim and the aggregate amount thereof and the time from which he claims interest thereon and the credits if any to which the defendant may be entitled, and if the plaintiff file with his notice an affidavit made by himself or his agent, stating therein to the best of the affiant's belief the amount of the plaintiff's claim, that such amount is justly due, and the time from which the plaintiff claims interest, judgment shall be rendered by the court in which the motion is made for the plaintiff for the amount claimed in the affidavit filed with his notice unless the defendant shall allege on oath of himself or his agent that the plaintiff is not entitled, as the affiant verily believes, to recover anything from the defendant on such claim, or state on such oath a sum certain less than that set forth in the affidavit filed by the plaintiff which, as the affiant verily believes, is all that the plaintiff is entitled to recover from the defendant on such claim. If the defendant shall admit that the plaintiff is entitled to recover from the defendant a sum certain less than that stated in the affidavit filed by the plaintiff judgment may be taken by the plaintiff for the sum admitted to be due and the case be tried as to the residue. A motion under this section which is docketed under section thirty-three hundred and seventy-eight shall not be discontinued by reason of no order of continuance being entered in it from one day to another or from term to term. This section shall not be construed as intended to affect the remedy by motion given by the preceding section."

Then and then only is it an official document. If, however, the plaintiff is proceeding on an *open account* and desires to compel the defendant to swear to his plea, or other mode of defence, he must be careful to observe the requirements of the statute, which are:

(1) He must serve the defendant at the same time and in the same manner as the notice is served with a copy of the account on which the motion is to be made. This copy of the account must state distinctly: (a) The several items of the plaintiff's claim; (b) the aggregate amount thereof; (c) the time from which he claims interest; and (d) the credits, if any, to which the defendant may be entitled.

(2) This copy of the account must be certified by the clerk of the court to which the notice is returnable. This means that the clerk must certify on the copy of the account served on the defendant that it is a true copy of an account filed in his office by the plaintiff. It is necessary, therefore, for the plaintiff to file the account with the clerk in order that he may be able to make this certificate.

(3) He must file with his notice an affidavit made by himself or his agent stating therein to the best of the affiant's belief (a) the amount of the plaintiff's claim, (b) that such amount is justly due, and (c) the time from which the plaintiff claims interest.

It will be seen that the plaintiff must make as many copies of his account as there are defendants to be served. The original must be filed in the clerk's office (in order that the clerk may *certify* the copy to be served on the defendant), and a copy served on each defendant. The plaintiff *need not* serve the defendant with a copy of the affidavit verifying the account. He is merely required to file the affidavit with his notice *in the clerk's office*. However, as such affidavits are frequently endorsed on the accounts, it is very common in practice to make copies of the whole paper, account and affidavit, and serve on the defendant. After the plaintiff has prepared his notice, and the copies thereof, and the above account and copies, he delivers the same to the sheriff or sergeant to be

served on the defendants.<sup>2</sup> When the motion is made judgment is given by the court for the plaintiff for the amount claimed in the affidavit filed with his notice, unless the defendant shall allege on oath of himself or his agent: (1) That the plaintiff is not entitled, as the affiant verily believes, to recover *anything* from the defendant on such claim; or (2) state on such oath a sum certain less than that set forth in the affidavit filed by the plaintiff, which, as the affiant verily believes, is all that the plaintiff is entitled to recover from the defendant on such claim. In the latter case, judgment may be taken for the sum admitted to be due, and the case tried as to the residue.

It should be observed that the provisions of the statute apply only to *open accounts*, and as to them the statute furnishes a most convenient remedy, which is especially useful to non-resident creditors, who are suing on uncontested claims, and are thus saved the expense of attending the trial to give their testimony, or of taking depositions.

These provisions do not apply to that very numerous class of cases where motions are made on promissory notes, bonds, bills of exchange, due bills, checks, etc. In such cases the provisions of the statute quoted as to affidavit, etc., are not needed, for if the notice charges that the defendant made, endorsed, assigned or accepted such writings, he is put to his oath, by statute, if he wishes to deny such allegations.<sup>3</sup>

Particular care should be taken, when the affidavit is made by an *agent* of either the plaintiff or the defendant, that the affiant be described in the affidavit *as agent*, and not as secretary and treasurer, bookkeeper, vice-president, director, etc., as it has been held in Virginia that such terms do not *ex vi termini* import *agency*, whatever may be the true status of the affiant, and that, under statutes requiring affidavits by "*agents*," the affiant must be described *as agent*.<sup>4</sup>

2. As to mode of service, see Code, §§ 3207, 3224.

3. Code, § 3279.

4. *Merriman Co. v. Thomas*, 103 Va. 24, 48 S. E. 490 ("bookkeeper"); *Taylor v. S. M. Tob. Co.*, 107 Va. 787, 60 S. E. 1323 ("secretary and treasurer"); *Damron v. Bank*, 112 Va. —, 72 S. E. 153 ("vice-president"; "director").

When the motion is made on a bond, note or other writing, it is the practice either to copy the instrument in the notice or to attach *a copy* of the same to the notice, reserving the original for production in court when the motion is heard.

Forms of notice of motion, affidavit, and counter affidavit, are given in the annotations to § 3211 of the Code.

*Venue of Proceeding by Motion.*—The statute provides that the motion may be made before any court which would have jurisdiction in an action otherwise than under § 3215 of the Code.

This last-mentioned statute provides that "An action may be brought in any county or corporation wherein the cause of action, or any part thereof arose, although none of the defendants reside therein." Thus the venue of proceedings by motion is precisely the same as that in formal legal actions with the exception that where the *only* ground of jurisdiction is that the cause of action, or some part thereof, arose in the county or corporation wherein an action is desired to be brought, some form of action other than a proceeding by motion must be adopted. But if any of the grounds of venue given in § 3214 exist, the procedure by motion may be maintained. So, it has been held that, construing § 3214 of the Code together with § 3211, a motion may be maintained against an insurance company, either fire or life, in the county in which the property insured, and which was destroyed by fire, was situated at the date of the policy, or the person whose life was insured resided at the date of his death, or at the date of the policy.<sup>5</sup>

Under the conformity act (Rev. Stat., § 914; U. S. Comp. Stat. 1901, p. 684) an action may be instituted by notice under § 3211 in a federal court in Virginia in accordance with the State practice.<sup>6</sup>

*Length of Notice and Return Day.*—The statute requires *fifteen days'* notice, and the length of the notice is *jurisdictional*

5. *Morotock Ins. Co. v. Pankey*, 91 Va. 259, 21 S. E. 487.

6. *Leas & McVitty v. Merriman*, 132 Fed. 510; *Schofield v. Palmer*, 134 Fed. 753, 11 Va. Law Reg. 31. See also 10 Va. Law Reg. 739; 14 Va. Law Reg. 339.

and must be complied with. In *Tench v. Gray*<sup>7</sup> notice of a motion for judgment was served on October 13, 1900, informing the defendant that a judgment would be asked for "on the first day of the next term" of the circuit court. The time fixed by law for the next term to begin was October 27, 1900, but the court did not actually open until October 29, 1900. The circuit court quashed the notice as insufficient in length of time, and, on appeal, this judgment was affirmed. The Court of Appeals said that "under the law, no judgment could be given upon this notice unless served on the defendant at least fifteen days before the day on which the motion was to be made. The day fixed by law for the term to begin being October 27, 1900, it is apparent that a notice served October 13, 1900, did not give the fifteen days required before the day the motion was to be made." The court held further that a litigant had a right to assume that the law will be complied with, and that the court will commence on the day prescribed by the statute, and he could not be prejudiced by a delay in the actual convening of the court. The notice was a nullity and the defendant had the right to treat it as such.

In *Hanks v. Lyons*<sup>8</sup> it was held that a notice of a motion for a judgment for money, under § 3211 of the Code, need not be given to the first day of the term of the court, but may be given to *any day of the term*, provided only the notice be served at least fifteen days before the day on which judgment is to be asked. In this case it was further held (under the old statute) that a notice of a motion could not be given and heard during the term, but must be in a condition to be docketed before the term.<sup>9</sup> This last proposition is no longer the law since the amendment to § 3211 by Acts 1895-6, p. 140. Before this amendment the notice had to be returned to the clerk's office ten days before the commencement of the term, and, this being so, it inevitably followed that the notice could not be given *during the term*. Since the said amendment, the statute does not require this return before the term, but

7. 102 Va. 215, 46 S. E. 287.

8. 92 Va. 30, 22 S. E. 813, 1 Va. Law Reg. 439 and note.

9. Citing *Hale v. Chamberlain*, 13 Gratt. 658.

provides that, "*after such fifteen days' notice, the motion shall be docketed.*" Motions under § 3211, as amended, mature after fifteen days' notice, *whether the notice be served before or during the term at which the motion is to be heard*, provided the notice is returned to the clerk's office within five days after service. After complying with these requirements with reference to the service and return, the motion should be docketed, *though the term has already commenced before the maturity of the notice*. It is the usual practice, to allow such notices to be *given, matured and tried, during the same term*, provided the term lasts long enough.<sup>10</sup>

*The Return and Proof of Notice.*—The statute requires that the notice shall be returned to the clerk's office within *five days* after service. In *Swift & Co. v. Wood*<sup>11</sup> it is held that this provision of the statute is mandatory and must be complied with, and that, in computing the time, the day of service is to be counted, as prescribed by § 5, clause 8, of the Code, but not the date on which the notice is returned, and hence a notice served February 21 and returned February 26 is not within five days—the time prescribed—and a judgment by default rendered thereon was invalid. The court further held that, in counting the five days, Sunday is to be counted like any other day, but if the *last day* of the five fell on Sunday a notice returned on the next day would be held to comply with the statute.

It is usual for the clerk to endorse on the notice the date of its return by the officer serving same, and, when this is done, it affirmatively shows whether or not the notice was returned in the prescribed time. But where an action is brought under this section the question whether the return was made in the statutory time is one of fact, which may be determined by evidence, although the date of the return is not endorsed on the notice; and where it is shown that the return was in fact made, and the cause duly docketed, the presumption is

10. See 2 Va. Law Register 647-651, 913-914; Graves' Notes on Pleading (new) 37, 38. It may be mentioned here that, though not expressly stated, it is necessarily implied, that the notice shall be *in writing*, as otherwise it could not be served, returned, filed and docketed, as required. See note 1 Va. Law Reg. 442.

11. 103 Va. 494, 49 S. E. 643.

that the sheriff complied with the law and made the return within the prescribed time.<sup>12</sup>

*Continuances.*—Section 3211 provides that “a motion under this section which is docketed under § 3378 shall not be discontinued by reason of no order of continuance being entered in it from one day to another, or from term to term.”<sup>13</sup> It has

12. *New River Mineral Co. v. Roanoke Coal & Coke Co.*, 110 Fed. 343, 49 C. C. A. 78.

13. Before the present statute it was held in *Amis v. Koger*, 7 Leigh 221, that a motion cannot be continued, except by consent, from the June term until the August term of court, passing by the intermediate July term; that such a continuance would work a discontinuance, Judge Carr saying: “If the court could thus pass over one term, it might twenty.” And this would, even since the statute, seem to be the correct rule, as the statute merely provides for cases where there is *no* order of continuance, and not for erroneous and unjustifiable continuances.

That portion of § 3211 quoted in the text has given rise to some difficulty, and is the subject of discussion in 2 Va. Law Reg. 647-651, 913, 914. The difficulty arises out of the fact that § 3378, relating to docketing causes, requires the clerk to make out the docket *before* the term of the court begins, and the argument is made that the notice must be served and returned to the clerk's office *before the term begins* in order to enable the clerk to place the case on the docket. This provision of § 3211 was inserted at the time of its original enactment, when the notice was required to be executed 60 days before the return-day and to be returned to the clerk's office forty days before the motion was heard (Code 1849, ch. 168, § 5), and when courts did not sit so long. Under the Code of 1887 the notice was required to be returned to the clerk's office “ten days before the commencement of the term.” Under these statutes it was proper to require the docketing of motions before the term as of other actions at law and there was no difficulty in complying with the statutes because the notice had to be executed and returned before the term began, but when the statute was changed so as to allow judgment after fifteen days' notice, and requiring the notice to be returned to the clerk's office within five days after service, this enabled parties to proceed by notice after the term began and it would seem that the reference to § 3378 should have been either omitted altogether, or else the phraseology changed, but this was not done. It was left in its original form and the effect must now be determined. It can hardly be doubted that the change in the phraseology of the section so as to require the notice to be returned within five days after service instead of ten days before the commencement of the term was made for the purpose of en-

been held that a motion to recover money under § 3211 of the Code, when duly docketed according to the statute, is not discontinued by the failure of the term on account of the illness of the judge. And this seems plainly right.<sup>14</sup>

So, it is said: "The docketing supersedes the necessity of calling and continuing the motion, and it remains like actions at law, a case in court to be called and disposed of in the regular calling of the docket.<sup>15</sup> The motion should be called

abling parties to begin the proceeding by motion after the commencement of the term in those courts which sat for long periods of time (2 Va. Law Reg. 913) and it would seem that the retention of the reference to § 3378 was an inadvertence (2 Va. Law Reg. 651). But, however this may be, the language of the section must be construed, and in doing so, it must be construed in harmony with other sections of the Code, and the whole permitted to stand, if possible. The language of § 3211 is very explicit that "after such fifteen days' notice the motion shall be docketed." It makes no requirement that this shall be *before* the term begins. It is general, and applies as well to notices returned during the term as to those returned before. If there is no occasion to continue the motion to another term, judgment may be taken at the return-day of the notice, but if the parties are not ready for trial the case like any other case may be continued to another term. But suppose the motion is docketed as required, but no order of continuance is entered in the cause, the effect would be a *discontinuance* unless there was some statute to prevent it, and hence it was provided that if docketed under § 3378 (that is, before the term) no such discontinuance shall take place. This would leave a motion not docketed under § 3378 liable to be discontinued if no order of continuance was entered in it. The whole question is simply one of *discontinuance* if no order of continuance is entered in the case. But this is amply provided against by § 3124 of the Code, declaring that "All causes upon the docket of any court, and all other matters ready for its decision, which shall not have been determined before the end of a term, whether regular or special, shall, without any order of continuance, stand continued to the next term."

This is a cause "upon the docket" by the express mandate of § 3211 and is saved from a discontinuance by § 3124. Indeed, it is not perceived why any reference should ever have been made to § 3378, as § 3124 was in operation when § 3211 was first enacted. Even a criminal case is not discontinued by a failure to enter an order of continuance therein. *Harrison's Case*, 81 Va. 492.

14. *Dillard v. N. Y. Life Ins. Co.* (Cir. Court of Lynchburg), 5 Va. Law Reg. 43, and note.

15. *Hale v. Chamberlain*, 13 Gratt. 658.

up in open court on the day to which the notice is returnable, and if judgment is not to be asked on that day, the motion should be docketed, and either continued to another term, or a day fixed for trial at a later day of the same term. This should be done in order that the *records of the court* may show the pendency of the motion. If the notice is not proved or docketed, nor otherwise noticed on the record on the return day, it will be deemed to have been abandoned.<sup>15a</sup>

*Advantages of Procedure by Motion.*—One of the advantages of procedure by motion is the simplicity of the proceeding and emancipation from the forms required in a regular action. The second and chief advantage is that you may proceed by motion when it is too late to mature a regular action, or even after a term of court has begun, if it shall continue in session long enough for that purpose as many of the city courts do. It requires two sets of rule days to mature a regular action, but you may proceed by motion, as just stated, after either or both sets of rule days have passed, and if there is time enough to give the requisite notice, may thus proceed to obtain judgment by motion when it will be too late to obtain it by a regular action. Of course, this latter advantage has no application where there is ample time to proceed either by action or motion.

### § 97. Policy of the statute—Construction of notice.

Section 3211 of the Code was first incorporated into our statute law by the revisors of 1849. As said in *Hale v. Chamberlain*,<sup>16</sup> the revisors, seeing that other proceedings by motion theretofore given had worked well, “proposed to extend the remedy by motion on notice to all cases in which a person was entitled to recover money by action on contract.”

The object of the statute was to simplify and shorten pleadings and other proceedings, to afford a more speedy remedy for the enforcement of contracts, and give suitors a plain and summary proceeding for the recovery of judgments.<sup>17</sup>

15a. *Johnson v. Wheeler Lumber Co.* (W. Va.), 72 S. E. 470. 16. 13 Gratt. 658.

17. *Hale v. Chamberlain*, 13 Gratt. 658; *Preston v. Salem Improvement Company*, 91 Va. 583, 22 S. E. 486, 1 Va. Law Register 447, and note; *Cahoon v. McCulloch*, 92 Va. 177, 23 S. E. 225.

Of it, Judge Burks said: "The statutory proceeding by motion for the recovery of money due by contract is of great convenience and utility. It is a most salutary reform. Much of the formality of technical common-law pleading is dispensed with, and justice is administered more speedily and with less chance of miscarriage. It is not surprising, therefore, that in plain cases the summary remedy by motion has almost superseded the common-law forms of action for the recovery of debts."<sup>18</sup>

The courts are most liberal in their construction of the notice. It is held that the notice takes the place of both the writ and the declaration in a common-law action,<sup>19</sup> and that the rule governing notices is that they are presumed to be the acts of parties and not of lawyers. They are viewed with great indulgence by the courts; and if the terms of the notice be general, the court will construe it favorably, and apply it according to the truth of the case, so far as the notice will admit of such application. If it be such that the defendant cannot mistake the object of the motion, it will be sufficient.<sup>20</sup>

*Particularity Required in Notice.*—As it is the object of all pleadings to give to the opposite party a sufficient idea of the grounds of action or defence relied on, and to state a good cause of action or a valid defence, so also in motions, though great informality is allowed, the notice must state a case and must have the requisite certainty.

Accordingly it has been held that the names of the parties, the amount for which judgment will be asked, and the time and place at which the motion will be made must be stated in clear and unmistakable terms.<sup>21</sup> And, in a proceeding by motion against the endorser of a negotiable note, the notice must contain such allegations of presentment for payment and

18. 1 Va. Law Register 441.

19. *Morotock Ins. Co. v. Pankey*, 91 Va. 259, 21 S. E. 487; *Grubbs v. National Life Ins. Co.*, 94 Va. 589, 27 S. E. 464; *Tench v. Gray*, 102 Va. 215, 46 S. E. 287; *Security Loan & Trust Co. v. Fields*, 110 Va. 827, 67 S. E. 342.

20. *Supervisors v. Dunn*, 27 Gratt. 608; *Carr v. Mead*, 77 Va. 142; *Union Central Life Ins. Co. v. Pollard*, 94 Va. 151, 26 S. E. 421.

21. *Tench v. Gray*, *supra*.

notice of dishonor to the endorser as will fix a liability upon him for the payment of the note, else the notice will be bad upon demurrer.<sup>22</sup>

*Variance.*—The rule that the *allegata* and the *probata* must correspond is likewise applicable to proceedings by way of motion, and if the notice descends to particulars, as to dates and sums, it must be correct as to them, and the documents referred to must, when produced, correspond with the notice. If there is a material variance no judgment can be given.<sup>23</sup> Thus, in a notice of a motion to be made on a forthcoming bond, the bond was described by mistake as executed by *John* when it was in fact executed by *George M. Cooke*, and it was held that the variance was material, and the notice insufficient.<sup>24</sup> And, in a motion on a treasurer's bond, where there was a plea of *nul tiel record*, the bond produced on the trial was different from that recited in the notice of the motion, and the court held that this was a variance, and the plea of *nul tiel record* was sustained and the motion dismissed.<sup>25</sup>

*Proceeding by Motion Is Action at Law.*—In *Furst v. Banks*<sup>26</sup> it was said that: "The plaintiff, not the clerk, gives the notice. It is not required to be served by the sheriff or other officer. It is a private paper in the hands of the plaintiff or his agent, and does not belong to the court until it is returned to, or more properly, filed in, the clerk's office. Then, and not till then, has the clerk, as such, any knowledge of or control over

22. *Security Loan & Trust Co. v. Fields*, 110 Va. 827, 67 S. E. 342.

23. *Drew v. Anderson*, 1 Call 44.

24. *Cookes v. Bank*, 1 Leigh 475. As to amendments when at the trial a variance appears between the evidence and the allegations or recitals, see Code, § 3384, giving the courts wide powers to permit amendments and to promote substantial justice in such cases. In the case of a variance the proper practice is to object to the evidence when offered, or move to exclude it, the attention of the court being already called to the variance, and an opportunity afforded to meet the emergency under the section of the Code referred to. *Portsmouth St. R. Co. v. Peed*, 102 Va. 662, 47 S. E. 850.

25. *Blanton v. Com.*, 91 Va. 1, 20 S. E. 884.

26. 101 Va. 208, 43 S. E. 360, 8 Va. Law Reg. 821, and note. See this note for numerous illustrations where statutes governing proceedings in "action at law" will apply to motions.

it." And, as a result of the above reasoning, the court held that a proceeding by motion under § 3211 cannot be regarded as the *institution of an action* so as to warrant an attachment until the notice has been served and filed in the clerk's office, and that an attachment issued before return of the notice is void.<sup>27</sup> In this case it was objected that such a motion was not an *action at law* under § 2959 of the Code providing for the issuing of attachments in an "action of law." The court, having disposed of the case on another ground, deemed it unnecessary to decide this question. All doubt as to the last question, however, is now resolved by several decisions which hold, unequivocally, that a proceeding by motion under § 3211 *is an action at law*.<sup>28</sup> It has been held in a recent case that § 2959 of the Code of 1887, which provides for the issuing of an attachment at the time of or after the institution of any action at law for the recovery of a debt, etc., applies to a motion for a judgment by notice, and an attachment may be sued out in such a proceeding.<sup>29</sup>

### § 98. When motion lies under § 3211 of Code.

The general rule is as follows: "The statute thus authorizes the proceeding by motion whenever a person is entitled to recover money by action on 'any contract.' The only restriction imposed by the statute as to the nature of the contract upon which the recovery may be by motion is the right to recover

27. In a note to this case in 8 Va. Law Register 824, the editor says: "The point as to the pendency of the proceeding \* \* \* is equally pertinent and important under the statute of limitations, on the question when the statute ceases to run." A common-law action is considered as instituted when the summons is issued for the purpose of having it executed, and the statute of limitations on the claim asserted in such action ceases to run from the time such action is instituted. From a parity of reasoning it would seem, therefore, that, as a proceeding by motion is only instituted on the return of the notice to the clerk's office, the statute of limitations would only cease to run as of the date of such return.

28. See *Gordon v. Funkhouser*, 100 Va. 675, 42 S. E. 677; *Reed & McCormack v. Gold*, 102 Va. 37, 45 S. E. 868; *Newport News, etc., Ry. Co. v. Bickford*, 105 Va. 182, 52 S. E. 1011. And in the last named case it was held that the defendant may file a plea under § 3299 of the Code to such notice.

29. *Breeden v. Peale*, 106 Va. 39, 55 S. E. 2.

money upon it by action. If the contract is such that the person making the motion is entitled to recover money upon it by action, he is entitled to proceed to do so by motion, whether his right is based upon an expressed or implied contract. The remedy extends to all cases in which a person is entitled to recover money by action on contract."<sup>30</sup>

Hence, in the case cited in the margin it was held that an assignee of a note could recover against a remote assignor under § 3211; the recovery being on the implied contract. It has also been held that a recovery may be had on a fire insurance policy under this section,<sup>31</sup> or on a life insurance policy.<sup>32</sup>

### § 99. When motion does not lie under § 3211 of Code.

It has been held that § 3211 does not authorize the recovery by motion of a statutory penalty for failure to deliver a telegram as soon as practicable. The court said: "Section 3211, Code, authorizes the remedy by motion only in those cases in which the plaintiff is entitled to recover money by action on a contract; and here the proceeding is founded, not upon contract, but upon a tort, i. e., a wrongful violation of a public duty. \* \* \* It is true an action of debt lies for a statutory penalty, but this is

30. *Long v. Pence*, 93 Va. 584, 25 S. E. 593.

31. *Morotock Insurance Co. v. Pankey*, 91 Va. 259, 21 S. E. 487. See opinion in this case for form of such notice held sufficient. The right to proceed by motion in this case was properly called in question by demurrer, but was upheld. The opinion, however, does not deal with the question whether or not the policy was a contract of indemnity, or a contract to pay money.

32. *Union Cent. Life Ins. Co. v. Pollard*, 94 Va. 151, 26 S. E. 421; *Grubbs v. Nat. Life Ins. Co.*, 94 Va. 589, 27 S. E. 464.

In *Cardwell v. Talbott* (Corp. Ct. of Danville), 5 Va. Law Reg. 182, a motion was brought and a judgment obtained on a decree of a domestic court of chancery, and no question seems to have been made as to the right to substitute a motion for a formal action in such case. But see *quare* in note to said case by the editor of the Law Register; and such a conclusion would certainly seem to be in conflict with the *reasoning* in the opinion in *W. U. Tel. Co. v. Bright*, 90 Va. 778, 20 S. E. 146, as well as with the principle stated *ante*, § 71, that a domestic judgment is of such high dignity that, in the absence of statute, *debt only* will lie on it, and not *assumpsit*. Surely a motion is not of higher dignity than an action of *assumpsit*.

because the sum demanded is certain, and not because the cause of action arises *ex contractu*.”<sup>33</sup>

It will be noted that in both the case of *Long v. Pence*, *supra*, and *W. U. Tel. Co. v. Bright*, *supra*, the court took care to say that a motion lay to recover money *on* a contract, i. e., money due *by* contract. That this procedure is thus limited appears from the case of *Wilson v. Dawson*,<sup>34</sup> in which it was held that a motion

33. *West. Union Tel. Co. v. Bright*, 90 Va. 778, 20 S. E. 146.

34. 9 Va. 690, 32 S. E. 461. The court in this case says: “There have been amendments to this section which may have enlarged its scope, but with these we have nothing to do;” because in that case the motion was made before the amendment. The reference is to Acts 1895-6, p. 140, giving the plaintiff the privilege, in any case where his motion is founded on such a contract that an *action of assumpsit would also lie*, to serve an account and file an affidavit, and thus avoid a writ of inquiry of damages and put the defendant to a sworn defence (see § 96). It is thought, however, that the amendment has not changed the law in this particular, and that the rule announced in *Wilson v. Dawson*, *supra*, is still the law. As said by Prof. Graves in his Notes on Pleading (new) 34, note: “As assumpsit lies both to recover money on a contract, and also for unliquidated damages for the breach of a contract, it might be contended that a *motion* is now allowed to recover such damages. It is believed, however, that the amendment has not changed the previous law on this point. The *general provision* as to motions remains unchanged; and it is only when *by virtue of it* a motion is brought, when also assumpsit would lie, that the amendment proceeds to confer on the plaintiff an additional privilege.”

This distinction, however, has not always been carefully observed in practice. The case of *Duke v. N. & W. R. Co.*, went to the Court of Appeals twice. The first appeal is reported in 106 Va. 152, 55 S. E. 548, and the second in 107 Va. 764, 60 S. E. 96. This was a motion for judgment for *damages* for failure to receive and accept goods sold, and such *damages* were claimed in the notice *eo nomine*. No question was raised as to the propriety of the proceeding by motion on the first appeal, either by counsel or the court. On the second appeal, it was assigned as error that, on such proceeding by motion upon notice, the trial court, under the holding in the *Wilson v. Dawson*, *supra*, had no jurisdiction in the manner and form in which it was invoked. The court said: “Whether this contention be correct or not cannot now be considered,” for the reason that the jurisdiction of the circuit court, though not expressly presented or decided on the former writ of error, was necessarily involved, and was, therefore, *res judicata*.

will *not* lie to recover *damages* for a *breach of contract*, or the profits which the plaintiff would have made if he had been permitted to fill his contract, as such *damages* are not considered as money *due upon contract*, and the remedy by motion does not extend to actions which *sound in damages*.

### § 100. The manner of making defences to motions.

Defence may be made either by formal pleas, or by an informal statement in writing of the grounds of defence.

In these proceedings by motion it is intended that, in so far as possible, all formalities and technicalities shall be done away with. And this policy extends to the modes of making defence, as well as to the notice of the motion.

Accordingly, it is held that no *formal* pleas are *necessary*, except in cases where statutes require them, but that the defendant may make his defence by an informal statement in writing of the grounds of his defence. This statement will be treated as a plea or pleas, and the plaintiff may reply thereto with like informality. The defendant however *may* plead formally if he chooses, according to the course of the common law, and this is in all cases the *better practice*. But in every case an *issue* must in some way be made up on the record, in order to have a trial by jury.<sup>35</sup>

The general rule on this subject is well stated in *Preston v. Salem Improvement Co.*<sup>36</sup> In this case the question was squarely presented as to whether a defendant, in a motion under § 3211, could claim a right to a trial by a jury, without tendering an *issue*. The defendant declined to plead or to tender an issue in fact, claiming the right, as the motion was a summary proceeding, to go to trial without any formal pleadings, and to produce orally, in the progress of the trial, any defences he might have. The court declined to allow a jury to be sworn until and unless some issue of fact was joined. The Court of Appeals held

35. *Preston v. Salem Improvement Co.*, 91 Va. 583, 22 S. E. 486, 1 Va. Law Reg. 447, and note; 1 Va. Law Register 442; 4 Va. Law Register 752; *Hall v. Ratliff*, 93 Va. 327, 24 S. E. 1011; *Supervisors v. Dunn*, 27 Gratt. 608.

36. 91 Va. 583, 22 S. E. 486, 1 Va. Law Reg. 447, and note.

that the ruling of the lower court was correct, saying: "The object of § 3211 of the Code was to afford a more speedy remedy for the enforcement of contracts, but it was not contemplated that all the rules of pleading were to be abrogated thereby. \* \* \* The *better practice* [italics ours] in proceedings by motion would be to make up the issue to be tried by the jury by filing such formal plea as would be suitable had the action been by declaration, according to the form at common law. Inasmuch, however, as the object of this proceeding by motion under § 3211 was to give suitors a plain and summary proceeding for the recovery of judgments, and it is but in accordance with the spirit of this flexible proceeding by motion to permit the defendant to make his defence by such informal pleas or statement in writing as will state his defence and make up the issue to be tried, this latter practice is permissible, except in all cases where the statute requires the plea to be verified by affidavit. In such cases that requirement of the statute must always be complied with."<sup>37</sup>

While, as a general rule, the pleadings on a motion for a judgment for money after notice may be of a very informal nature, this is not so where statutes require otherwise, as under § 3299 of the Code, but, in such cases, the requirements of the statute must always be complied with.<sup>38</sup> It would thus seem that where a motion is made on a sealed instrument and the defendant desires to rely on any of the defences enumerated in § 3299 of the Code, or in *any case* where the defendant has an *unliquidated*

37. See notes, 1 Va. Law Register 442, 450, 4 Va. Law Register 752. However, in the case of *Bunch v. Fluvanna County*, 86 Va. 452, 11 S. E. 532, the court said of a motion to enforce a county bond: "The proceeding was a mere motion, in which no formal pleadings are required, and in which, therefore, it was competent for the county to make, *ore tenus*, any defence that could be appropriately made by plea in a regular action." This case seems to be in conflict with *Preston v. Salem Imp. Co.*, *supra*. See comment on this case in 4 Va. Law Register 752, 753. See also *M'Kinster v. Garrott*, 3 Rand. 554; *Cecil v. Early*, 10 Gratt. 198, 202.

38. *Preston v. Salem Improvement Co.*, *supra*; *Saunders v. Bank of Mecklenburg*, 112 Va. —, 71 S. E. 714; *Liskey v. Paul*, 100 Va. 764, 42 S. E. 875. And see *Newport News, etc., Ry. Co. v. Bickford*, 105 Va. 182, 52 S. E. 1011; *Briggs v. Cook*, 99 Va. 273, 38 S. E. 148.

*counterclaim* greater in amount than the claim asserted by the plaintiff and wishes to recover the *excess*, he can only do so by filing a formal sworn plea under the above section. So, if he wishes to deny his signature to a writing which the notice alleges he signed, or to deny a partnership or incorporation alleged in such notice, it would seem, under the above rule, that the proper affidavits must be made and filed under the statutes;<sup>39</sup> and, as § 3278 provides that no plea of *non est factum* shall be received unless it be verified by oath, it would seem that where a defendant to a motion on a sealed instrument wishes to make a defence which, if formally plead, would be shown under *non est factum*, he must verify such defence by affidavit duly filed.<sup>40</sup>

It has been pointed out that the *better practice* is to file formal pleas such as *non assumpsit*, *nil debet*, *non est factum*, etc., just as would be done to a common-law declaration, and it will be found by a reference to the cases cited in the margin that, in spite of the informality *permitted*, the *usual practice* has been to file *formal pleas*.<sup>41</sup>

39. See Code, §§ 3279, 3280. And in *Gordon v. Funkhouser*, 100 Va. 675, 42 S. E. 677, the defendant filed an affidavit denying a partnership and signature alleged in a notice of a motion, as well as a plea of *non est factum*.

40. See, however, *Bunch v. Fluvanna County*, 86 Va. 452, 10 S. E. 532, where on a motion to enforce a county bond, a jury being waived, the principal defence set up by the county was that the bond was executed and issued without lawful authority, and was, therefore, void. The plaintiffs argued that as the bond was regular on its face, and there was no affidavit putting its proper execution in issue, parol evidence on the subject was inadmissible. But the court said that this was a mistaken view, that no formal pleadings were required on a notice, and that it was competent for the county to make, *ore tenus*, any defence that could be appropriately made by plea in a regular action. This holding is in conflict with the rule announced in the cases above cited, and the court apparently overlooked the fact that, in a regular action, it would have been necessary to verify the plea by affidavit. The plea is one thing; the verification by oath of the defence another. In *Supervisors v. Dunn*, 27 Gratt. 615, the defendants to a motion on a sheriff's bond attacked its validity and filed affidavits in support of their defence, and the court said: "The fact is, that these affidavits are nothing more than pleas of *non est factum* in disguise."

41. In the following cases of motions formal pleas were filed by the defendant; *Supervisors v. Dunn*, 27 Gratt. 608; *Blanton v.*

*Instances of Informalities Held Not Reversible Error.*—As illustrations of the indulgence with which the courts view the procedure in these actions by way of motion, the following cases are instructive:

In *Briggs v. Cook*,<sup>42</sup> a proceeding by motion to recover a judgment for money, the defendant pleaded *non assumpsit* and a special plea of set-off under § 3299 of the Code. Issue was taken on the plea of *non assumpsit*, but no replication was filed to the special plea, and no evidence offered thereunder. The jury was sworn to try the issues joined. After verdict for the plaintiff, the defendant moved to set it aside because no issue had been joined on the special plea. The court held that the motion to set the verdict aside came too late; that in a proceeding by motion much greater latitude is allowed in pleading than in common-law actions; that the defendant had the right to demand a replication and, having failed to do so, he is deemed to have consented to a trial on the pleadings as they were.

In *Liskey v. Paul*,<sup>43</sup> which was a proceeding by motion to recover on three negotiable notes and one bond, the statute of limitations was pleaded to the notes sued on, but not to the bond; no plea at all being offered as to the bond. The court held, however, that it was clear that both the parties and the court treated the plea as going to all the demands sued on, and, the bond being actually barred by the statute of limitations, the failure to plead as to the bond was not reversible error.

The court said: "The proceeding by way of motion on notice is very informal, and was intended to do away with the necessity of formal pleading except in cases where provision is made by

Com., 91 Va. 1, 20 S. E. 884; *Morotock Ins. Co. v. Pankey*, 91 Va. 259, 21 S. E. 487; *Hall v. Ratliff*, 93 Va. 327, 24 S. E. 1011; *Briggs v. Cook*, 99 Va. 273, 38 S. E. 148; *Clarke v. Sleet*, 99 Va. 3818, 38 S. E. 183; *Gordon v. Funkhouser*, 100 Va. 675, 42 S. E. 677; *Liskey v. Paul*, 100 Va. 764, 42 S. E. 875; *Reed & McCormick v. Gold*, 102 Va. 37, 45 S. E. 868; *Rocky Mount Trust Co. v. Price*, 103 Va. 298, 49 S. E. 73; *Newport News, etc., R. Co. v. Bickford*, 105 Va. 182, 52 S. E. 1011; *Stimmell v. Benthall*, 108 Va. 241, 60 S. E. 765; *Saunders v. Bank of Mecklenberg*, 112 Va. —, 71 S. E. 714.

42. 99 Va. 273, 38 S. E. 148.

43. 100 Va. 764, 42 S. E. 875.

statute requiring formal pleadings, as under § 3299 of the Code. In a case like this, where it is clear that the parties and court treated the plea of the statute of limitations as applicable to all of the claims sued on, and all were in fact barred by the statute, and the court so held, its judgment will not be reversed, though it were technically erroneous."

So, in the recent case of *Stimmell v. Benthall*,<sup>44</sup> the court held that where the plaintiff in a proceeding by way of motion in answer to a plea of set-off, filed a replication which set up two separate and distinct replies, but the defendant, without objection, took issue thereon, and the lower court, after hearing arguments of counsel, rendered judgment on the issue, objection to said replication for duplicity could not thereafter be made in the Court of Appeals for the first time, though this objection, if it had been made in the trial court, would not, perhaps, have been without force.

*Plaintiff Should, as a Rule, Call for Grounds of Defence.*—Section 3249 of the Code provides: "In any action or *motion*, the court may order a statement to be filed of the particulars of the claims, or of *the ground of defence*; and, if a party fail to comply with such order, may, when the case is tried or heard, exclude evidence of any matter not described in the *notice*, declaration, or other pleading of such party, so plainly as to give the adverse party notice of its character." Of course, the above statement of grounds of defence must be *in writing*, as only a *written* statement could be *filed*.

By reason of the informality of the pleading to a motion, the above statute is particularly useful in cases of this character, and the plaintiff, in cases where the pleas or statement of defence by the defendant do not fully and clearly disclose the actual defence, should call for a statement of the grounds of defence, and thus avoid being taken by surprise. It would be advisable for him to do so in every case.<sup>45</sup>

*By Demurrer.*—Where the objection to the notice is that, while sufficient to withstand a demurrer, it is so general or indefinite in its terms that the defendant cannot feel sure that it

44. 108 Va. 141, 60 S. E. 765.

45. See 1 Va. Law Register 442; 4 *Idem* 753.

completely informs him of the plaintiff's claim, the defendant may protect himself against surprise by calling for a *bill of particulars* under the statute discussed in the last heading. Thus the court said, in *Union Central Life Insurance Co. v. Pollard*:<sup>46</sup> "If the defendant desires to have more specific information of the plaintiff's claim than is contained in the notice, he has the right to move the court to order the plaintiff to file a statement of the particulars of his claim. If the court makes such order, and the plaintiff fails to comply with it, the court may exclude evidence of any matter not so plainly described in the notice as to give the defendant information of its character. Code, § 3249."

But the defendant need only resort to the above procedure in cases where the notice states a good cause of action, but is in some feature of calculation or detail indefinite, e. g., where the motion is for money due by open account for work and labor done, or goods furnished, and the notice does not particularize the details of the work and labor, or the items of the goods. The notice *must* set out matter sufficient to maintain the action, and, whether or not it does so, is tested by a *demurrer to the notice*.<sup>47</sup> Thus, in *Security Loan & Trust Co. v. Fields*,<sup>48</sup> it was held that in a proceeding by motion against the endorser of a negotiable note the notice must contain such allegations of presentment for payment and notice of dishonor to the endorser as will fix a liability upon him for the payment of the note, else the notice will be bad *upon demurrer*. The defendant is not obliged to call for a bill of particulars in such case. The court in the case cited distinguishes *Union Central Life Ins. Co. v. Pollard*, *supra*, saying that in the latter case the objection raised to the notice (the admissibility in evidence of certain foreign statutes) was "a question not raised by the demurrer to the notice," and that this case is not in conflict with the settled doctrine that a notice which does not set out sufficient matter to maintain the action is demurrable.

However, the demurrer to the notice only raises the question

46. 94 Va. 151, 26 S. E. 421.

47. *Security Loan & Trust Co. v. Fields*, 110 Va. 827, 67 S. E. 342.

48. *Supra*.

as to whether or not there is matter in the notice sufficient to maintain the action.<sup>49</sup>

*Pleas in Abatement.*—A notice of motion for judgment on a note, if served before the liability of defendant has matured, is subject to a plea in abatement, the same as a declaration prematurely filed would be;<sup>50</sup> and it would seem plain that pleas in abatement to notices may be filed under all circumstances where—taking into consideration the fact that the notice takes the place of both the declaration and writ, and hence there can be no such plea for a variance between declaration and writ as in common-law actions—they would be applicable (as to the jurisdiction of the court, the disability of the parties to sue or be sued, etc.), in the same manner as they would be to more formal actions at law. Of course, they should be filed before the defendant has demurred, pleaded in bar, or filed a statement of his defence (which, as we have seen, is allowed on motions in lieu of formal pleading).<sup>51</sup>

### § 101. Against whom judgment may be given on motion.

Section 3212 of the Code provides that: "A person entitled to obtain judgment for money on motion, may, as to any, or the personal representatives of any person liable for such money, move severally against each or jointly against all, or jointly against any intermediate number; and when notice of his motion is not served on all of those to whom it is directed, judgment may nevertheless be given against so many of those liable as shall appear to have been served with the notice: Provided, that judgment against such personal representatives shall, in all cases, be several. Such motions may be made from time to time until there is judgment against every person liable, or his personal representative."<sup>52</sup>

49. *Morotock Ins. Co. v. Pankey*, 91 Va. 259, 21 S. E. 487; *Security Loan & Trust Co. v. Fields*, *supra*.

50. *Schofield v. Palmer*, 134 Fed. 753, 11 Va. Law Reg. 31.

51. See Code, §§ 3259, 3260. In *Morotock Ins. Co. v. Pankey*, 91 Va. 259, 21 S. E. 487, the objection that the notice had not been served as required by law was made by motion to dismiss the action.

52. See 4 Min. Inst. 1320 for comment on this statute. Any extended discussion of the above statute here would be out of place, as the subject belongs more properly to a discussion of *parties*. See *ante*, § 48.

Under the above section it has been held<sup>53</sup> that, on a motion against a principal and his sureties, a confession of judgment by the principal does not merge the cause of action against the sureties, and judgment may be rendered against the latter at a succeeding term of the court; and that the plaintiff's rights are not affected by suffering a nonsuit, but he may at a subsequent term renew his action or motion on the same cause of action against any or all of the parties against whom he has not already obtained judgment.

### § 102. The trial of the motion.

In general, it may be said that a motion is tried precisely like any other action at law. It is provided by § 3213 of the Code that: "On a motion, when an issue of fact is joined, and either party desires it, or, when in the opinion of the court, it is proper, a jury shall be impaneled, unless the case be one in which the recovery is limited to an amount not greater than twenty dollars, exclusive of interest."

It will be recalled that it has been stated earlier in this chapter that, when a motion is made under § 3211, in order to entitle the defendant to a trial by jury *an issue must be made up*; and that this issue may be tendered by a formal plea, or, in most cases, by an informal statement in writing of the grounds of defence, but that a mere oral statement of the grounds of defence is not sufficient.<sup>54</sup>

In most cases the motion is called up on the day to which the notice has been given and judgment then and there asked and granted, unless the motion is contested, when a date is set for its trial, or, if both sides are ready, the trial is forthwith held. Mr. Barton says:<sup>55</sup> "If there be no defence to the motion it is treated just as a suit to which there is no plea, and a judgment may be rendered thereon by default, or else

53. *Cahoon v. McCulloch*, 92 Va. 177, 23 S. E. 225. See also §§ 3395, 3396, of the Code. *Rocky Mount Trust Co. v. Price*, 103 Va. 298, 49 S. E. 73, is a recent case where the proceedings were under § 3212 of the Code.

54. *Preston v. Salem Imp. Co.*, 91 Va. 583, 22 S. E. 486, 1 Va. Law Reg. 447, and note. See *ante*, § 100.

55. 2 Barton's Law Practice 1047.

if there be not enough in the papers to justify a judgment a writ of enquiry will be first ordered, and executed either by the court or a jury."

The above statement would, perhaps, be more in accord with the actual practice were it amended so as to state that a writ of inquiry of damages is, in fact, never ordered on a motion (there being no rules taken on motions). What *is* done where there is no contest, and the motion is on some cause of action which does not *prove itself* (as a note or bond would), is for the plaintiff to swear his witnesses, prove his case, and take judgment. This is in the nature of *an execution of a writ of inquiry*, but no such writ is actually ordered or shown on the order book.

It is provided by § 3062 of the Code that at a *special term* "any motion for a judgment \* \* \* may be heard and determined whether it was pending at the preceding term or not." And in *Wooten v. Bragg*,<sup>56</sup> it was held that a notice of motion upon a forthcoming bond given to a regular term, which is not held, may be heard at a special term; and, by § 3054 of the Code, a motion, where the defendant does not appear and demand a trial by jury, may be heard and determined even at a term set aside by a corporation or city court for the exclusive trial of criminal and chancery cases.

### § 103. Motion to recover money in general otherwise than under § 3211 of the Code.

The statutes of this State in many instances provide for a summary remedy by motion in various cases where it is considered that justice and considerations of dispatch require the application of this simple and speedy remedy. Among other instances, the procedure by motion is prescribed in the following cases: For debts and fines due the State;<sup>57</sup> against certain bonded officers for a failure to properly discharge their duties;<sup>58</sup>

56. 1 Gratt. 1.

57. Debts due State, Code, §§ 681-685. Fines, where no corporal punishment is prescribed, Code, §§ 712-714.

58. Against delinquent treasurers and their sureties, Code, § 615. §§ 863-865. Against officer for not making proper return or process, Code, §§ 900-901; for various forms of notices of motions un-

on certain bonds taken as incidents to actions at law, such as forthcoming bonds;<sup>59</sup> by and between individuals in certain special cases, as e. g., attorney and client, and principal and surety.<sup>60</sup>

And it is provided by § 3210 of the Code that: "The court to which, or in, or to whose clerk or office, any bond taken by an officer, or given by any sheriff, sergeant, or constable, is required to be returned, filed or recorded, may, on motion of any person, give judgment for so much money as he is entitled, by virtue of such bond, to recover by action."

The motions referred to in this section are governed by the same general rules, as to liberal construction given to the notice, by whom such notice is served, the manner of making defences, the trial of the motion, and the freedom of all the proceedings thereunder from technicality, as are the motions under § 3211 of the Code heretofore discussed, save only in instances where the statutes giving the remedies in such cases specifically require otherwise. A number of the cases cited in the discussion of § 3211 to illustrate general principles, were cases decided under statutory motions allowed by other sections of the Code.

As to the *length of the notice* to be given, of course, where der the last section, see 4 Min. Inst., 1771, 1772. Against sheriffs and their deputies for not turning over money collected to person entitled thereto, Code, § 909; for form of notice, see 4 Min. Inst. 1773. By Sheriffs against their deputies, Code, §§ 910-912; for forms of notices, see 4 Min. Inst. 1774. Against sheriffs, constables, and their sureties for failure to account for fees collected, Code, § 3519; for form of notice of motion against an officer for clerk's fees collected, see 4 Min. Inst. 1770. For failure of officer to make due return of an execution issued by a justice, Code, § 2952. For failure of justice to pay to clerk fines collected by him, Code, § 723.

59. On forthcoming bonds, Code §§ 3620, 3625. For forms of notice, see note to § 3620, Pollard's Code. For full treatment of motions on forthcoming bonds, see 2 Barton's Law Practice 1049-1067; 4 Min. Inst. 1321, 1322.

60. By client against attorney at law for failure to pay over money collected, on demand, Code, § 3200; for form of notice, see 4 Min. Inst. 1770. By surety against principal for money paid, Code, § 2893; for form of notice, see 4 Min. Inst. 1769. By one surety against another, Code, § 2895; for form of notice, see 4 Min. Inst. 1770.

the particular statute giving the remedy prescribes the length of the notice the provisions of such statute must be strictly followed. Such provisions in the statutes are rare, however, and most cases are governed by § 3209 of the Code, which declares that: "In any case wherein there may be judgment or decree for money on motion, such motion shall be after *ten days' notice*, unless some other time be specified in the section or statute giving such motion;" and, as said by Prof. Minor:<sup>61</sup> "In prudence, the notice should be *in writing*, but it seems to be in general not indispensable." *In practice*, however, a *written notice* is almost invariably given.

So, also, it may be said of the motions now under discussion that: "The motion should be made on the day to which the notice is given; or at least *docketed* on that day, and then regularly continued from that day until the day on which it is heard by the court; and if not thus regularly continued, as if, without the defendant's consent, it be continued from the *June* until the *August* term, passing by the intermediate *July* term, it is a *discontinuance*, and puts the motion out of court."<sup>62</sup>

61. 4 Min. Inst. 1318; 2 Barton's Law Practice 1043.

62. 4 Min. Inst. 1320; 2 Barton's Law Practice 1046; *Parker v. Pitts*, 1 H. & M. 4; *Amis v. Koger*, 7 Leigh 221.

## CHAPTER XII.

### ACTION OF ACCOUNT.

§ 104. Nature of action, and general rules applicable thereto.

§ 105. Superseded by bill in equity.

#### § 104. Nature of action, and general rules applicable thereto.

The common-law action of account, or account-render, is an *ex contractu* action, supposed to be founded on a contract, express or implied.<sup>1</sup> It was anciently employed to adjust and settle mutual accounts where there was some privity or mutual confidence existing between the parties, and its object was to recover the balance ascertained to be due.<sup>2</sup> This privity might be either *in fact* (as in case of partners, bailiffs, receivers, or principals), or *in law* (as in case of guardians in socage).<sup>3</sup>

It was a very technical, dilatory, and unsatisfactory mode of relief. There was a preliminary judgment that the defendant should account (*quod computet*), after such judgment to account the case was referred to *auditors* to take the account, and the final judgment (*quod recuperet*) was rendered on the report of the auditors.<sup>4</sup>

The procedure in this action, and especially before the auditors, was, as Prof. Minor says, so "intolerably tedious, expensive and inconvenient,"<sup>5</sup> that the action is practically obsolete, and, as said by Mr. Barton,<sup>6</sup> "is so little used as scarcely to be known in practice." However, the action *may* still be brought in this State, and, by statute,<sup>7</sup> certain instances where it may

1. 1 Encl. L. & P. 764.

2. 4 Min. Inst. 427, 552.

3. 4 Min. Inst. 427; 1 Encl. L. & P. 764.

4. 4 Min. Inst. 1468-1469; 1 Encl. L. & P. 768-769; Bispham's Principles of Equity, § 481.

5. 4 Min. Inst. 1469, 1467.

6. 1 Barton's Law Practice 176. See also 1 Encl. L. & P. 763; Stephen's Pleading, § 77.

7. Code, § 3294, is as follows: "An action of account may be maintained against the personal representative of any guardian, bailiff, or receiver, and also by one joint tenant or tenant in common, or his personal representative, against the other as bailiff, for re-

be maintained are enumerated. It should be noted of this statute that "The statutes authorizing the action in particular cases are regarded as in aid of the action and extending the remedy, and not as limiting it to the cases enumerated."<sup>8</sup>

The declaration in the action was rather like a bill in equity for an accounting, save that it did not ask for an account to be taken, but concluded, as other declarations at law, with a demand for damages. The theory of the action was not that the defendant was indebted to the plaintiff, but that he was obliged to account, and the judgment might be for more than was asked in the declaration.<sup>9</sup>

### § 105. Superseded by bill in equity.

As has already been said, this action is obsolete and not used. To quote from Prof. Minor: "In practice the *bill in chancery* has quite superseded the action of account, being not only applicable wherever the *accounts are mutual* (although there be no privity between the parties), and in all equitable claims arising out of trusts, and, therefore, in a wider range of cases than the action at law, but being also a much more speedy and effective remedy."<sup>10</sup> The authorities are in accord that the remedy by suit in equity for an accounting is a better, speedier, and more convenient remedy, applying to more cases than did the common law action of account, and that it is applicable to *every case* where the action of account lay at common law.<sup>11</sup>

ceiving more than comes to his just share or proportion, and against the personal representative of any such joint tenant or tenant in common."

8. 1 Encl. L. & P. 764.

9. 1 Encl. L. & P. 767-768; Stephen's Pleading, § 77. For form of declaration, see 4 Min. Inst. 1706, 1707; 1 Barton's Law Practice 372. For full treatment of the common-law action of account, see 1 Encl. L. & P. 763-769; 4 Min. Inst. 165, 427, 552, 585, 1468-1469; 1 Barton's Law Practice 175-176, 372; Graves' Notes on Pleading (new) 21; Stephen's Pleading, § 77; Bispham's Principles of Equity, § 481.

10. 4 Min. Inst. 427. See also Stephen's Pleading, § 77; 1 Barton's Law Practice, 176.

11. 4 Min. Inst. 1467; Bispham's Principles of Equity, § 484; 1 Encl. L. & P. 745, 746; Huff v. Thrash, 75 Va. 546.

## CHAPTER XIII.

### UNLAWFUL ENTRY OR DETAINER AND FORCIBLE ENTRY.

- § 106. Nature and object of action.
- § 107. Plaintiff's title.
- § 108. Pleadings.
- § 109. Contrasted with ejectment.
- § 110. Statute of limitations.
- § 111. How possession of premises recovered from tenant in default for rent.
- § 112. When proceeding to be before justice of the peace.
- § 113. Right of appeal.

#### § 106. Nature and object of action.

This action is of purely statutory origin and not common law, and is given to recover the possession only of real property, and not damages. It is therefore a *real* action. The object is to protect an actual possession against an unlawful invasion. The entry of the owner is unlawful if forcible, and the entry of any other person is unlawful, whether forcible or not. If, therefore, the tenant should hold over his term without consent of the landlord, the remedy of the landlord is by an action of unlawful detainer. He cannot forcibly turn the tenant out, and if he does, the tenant may bring his action of forcible entry against the landlord and thereby restore his possession. As against forcible or unlawful entry, the purpose of the statute is to protect the *actual possession*, whether rightful or wrongful, and if the defendant has entered either forcibly or unlawfully, the plaintiff is entitled to recover regardless of his right to the possession, if he in fact had actual possession. The action must be brought within three years after such forcible or unlawful entry. If, however, the action be for unlawful *detainer*, its object and purpose is to try the *right of possession*. Here the defendant has actual possession, but is not entitled to hold it. Some one else is en-

titled to the possession as against him. The purpose of the action in this instance is to try the right of possession.<sup>1</sup>

### § 107. Plaintiff's title.

The Virginia statute gives the right of action to the party turned out of possession "no matter what right or title he had thereto."<sup>2</sup> The question involved in the case is not one of title at all, but of possession or the right of possession as the case may be. One who has no title and no right of possession, for example, a tenant holding over after his term, if in actual possession may maintain forcible or unlawful entry against any one forcibly or unlawfully depriving him of his possession. The action lies wherever trespass would lie, and sometimes where it would not. The real owner may enter even with force if he has the right of entry without committing a trespass, but he may be turned out for a forcible entry. When the plaintiff shows that he has been turned out by force or by one having no right to do so, he has made out his right of restitution which cannot be defeated by any evidence in regard to title, or right of possession.<sup>3</sup> The possession which will maintain the action, however, is not confined to actual occupancy or enclosure, but is any possession which is sufficient to sustain an action of trespass. An actual possession of a part of a tract of land under a *bona fide* claim or color of title to the whole is such a possession of the whole or so much thereof as is not in adverse possession of others as will sustain the action. The title alone draws after it possession of property not in the adverse possession of another. It is essential, however, that the plaintiff, in unlawful detainer, should have actual possession, or the right to the possession, and that the defendant should be the wrongdoer.<sup>4</sup> Where the action is for a forcible

1. Code, § 2716, and notes; 4 Min. Inst. 559; *Olinger v. Shepherd*, 12 Gratt. 471; *Davis v. Mayo*, 82 Va. 97; *Mears v. Dexter*, 86 Va. 828, 11 S. E. 538; note to *Dobson v. Culpepper*, 23 Gratt. (Va. Rep. Ann.) 352.

2. Code, § 2716.

3. *Olinger v. Shepherd*, *supra*.

4. *Olinger v. Shepherd*, *supra*; *Moore v. Douglas*, 14 W. Va. 708, 732; *Storrs v. Frick*, 24 W. Va. 606, 608.

entry, it is said that force is an essential element of the action; that a mere trespass will not sustain it, and that there must be the element of force or violence or the terror of the occupant.<sup>5</sup> If the plaintiff relies upon actual possession as his right to recover, the possession, it is said, must be of sufficiently long standing to become in a legal sense peaceable, that a mere scrambling possession, such as tying horses in an unfinished stable in the hands of the contractor, is not sufficient.<sup>6</sup>

### § 108. Pleadings.

The statute in Virginia provides that when the action is brought in court it shall be the circuit court of the county, or the circuit or corporation court of the corporation in which the land or some part thereof is; and that it shall be commenced by a summons, and that no declaration shall be required. This is the only formal action in which no declaration is required. The summons is issued by the clerk upon a memorandum furnished by the plaintiff, or his attorney, describing the premises with sufficient accuracy to enable the sheriff to place the plaintiff in possession if he recovers. The summons should show on its face that the possession has not been withheld over three years, and should be issued and returnable in the county or corporation in which the land or some part thereof is. It is returnable to any term and must be served at least five days before the return day. The defendant's only plea is not guilty. The parties may have a jury if desired, and the case takes precedence on the docket over all other civil cases.<sup>7</sup> While the defendant's only plea is not guilty, the equitable defences allowed in an action of ejectment under §§ 2741 and 2742 of the Code are equally available to the defendant provided he gives the ten days' notice in writing of such defences as required by § 2743 of the Code.<sup>8</sup> Where a defendant appears, but fails to plead, and the jury are sworn

5. Stephen on Pleading, § 71.

6. *Blake v. McCray*, 65 Miss. 443, cited in note to 8 L. R. A. 537.

7. Code, §§ 2716, 2717.

8. *Dobson v. Culpeper*, 23 Gratt. 352, 355; *Locke v. Frasher*, 79 Va. 409.

to try the issues joined, and the defendant has been permitted to make full defences as though the issues had been joined, he cannot afterwards, in the appellate court, make the objection for the first time that no issue was in fact joined.<sup>9</sup>

### § 109. Contrasted with ejectment.

Unlawful entry and detainer is designed to protect the actual possession, whether rightful or wrongful, against unlawful invasion, whereas ejectment tries the title. In ejectment, the plaintiff, as a rule, recovers on the strength of his own title, and not on the weakness of that of his adversary, and the judgment in ejectment is final and conclusive between the parties, whereas in unlawful entry and detainer it is expressly provided by statute that judgment shall not bar any action of trespass or ejectment between such parties, nor shall any such verdict or judgment be conclusive in any future action on the facts therein found.<sup>10</sup>

### § 110. Statute of limitations.

The limitation prescribed by the statute is three years and the burden is on the plaintiff to show that the action was brought within that time. As this is an action given by statute, it is believed that the limitation is of the right, and not merely of the remedy.<sup>11</sup>

### § 111. How possession of premises recovered from tenant in default for rent.

Section 2719 of the Code as amended in 1910 is as follows: "If any tenant or lessee of premises in a city or town, or in any subdivision of suburban and other lands divided into building lots for residential purposes, or of premises anywhere used for residential purposes, and not for farming or agriculture,

9. *Bartley v. McKinney*, 28 Gratt. 750; cf. *Briggs v. Cook*, 99 Va. 273, 38 S. E. 148; *Colby v. Reams*, 109 Va. 308, 63 S. E. 1009.

10. Code, § 2721; *Davis v. Mayo*, 82 Va. 97.

11. *Olinger v. Shepherd*, 12 Gratt. 462; *Pettit v. Cowherd*, 83 Va. 20, 25, 1 S. E. 392; 4 Min. Inst. 558; *Graves' Notes on Pl. 31*; *Kincheloe v. Tracewells*, 11 Gratt. 587; for historical development of the action, see 13 Am. & Eng. Encl. Law (2nd Ed.) 744.

being in default in the payment of rent, shall so continue for five days after notice, in writing, requiring possession of the premises, or the payment of rent, such tenant or lessee shall thereby forfeit his right to the possession. In such case the possession of the defendant may, at the option of the landlord or lessor, be deemed unlawful, and he may proceed to recover the same in the manner provided by this chapter."

**§ 112. When proceeding to be before justice of the peace.**

If the proceeding be against the tenant or some person claiming under him, the lease of the tenant being originally for a period not exceeding one year, or for the time such tenant is employed by the landlord as a laborer, the landlord or other person entitled to the possession may proceed to recover the same by summons obtained from a justice of the peace.<sup>12</sup>

**§ 113. Right of appeal.**

The constitution and statute giving right of appeal in cases involving the title or boundaries of land, regardless of value, include cases of unlawful detainer. Possession is regarded as a necessary element of complete title.<sup>13</sup>

<sup>12</sup>. Code, § 2716.

<sup>13</sup>. *Pannill v. Coles*, 81 Va. 380; *Rathbone Co. v. Ranch*, 5 W. Va. 79.

## CHAPTER XIV.

### EJECTMENT.

- § 114. Historical.
- § 115. Ejectment at common law.
- § 116. Plaintiffs in ejectment in Virginia.
- § 117. Plaintiff's title.  
Adverse possession.
- § 118. What may be recovered.
- § 119. Defendants in ejectment.
- § 120. Pleadings in ejectment.  
Improvements.
- § 121. Evidence in ejectment.
- § 122. Statute of limitations.
- § 123. Interlocks.
- § 124. Equity jurisdiction.
- § 125. Verdict.
- § 126. Judgment.

#### § 114. Historical.

The action of ejectment was originally a mere personal action of trespass to recover damages from the defendant for ejecting the plaintiff from his close. At a later stage, a tenant was allowed to recover his unexpired term of years. It was afterwards extended to the recovery of freeholds, and finally became the established method of trying title to land.<sup>1</sup>

#### § 115. Ejectment at common law.

Professor Graves gives the following account of the proceeding in an action of ejectment at common law:<sup>2</sup> "The old action was commenced in the name of a fictitious plaintiff, say John Doe, and was brought against a fictitious defendant, say Richard Roe. The owner of the land on whose behalf the action was really brought, say Wm. Brown, was called the lessor of the plaintiff, i. e., of John Doe, the nominal or fictitious plaintiff, to whom Wm. Brown was supposed to have made a lease.

1. 4 Min. Inst. 438; 10 Am. & Eng. Encl. Law (2nd Ed.) 470.

2. Graves' Notes on Pl. 24-26.

The real tenant of the land, say John Green, was not made the defendant at first, but Richard Roe in his stead, called the *casual ejector*. The object of this was to compel John Green to beg to be allowed to defend his land, when he would be granted the liberty *on terms*, i. e., on condition of entering into the *consent rule*, confessing *lease, entry, and ouster*. The style of the action was at first John Doe, on the demise of Wm. Brown *v.* Richard Roe; i. e., John Doe, the *tenant* of Wm. Brown, *v.* Richard Roe. For *ejectment* could only be brought by a *tenant for a term of years*, complaining of a forcible ejection, or ouster, from the land demised; and hence Wm. Brown could not sue in ejectment directly to recover his land, but was forced to *try the title* under cover of a lease pretended to have been made by him to John Doe, and in an action apparently brought by the said *Doe* for his injury in being deprived of the lease. But the doctrine of *maintenance* forbade Brown to make Doe a lease, while he, Brown, was out of possession, with an adverse possession against him. Hence Brown must either actually enter on his land before making Doe the lease, or under the fictions he must have the *right of entry*, or ejectment would not lie; for it would otherwise be impossible that Brown could ever have given Doe the lease, which is the foundation of the action of ejectment. By the old law the *owner* of land did not always have the *right of entry*, and hence could not always bring ejectment, but was sometimes forced to resort to a *writ of right*, or some other action.

“The ordinary way in which the right of entry was lost at common law was by the death of the tortfeasor (disseisor), and the descent of his tortious fee to his heir. The true owner’s right of entry was then said to be *toll*ed (i. e., taken away) by descent cast.<sup>3</sup> But now in Virginia, ‘The right of entry or action for land shall not be tolled or defeated by descent cast.’<sup>4</sup> The English statute of 21 James I, ch. xvi, § 1, added another way of tolling an entry, namely, by the lapse of twenty years after the right accrued; and in this indirect mode the time of bringing ejectment was limited by that statute. And the Code

3. 3 Bl. Com. (176).

4. Code, § 2715.

of Virginia, § 2915, declares that 'no person shall make an entry on, or bring an action to recover, any land lying east of the Alleghany mountains but within fifteen years, or any land lying west of the Alleghany mountains but within ten years, next after the time when the right to make such entry, or bring such action, shall have first accrued to himself, or to some person through whom he claims.'

"Under this statute right of *entry* and of *action* is barred after fifteen or ten years (as the case may be) of adverse *possession*; but before the action is thus barred by the statute of limitations, the right to bring ejectment now in Virginia does not depend upon the right of entry. For ejectment is made to take the place of the old *writ of right* (now abolished), and *that* did not require right of entry.<sup>5</sup> The student must not confound, under the old action, the *right of entry* of Brown, the lessor of the plaintiff, with the *entry* of Doe under Brown's lease which was confessed under the consent rule, admitting lease, *entry*, and ouster. For, under the old practice, Brown's right of entry, without which he could not legally give Doe a lease, was essential to the right to bring ejectment, and of course Green was not compelled to admit it. But once granted that Brown had the *right of entry*, then Green was compelled to admit that he *did* enter and give Doe a valid lease; that Doe made entry under this lease; and that Doe was ousted or evicted at the hands of Green, who, on these admissions is allowed to take the place of Richard Roe, and become defendant in the action."<sup>6</sup>

### § 116. Plaintiffs in ejectment in Virginia.<sup>7</sup>

All fictions have been abolished in Virginia, and the action is brought by the real claimant of the land against the person actually occupying the same adversely to the plaintiff, or if there be none such, against some person exercising ownership thereon or claiming title thereto, or some interest therein at the commence-

5. 2 Min. Inst. 513, 514; 2 Barton's Law Pr. 1101; Reynolds v. Cook, 83 Va. 817, 3 S. E. 710.

6. Langdell, Eq. Pl., § 123.

7. All of the subsequent sections of this chapter deal with the statutory action of ejectment in Virginia.

ment of the action. It may be brought in the same cases in which a writ of right might have been brought prior to July 1, 1850, and by any person claiming real estate in fee, or for life, or for years, either as heir, devisee, or purchaser, or otherwise. No person, however, can bring the action unless he has, at the time of commencing it, a subsisting interest in the premises claimed and a right to recover the same, or to recover the possession thereof, or some share, interest, or portion thereof. It may also be brought by one or more tenants in common, joint tenants or coparceners against their co-tenants, but the plaintiff in such case is bound to prove an actual ouster or some other act amounting to a total denial of the plaintiff's right as co-tenant. One joint tenant or tenant in common cannot bring the action in his own name for the benefit of himself and others. He can recover his own share, but not that of any one else.<sup>8</sup> Where land has been conveyed in trust to a trustee to hold for the benefit of a third person, the beneficiary, after the purposes of the trust have been satisfied, may maintain an action of ejectment in his own name, although the legal estate is still in trust,<sup>9</sup> or the action may be maintained by the trustee in his own name whether the trust has been satisfied or not against a third person holding adversely.<sup>10</sup>

### § 117. Plaintiff's title.

Generally, a plaintiff in ejectment must recover solely on the strength of his own title, and not on the weakness of that of his adversary, and this title of the plaintiff must be a legal title. There is no comparison of titles, and the verdict is not rendered in favor of the person having the better title, but the plaintiff must show good title in himself, and if he fails to do so, the defendant wins, i. e., the party in possession is left undisturbed. It results, therefore, if the defendant, occupying under a claim or color of title, can show an outstanding title in a third person he defeats the plaintiff as effectually as if the defendant had that title. The outstanding legal title, how-

8. Code, §§ 2723, 2725, 2726, 2736; *Marshall v. Palmer*, 91 Va. 344, 21 S. E. 672.

9. *Hopkins v. Ward*, 6 Munf. 38.

10. *Hopkins v. Stephens*, 2 Rand. 422.

ever, which will defeat the action must be a present, subsisting and operative legal title upon which the owner could recover if asserting it by action.<sup>11</sup> The plaintiff must have a subsisting interest and right to recover the same at the time of action brought. There can be no recovery except in special instances unless the evidence shows that at the time the action was brought the plaintiff was the owner of the legal title.<sup>12</sup>

If there be an outstanding unsatisfied mortgage or deed of trust on land merely to secure a debt, in many jurisdictions this is regarded as a mere lien, and the mortgagor or grantor may still maintain ejectment in his own name and the defendant will not be permitted to set up the outstanding mortgage or deed of trust to defeat the action.<sup>13</sup> It has been held in Virginia that, if the deed of trust has been satisfied although not released, the grantor in such deed may maintain ejectment in his own name.<sup>14</sup> The plaintiff, however, must have the legal title at the time the action is commenced. It cannot be acquired afterwards. An outstanding legal title in another than the plaintiff at the time of the institution of the action breaks in upon and disrupts the plaintiff's title and bars his recovery, and the plaintiff cannot make good the defect by the subsequent purchase of such outstanding title.<sup>15</sup> It is immaterial whether this outstanding legal title is in the commonwealth or another. The title to be shown by the plaintiff in order to entitle him to recover is either a grant from the commonwealth connecting himself therewith by a regular chain of title, or such a statement of facts as will warrant the jury in presuming a grant, or adverse possession for the statutory period under a claim or color of title.<sup>16</sup> If, however,

11. *Reusens v. Lawson*, 91 Va. 226, 21 S. E. 347; *King v. Mullins*, 171 U. S. 404.

12. *Leftwich v. City of Richmond*, 100 Va. 164, 40 S. E. 651.

13. 10 Am. & Eng. Encl. Law (2nd Ed.), 504, and cases cited; *Barrett v. Hinckley*, 124 Ill. 32, 7 Am. St. Rep. 331; 15 Cyc. 70, 71.

14. *Lynchburg Cotton Mills v. Rives*, 112 Va. —, 70 S. E. 542.

15. *Merryman v. Hoover*, 107 Va. 485, 59 S. E. 483.

16. *Sulphur Mines Co. v. Thompson*, 93 Va. 293, 25 S. E. 832; *Va. Midland R. Co. v. Barbour*, 97 Va. 118, 33 S. E. 554, 5 Va. Law Reg. 166, and note; 88 Am. St. Rep. 701.

the plaintiff and defendant claim title from a common source, the plaintiff need not trace his title back of the common source.<sup>17</sup>

*Adverse Possession.*—The subject of adverse possession cannot be gone into fully in a course of pleading. It is fully discussed elsewhere.<sup>18</sup> The article in 1 Am. & Eng. Encl. Law is commended as a very satisfactory discussion of the subject. The essentials of adverse possession to confer title are: the possession must be hostile and under claim of right, must be actual, open and notorious, exclusive and continuous. Adverse possession to constitute title must at all times be such an invasion of the rights of the owner as will give him a cause of action.<sup>19</sup> It would seem, therefore, that where the surface and mineral rights have been severed, the adverse possession of the surface for no length of time would bar the rights of the owners of minerals in unopened mines. At no time has the owner of the minerals had a cause of action against the owner of the surface. "The title to the freehold of the one subject cannot be acquired by the adverse possession of the other. The presumption, however, is that the owner of the surface owns all beneath it, and the burden is on the person claiming that there has been a severance of title and interest to prove it either by deed of record, or by the proof of such facts and circumstances, brought home to the party sought to be charged, as will affect his conscience with notice of adverse rights, or will serve to put him on enquiry which would lead to such knowledge."<sup>20</sup>

A vendee who has not paid the purchase money nor recorded his deed, holds under and not against the vendor. Coparceners, tenants in common and joint tenants are presumed to hold for and not against each other, but this presumption may be overcome by notorious acts of ouster, or adverse possession brought

17. *Carter v. Wood*, 103 Va. 68, 48 S. E. 553; *Marbach v. Holmes*, 105 Va. 178, 52 S. E. 828; *Hurley v. Charles*, 110 Va. 27, 65 S. E. 468.

18. 1 Am. & Eng. Encl. Law (2nd Ed.) 787.

19. *Va. Coal & Iron Co. v. Kelly*, 93 Va. 332, 24 S. E. 1020.

20. *Interstate Co. v. Clintwood*, 105 Va. 575, 54 S. E. 593; cf. *Harman v. Ratcliff*, 93 Va. 249, 24 S. E. 1023; *Sharp v. Shenandoah Furnace Co.*, 100 Va. 27, 40 S. E. 103; *Steinman v. Vicars*, 99 Va. 555, 39 S. E. 227.

home to the others.<sup>21</sup> While, as a rule, a tenant cannot dispute the title of his landlord, still the tenant may become an adverse claimant by a clear, positive, continued disclaimer and disavowal of the landlord's title brought home to the landlord, and the tenant need not first surrender possession to the landlord.<sup>22</sup> The title acquired by adverse possession is superior to any paper title, no matter how complete the latter may be. Such adverse possession does not merely bar the remedy of the party holding the paper title, but takes away from him his title and his right of entry and vests it in the adverse claimant, thereby giving him a superior title upon which he may himself maintain ejectment.<sup>23</sup>

The rule that the plaintiff must recover on the strength of his own legal title is subject to two important exceptions: (1) Where a mere stranger, without title or authority, intrudes upon a person in peaceable possession of land. Here the prior possessor is allowed to recover on the strength of his previous possession, because actual possession is evidence of title against all the world except the true owner, and this possession cannot be disturbed nor the possessor put to the proof of his title by a mere stranger. e. g., a squatter. It is said that "the relation of the parties stands in the place of title; and though the title of the plaintiff is tainted with vices or defects that would prove fatal to his recovery with any other defendant in peaceable possession, it is yet altogether sufficient in litigation with one who entered into possession under it or otherwise stands so related to it that the law will not allow him to plead its defects in his defence."<sup>24</sup> (2) A tenant put into possession by his landlord is estopped to deny the title of his landlord as well in ejectment as elsewhere.<sup>25</sup>

If a party claiming to be the purchaser of a tract of land for valuable consideration, and without notice of a prior unrecorded

21. *Pillow v. S. W. Imp. Co.*, 92 Va. 144, 23 S. E. 32.

22. *Neff v. Ryman*, 100 Va. 521, 42 S. E. 314.

23. *Leffingwell v. Warren*, 2 Black (U. S.) 599; *Sharon v. Tucker*, 144 U. S. 533, 544. See also *Hollingsworth v. Sherman*, 81 Va. 668, 671; *Va. Mid. R. Co. v. Barbour*, 5 Va. Law Reg. 166, and note.

24. *Tapscott v. Cobbs*, 11 Gratt. 172, 174; *Bradshaw v. Ashley*, 180 U. S. 59; *Rhule v. R. Co.*, 102 Va. 343, 46 S. E. 331.

25. *Emerick v. Tavener*, 9 Gratt. 220; *Witten v. St. Clair*, 17 W. Va. 762.

deed, can maintain ejectment against the grantee in such unrecorded deed, he must show that he received his conveyance and actually paid the purchase money before he had notice of the prior unrecorded deed. The recital in the deed of the payment of the purchase money is evidence against his grantor, but as against the grantee in the prior deed it is mere hearsay.<sup>26</sup>

### § 118. What may be recovered.

As a general rule, the action will not lie except for that upon which entry may be made, or of which the sheriff can deliver possession. Usually, it cannot be maintained for a mere easement or license. It is allowed, however, by municipal corporations to recover possession of streets wrongfully occupied by individuals, and a railroad company may maintain the action to recover its roadbed or right of way.<sup>27</sup> In Virginia it has been held that the right to quarry and remove stone is not a mere license, but an interest in or a right arising out of land, and hence may be recovered under the Virginia statute, declaring that the party having an interest in or claim to the land held adversely by another may sell and convey the same and his grantee may maintain ejectment for it.<sup>28</sup> Under the statute in Virginia, if the plaintiff recovers, he may recover not only possession of the land, but rents and profits for a period generally not longer than five years before the action was begun, and coming down to verdict, and also for any destruction or waste of the buildings or other property with which the defendant is chargeable.<sup>29</sup>

### § 119. Defendants in ejectment.

It is declared by statute in Virginia that the person actually occupying the premises and any person claiming title thereto, or any interest therein adversely to the plaintiff may be named defendants in the declaration, and if there be no person actually occupying the premises adversely to the plaintiff, then the action must be against some person exercising ownership thereon

26. *Bugg v. Seay*, 107 Va. 648, 60 S. E. 89.

27. 11 Am. & Eng. Encl. Law (2nd Ed.) 472.

28. *Reynolds v. Cook*, 83 Va. 817, 3 S. E. 710.

29. Code, § 2751.

or claiming title thereto or some interest therein at the commencement of the suit, and if a lessee be made defendant at the suit of a party claiming against the title of his landlord, such landlord may appear and be made a defendant with or in place of his lessee.<sup>29a</sup> In order to maintain ejectment, the plaintiff must be out of possession, though the defendant may be either in or out. "The object of the action is to try possessory title to corporeal hereditaments and to recover possession thereof," and the effect of the amendment of the statute made in 1895 and 1896 was simply to permit the plaintiff, in cases where the premises were occupied, in his discretion to join as defendants with the occupant any person claiming title thereto or interest therein adversely to the plaintiff.<sup>30</sup> Prior to the amendment referred to, if the land was actually occupied, the action was against the occupant only, and only in cases where the premises were vacant could the action be maintained against one merely claiming title thereto. The effect of the amendment is to permit the plaintiff, where the premises are occupied, to join as defendants with the occupant any person claiming title thereto or an interest therein adversely to the plaintiff, thus enabling him in a single action to establish his title against all.<sup>31</sup> But both before and since the amendment the action could be maintained against one merely claiming adversely to the plaintiff if the premises were vacant. If the plaintiff is in possession, his remedy, if any, is by a bill in equity. If the plaintiff is in possession of the surface of land, and the underlying minerals are claimed by another under a deed subordinate to that of the plaintiff, the plaintiff cannot maintain ejectment, but must proceed in equity by a bill to remove the cloud on his title.<sup>32</sup>

### § 120. Pleadings in ejectment.

The action is a mixed action to recover land and damages and is required to be brought in the circuit court of the county or circuit or corporation court of the corporation in which the land

29a. Code, § 2726. .

30. Steinman *v.* Vicars, 99 Va. 595, 39 S. E. 227.

31. Steinman *v.* Vicars, *supra*,

32. Steinman *v.* Vicars, *supra*.

or some part thereof is.<sup>33</sup> The action is commenced by service on the defendant of a declaration to which is appended a notice that at a certain time during the term of court to be held, or on a certain rule day, the declaration will be filed in court, or in the clerk's office, against the defendant. The form of the declaration and notice is as follows:

John Smith, plaintiff, complains of Henry Jones, defendant, of a plea of trespass, for this, to-wit, that heretofore, to-wit, on the . . . . day of . . . . ., 19 . . . . (any day after plaintiff's title accrues), the said plaintiff was possessed in fee simple (or whatever his title is) of a certain tract or parcel of land lying and being in the County of Rockbridge, near the Natural Bridge, adjoining the lands of James Jones and others, containing 500 acres and bounded as follows: (insert description) and the plaintiff says that he, being so possessed of the said tract or parcel of land, the said defendant afterwards, to-wit, on the . . . . day of . . . . ., 19 . . . . ., entered into the same, and that he unlawfully withholds from the said plaintiff the possession thereof, to the damage of said plaintiff . . . . . dollars and therefore he brings his suite.

. . . . ., p. q.

To Henry Jones:

You are hereby notified that the foregoing declaration in ejectment against you will be filed in the clerk's office of the Circuit Court of Rockbridge County at rules to be holden for said court on the first Monday of October, 1903, and that rents and profits and damages will also be claimed of you as per account thereof annexed to this declaration.

. . . . ., p. q.<sup>34</sup>

If the plaintiff desires to recover rents and profits of the land and damages for waste and injury to it, a statement of the rents and profits and damages should be filed along with the declaration, and a copy thereof served upon the defendant at the same time he is served with a copy of the declaration. The declaration must contain such a description of the premises claimed as

33. Code, § 2724.

34. See 4 Min. Inst. 1705, from which this form is taken.

will enable the sheriff, with the aid of information from the plaintiff or other person, to put the defendant into possession. It must also state the nature of the estate claimed by the plaintiff "whether he claims in fee, or for his life, or the life of another, or for years, specifying such lives or the duration of such time, and when he claims an undivided share or interest he shall state the same."<sup>35</sup> A declaration may contain several counts and several parties may be named as plaintiffs jointly in one count, and separately in another.<sup>36</sup> The defendant may demur to the declaration or plead in abatement or in bar, but the only plea in bar which he is allowed to file is that of the general issue, *not guilty*, and under this he is allowed to show all of his defences.

The defendant was not allowed at common law to set up any equitable defence against the plaintiff's legal title, but this has been changed by statute in Virginia so that in two cases the defendant is allowed to set up an equitable defence. (1) Where land has been sold and there is a writing, stating the purchase and the terms thereof, signed by the vendor or his agent, and there has been such payment or ~~part~~ performance as would in equity entitle the vendee or those claiming under him to conveyance of the legal title from the vendor without condition, there can be no recovery by the grantor, or those claiming under him. (2) The payment of the whole sum, or the performance of the whole duty, or the accomplishment of the whole purpose, which any mortgage or deed of trust may have been made to secure or effect, shall prevent the grantee in such deed or his heirs from recovering the property conveyed, wherever the defendant would in equity be entitled to a decree revesting the legal title in him without condition. In each of these cases, however, the defendant is not allowed the benefit of these defences, unless notice in writing of such defence is given ten days before the trial, but it is further provided that whether he shall or shall not make or attempt such defences he shall not be precluded from resorting to equity for any relief to which he would have been entitled if the above provisions had not been enacted.<sup>37</sup> With these two exceptions, the defendant in ejectment cannot avail

35. Code, § 2730.

36. Code, § 2731.

37. Code, §§ 2741, 2742, 2743.

himself of any equitable defences. It is to be further noted that when a defendant seeks to avail himself of either of these statutory exceptions, he must bring himself strictly within their provisions, e. g., a vendee of land may be in possession and have paid all of the purchase money, and be entitled to call for a deed without condition, but he cannot avail himself of the statutory defence unless his contract is *in writing*, signed, etc.<sup>38</sup> No mere parol disclaimer can operate to vest title. A disclaimer to a freehold estate can only be made in this State by a deed, or in a court of record. In case of disputed boundaries, the parties may agree upon a line by way of compromise, and if they take and hold possession up to that line for the requisite statutory period, the mere possession will in time ripen into title, but no mere parol agreement to establish a boundary and thus exclude from the operation of the deed land embraced therein, can divest, change, or affect the legal rights of the parties growing out of the deed itself.<sup>39</sup> Neither plaintiff nor defendant can rely upon an equitable estoppel and although two adjacent lot-owners agree, by a parol, upon a boundary line between them different from that called for by their deeds, and erect a fence on the new line, the purchaser of one of the lots whose deed calls for the original line, is not bound by the agreement, although he knew of it before his purchase and saw the fence on the new line.<sup>40</sup>

The office judgment entered against the defendant in an action of ejectment, when one is entered, does not become final without the intervention of the court or jury. A defendant may always appear at the next term and ask to set aside the office judgment and be allowed to plead. The judgment entered in the clerk's office is not final and does not become so until judgment is entered up in court.<sup>41</sup> A verdict in ejectment may be set aside where contrary to the evidence as in other cases, or if the amount of the recovery is plainly excessive, and the record points out

38. Jennings v. Gravely, 92 Va. 377, 23 S. E. 763.

39. McMurray v. Dixon, 105 Va. 605, 54 S. E. 481.

40. Sutherland v. Emswiller, 111 Va. 507, 69 S. E. 363; Va. Iron Co. v. Cranes Nest Co., 102 Va. 405, 46 S. E. 393.

41. Smithson v. Briggs, 33 Gratt. 180; James River, etc., Co. v. Lee, 16 Gratt. 424.

clearly what the excess is, the plaintiff may be put upon terms to release the excess or submit to a new trial. This may be done either in the trial court, or the court of appeals.<sup>42</sup>

*Improvements.*—Provision is made for the defendant to recover the value of any permanent improvements he may have put on the land when he had reason to believe his title was good, and it is provided that if the defendant intends to claim for improvements made by himself or those under whom he claims, he shall file with his plea, or at a subsequent time before trial (if for good cause allowed by the court), a statement of his claim therefor in case judgment be rendered for the plaintiff, and in such case the damages of the plaintiff and the allowance to the defendant for improvements shall be estimated and the balance ascertained, and judgment therefor rendered.<sup>43</sup> It is provided that the plaintiff may recover for rents and profits not exceeding five years before the commencement of the action and down to the verdict, and for damages for waste or other injury done by the defendant during the same period, but if the defendant claims for improvements and such claim should exceed the rents and damages for the period above stated, then the plaintiff may claim rents and profits and damages for as many years as is necessary to consume the improvements, if the defendant has had possession long enough for that purpose, but he cannot recover for *excess* of rents and damages beyond the five years.<sup>44</sup>

### § 121. Evidence in ejectment.

It had been held in an early case in Virginia<sup>45</sup> where the exterior boundaries of a plaintiff in ejectment included lands which were excepted from the operation of the grant that the plaintiff was entitled to recover *all* the land within the metes and bounds of his grant except such as the *defendants* may show themselves entitled to under the reservation. A different view was taken

42. *Fry v. Stowers*, 98 Va. 417, 36 S. E. 482, disapproving *Shiflett v. Dowell*, 90 Va. 745, 19 S. E. 848.

43. Code, §§ 2753, 2754.

44. Code, §§ 2762, 2764.

45. *Hopkins v. Ward*, 6 Munf. 38.

in a comparatively recent case where it was held that it was incumbent on the *plaintiff* to show that the lands in controversy are not within the excepted bounds.<sup>46</sup> Subsequently the legislature declared that where the reserved lands were not described with such certainty as would enable the same to be readily and accurately located by a competent surveyor, the plaintiff should be entitled to recover so much of said land within his said exterior lines as does not appear by preponderance of the evidence to be within the limits of any such reservation, and as he would otherwise be entitled to recover if such grant or other conveyance had contained no such reservation, provided that the act should not apply when it appeared from the evidence that the defendant was in possession of such reserved land under claim of title thereto.<sup>47</sup>

*Boundaries.*—In locating boundaries, regard is to be had first to natural landmarks, then to adjacent boundaries, and last to courses and distances. That which is in its nature more permanent is always to be preferred.<sup>48</sup> Upon the question of location of boundaries and corners, the Virginia doctrine is that the declarations of deceased persons as to such boundaries or corners may be given in evidence, provided such persons had peculiar means of knowing the facts in question, and the declarations are not liable to the suspicion of bias from interest.<sup>49</sup> Parol evidence may also be received to prove by general reputation and tradition the location of a corner of a patent more than one hundred years old.<sup>50</sup> Where the question is one of title by adverse possession, it may be shown by parol that the character of the possession was such that the possessor was generally reputed in the neighborhood to be the owner.<sup>51</sup>

46. *Reusens v. Lawson*, 91 Va. 226, 21 S. E. 347.

47. Code, § 2734a.

48. *Reusens v. Lawson*, 91 Va. 226, 21 S. E. 347; *Matheny v. Allen*, 63 W. Va. 443, 60 S. E. 407; Monographic Note, 129 Am. St. Rep. 990.

49. *Fry v. Stowers*, 92 Va. 13, 22 S. E. 500.

50. *Douglas Land Co. v. Thayer*, 107 Va. 292, 58 S. E. 1101. This case is very full and important on various other points.

51. *Lusk v. Pelter*, 101 Va. 790, 45 S. E. 333.

### § 122. Statute of limitations.

We have already seen that title may be acquired to real estate by adverse possession for the period fixed by statute, but a saving is made in favor of infants and insane persons who were such at the time the right of action accrued, and formerly a similar saving was made as to married women; but the infancy of one joint tenant or tenant in common will not prevent the statute from running against others not laboring under any disability, as they could at all times have brought an action to recover their shares or interest.<sup>52</sup> Furthermore, an action of ejectment in the name of the husband and wife to recover the common law lands of the wife must, if the husband be living at the time of trial, be brought within the statutory period without deduction on account of the coverture of the wife; but if the husband be dead and the action survives to the wife, the period of her coverture is deducted provided the whole time elapsing from the time the right of action accrued until action brought does not exceed twenty years.<sup>53</sup> The statute of limitations is a muniment of title in ejectment, and may be shown under the general issue of "not guilty."

### § 123. Interlocks.

In the case of interlocks where the senior patentee has entered upon any part of his lands, claiming the whole, the Virginia doctrine is that his claim is extended to the whole, and entry of a junior patentee on a part of the interlock only extends to the part thereof actually occupied by him.<sup>54</sup>

### § 124. Equity jurisdiction.

In the days of fictions, when a judgment in ejectment was not conclusive, equity had jurisdiction to enjoin frequent actions of

52. Code, § 2917; *Redford v. Clarke*, 100 Va. 115, 40 S. E. 630; *Merryman v. Hoover*, 107 Va. 485, 59 S. E. 483.

53. *McMurray v. Dixon*, 105 Va. 605, 54 S. E. 481; Code, § 2918.

54. *Fry v. Stowers*, 98 Va. 417, 36 S. E. 482; for a full discussion of the subject, giving the law elsewhere as well as in Virginia, see 3 Va. Law Reg. 763, 843; 4 Va. Law Reg. 1, 8, 127, 138, 557; 5 Va. Law Reg. 810; 6 Va. Law Reg. 1.

ejectment after there had been repeated trials. Such a bill was called a bill of peace.

Where a party has a complete and adequate remedy at law, equity has no jurisdiction. The bill in such case is called an ejectment bill, and is demurrable.<sup>55</sup> Equity does have jurisdiction, however, to quiet the title to real estate by removing clouds therefrom, but only those who have a clear legal and equitable title to land and *are in possession thereof* can invoke the aid of a court of equity to give them peace, or to dissipate a cloud on the title. If a person is out of possession but has the legal title, his remedy at law by ejectment is full, adequate and complete. If he has only an equitable title, he must acquire the legal title and then bring ejectment.<sup>56</sup>

### § 125. Verdict.

If the action be against several defendants, and a joint possession of all be proved, and the plaintiff be entitled to a verdict, it should be against all whether they plead separately or jointly.<sup>57</sup> The verdict in ejectment is required to be very specific. It must set out with particularity, either directly or by reference, the premises recovered, and must specify *the estate found in the plaintiff*, whether in fee, for life or years, but if the verdict is simply excessive as to the amount of land recovered, the court may put the plaintiff on terms to release the excess or submit to a new trial, and this may be done, even by the appellate court.<sup>58</sup> Where the plaintiff claims the whole premises in his declaration, but the proof shows he is only entitled to an undivided interest therein, a verdict for that interest is proper.<sup>59</sup> So "if the action be against several defendants, and it appear on the trial that any of them occupy distinct parcels in severalty or jointly, and that other defendants possess other parcels in sev-

55. *Stearns v. Harman*, 80 Va. 48; *Jones v. Fox*, 20 W. Va. 370.

56. *Tax Title Co. v. Denoon*, 107 Va. 201, 57 S. E. 586; *Hitchcox v. Morrison*, 47 W. Va. 205, 34 S. E. 993; *Frost v. Spitley*, 121 U. S. 552.

57. Code, § 2737.

58. *Fry v. Stowers*, 98 Va. 417, 36 S. E. 482; cf. *McIntyre v. Smyth*, 108 Va. 736, 62 S. E. 930.

59. Code, § 2739; *Callis v. Kemp*, 8 Gratt. 78.

erally or jointly, the plaintiff may recover several judgments against them, for the parcels so held by one or more of the defendants, separately from others."<sup>60</sup> And he may recover any specific or undivided part or share of the premises though it be less than he claimed in his declaration. "If the jury be of opinion for the plaintiffs, or any of them, the verdict shall be for the plaintiffs, or such of them as appear to have right to the possession of the premises, or any part thereof, and against such of the defendants as were in possession thereof or claimed title thereto at the commencement of the action."<sup>61</sup> "Where the right of the plaintiff is proved to all the premises claimed, the verdict shall be for the premises generally as specified in the declaration, but if it be proved to only a part or share of the premises, the verdict shall specify such part particularly as the same is proved, and with the same certainty of description as is required in the declaration."<sup>62</sup> "If the verdict be for an undivided share or interest in the premises claimed, it shall specify the same, and if for an undivided share or interest of a part of the premises, it shall specify such share or interest, and describe such part as before required."<sup>63</sup> "The verdict shall also specify the estate found in the plaintiff, whether it be in fee or for life, stating for whose life, or whether it be a term of years, and specifying the duration of such term."<sup>64</sup>

### § 126. Judgment.

Unlike unlawful detainer, a judgment in ejectment is conclusive between the parties. If the right or title of the plaintiff expires after commencement of the suit, but before trial, the plaintiff is entitled to judgment for his damages sustained from withholding the premises.<sup>65</sup> A saving is made in favor of infants and insane persons against whom the judgment is no bar to an action commenced within five years after the removal of disability.

60. Code, § 2738.

61. Code, § 2744.

62. Code, § 2746.

63. Code, § 2747.

64. Code, § 2748.

65. Code, § 2749.

## CHAPTER XV.

### DETINUE.

- § 127. Object of the action.
- § 128. Essentials to maintain the action.
- § 129. Parties.
- § 130. Description and value of the property.
- § 131. General issue.
- § 132. Death or destruction of property pendente lite.
- § 133. Verdict.
- § 134. Execution.
- § 135. Preservation of property.

#### § 127. Object of the action.

The object of the action is to recover specific personal property and damages for its detention. It is the appropriate action for the recovery of property of peculiar value, especially when it has a *pretium affectionis* attached, or is likely to appreciate in value. For these two reasons the action was formerly very common in Virginia for the recovery of slaves. In detinue, the recovery is of the specific property itself, if to be had, and if not, its alternative value at the time of the verdict; and the recovery embraces any increase of the property between the time of action brought and the date of the verdict, although not specifically claimed in the declaration. In many jurisdictions, replevin is preferred, because in that action the plaintiff obtains possession at the beginning of the action instead of at the end, as in detinue. In most of the States detinue has been superseded by the modern action of replevin, but in Virginia replevin has been abolished. Ordinarily no demand is necessary for the delivery of the property before action brought, but, where the possession was lawfully obtained but that possession has ceased to be lawful, a demand is necessary before action in order to make the detention unlawful. It seems to have been thought originally that *detinue* only lay where the *taking* was lawful, but the *detention* was unlawful—the action being for the unlawful detention—and that *replevin* lay only where the *taking* was un-

lawful. Now in Virginia detinue lies in either case, and in those States where replevin is used that action also lies in either case.<sup>1</sup>

### § 128. Essentials to maintain the action.

It is said that in order to maintain the action of detinue these points are necessary: (1) The plaintiff must have property in the thing sought to be recovered; (2) he must have the right to its immediate possession; (3) it must be capable of identification; (4) the property must be of some value, and (5) the defendant must have had possession at some time prior to the institution of the action. While detinue will lie for the recovery of a promissory note which has not been paid, it will not lie if the note has been paid or if founded upon such consideration as would entitle the maker to rescind the contract for fraud.<sup>2</sup> The refusal is based on the ground that what is sought to be recovered is of no value.

### § 129. Parties.

Generally, the plaintiff must be some person who, at the commencement of the action, has a general or qualified property in the chattel, and the right to immediate possession. Any kind of rightful possession is sufficient against a wrongdoer. If the plaintiff never had possession, but his title to the property carries with it the right of possession, he may recover on the strength of his legal title alone.<sup>3</sup> If personal property conveyed in trust is wrongfully converted by a third person, an action therefor may be maintained by the trustee only and not by the beneficiary, even though the debt secured be not due.<sup>4</sup> Detinue will not lie against a defendant who never had possession, but it will lie against one who had possession before action brought

1. 4 Min. Inst. 450; Graves' Notes on Pl. 21, 22; *Morris v. Peregoy*, 7 Gratt. 373; Code, § 2899.

2. *Hefner v. Fidler*, 58 W. Va. 159, 52 S. E. 513.

3. *Lynch v. Thomas*, 3 Leigh 682; *Hardaway v. Jones*, 100 Va. 481, 41 S. E. 957; 6 Encl. Pl. & Pr. 645, 6; *McDowell v. Hall*, 2 Bib. (Ky.) 610.

4. See *Poage v. Bell*, 8 Leigh 604, which, however, was an action of assumpsit.

and parted with it otherwise than as required by law.<sup>5</sup> Of course, in such an action if the defendant has not the property, a judgment for the specific chattel will be unavailing, but the plaintiff will recover the alternate value and damages for its detention.

### § 130. Description and value of the property.

As the action is to recover specific personal property, it must be described with reasonable certainty, so that possession may be given of it if recovered. Such a general description as "one horse," or so much money not marked in any way, would not be sufficient.<sup>6</sup> It is also generally necessary to affix a value as the judgment is to be in the alternative, though the omission of the statement of value would probably be cured after a verdict affixing a value.<sup>7</sup>

### § 131. General issue.

The general issue in detinue is non-detinet, that the defendant does not detain the goods of the plaintiff sought to be recovered, and under this plea the defendant may show the lack of title in the plaintiff, or that the defendant does not unlawfully detain. If the defendant claims to hold the property as a pledge, or as security for the performance of some duty, this fact must be pleaded specially. If the property sued for be dead at the time the action is brought, that fact may be shown under the plea of non-detinet, and will defeat the action. So also if the defendant has had adverse possession of the property for the statutory period, this gives him title, and may be shown under the general issue. In fact, the defendant may give in evidence any matter which shows that the defendant does not detain the plaintiff's goods.<sup>8</sup>

5. *Lynch v. Thomas*, 3 Leigh 682; 3 Rob. Pr. (New) 469, 470; 4 Min. Inst. 540.

6. *Boggs v. Newton*, 2 Bib. (Ky.) 221.

7. 6 Encl. Pl. & Pr. 653.

8. *Austin v. Jones*, Gilmer 341; *Elam v. Bass*, 4 Munf. 301; 3 Rob. Pr. (New) 468; 6 Rob. Pr. (New) 589, 591; 4 Min. Inst. 450, 539, 705, 907; 6 Encl. Pl. & Pr. 652.

“If the plaintiff has not had previous possession, but relies solely upon legal title in himself, his action may be defeated by showing an outstanding title in a third person. Under such circumstances, the question is one of title, pure and simple, and the plaintiff, in order to prevail, must show that he has it, as in the case of ejectment and unlawful detainer. (14 Cyc. 248; 6 Encl. Pl. & Pr. 657.) But, if the defendant has acquired his possession by a wrongful invasion of the actual possession of the plaintiff, then, under a principle observed in ejectment and unlawful detainer law, he cannot prevail by showing outstanding title or right in a third person, unless he claims under, or connects himself with, it in some way. As to this exception to the general rule, there is some conflict in the decisions; but the decided weight of authority, as well as reason, sustains it. (14 Cyc. 248.) ‘Where, however, a plaintiff in detinue has shown a prior possession and made out a *prima facie* case, the defendant cannot defeat a recovery by showing merely an outstanding title in a third person, without connecting himself therewith.’ (6 Encl. Pl. & Pr. 657.)”<sup>9</sup>

### § 132. Death or destruction of property pendente lite.

If specific personal property perishes pending the action, without fault of the defendant, this cannot be given in evidence under non-detinet, but must be specially pleaded by a plea *puis darrein continuance*, as all pleas speak as of the date of the writ. And this, on principle, would seem to constitute a good defence to the action, but on this subject there is conflict of authority.<sup>10</sup>

### § 133. Verdict.

The general rule is that a verdict should respond to all the issues and to the whole of each issue, and consequently in detinue the verdict should find for or against the plaintiff as to each item claimed, and should affix a value to each, and if it fails to do so the verdict is bad at common law, and a *venire fa-*

9. *Justice v. Moore* (W. Va.), 71 S. E. 204, and cases cited.

10. *Austin v. Jones*, *supra*; *Arthur v. Ingles*, 34 W. Va. 639, 12 S. E. 872; 4 Min. Inst. 450; 6 Encl. Pl. & Pr. 655, 656, and cases cited.

*cias de novo* should be awarded.<sup>11</sup> But it is provided by statute in Virginia that: "If on an issue concerning several things, in one count no verdict be found for part of them, it shall not be error, but the plaintiff shall be barred of his title to the things omitted; and if the verdict omit the price or value, the court may at any time have a jury impaneled to ascertain the same."<sup>12</sup>

### § 134. Execution.

At common law there was no writ of possession, and consequently the specific chattel itself could not be obtained and delivered. The method adopted at common law was a writ of *distringas*, by which other property, real and personal, of the defendant was taken and held until he delivered up the specific chattel, and the writ of *feri facias* was issued for the damages and cost. But neither writ could be executed on the property recovered in the action, as the judgment in the action ascertained the property found to be the property of the plaintiff.<sup>13</sup>

11. *Butler v. Parks*, 1 Wash. 76; *Higgenbotham v. Rucker*, 2 Call 313; 6 Encl. Pl. & Pr. 658.

12. Code, § 2912.

13. *Jordan v. Williams*, 3 Rand. 501; 1 Rob. Pr. (old) 569. The following is the form of *distringas* and *fi. fa.* given in Robinson's Forms 366, 367: "We command you, that you distrain A. B. by all his lands and chattels in your bailiwick, so that he to the said lands and chattels lay not his hands, until some other precept from us thereof you have, so that he deliver to C. D. two negro slaves named Cæsar and Pompey, of the prices of \$400 each, which the said C. D. lately in our Court of, etc., hath recovered against the said A. B. if the said slaves may be had, but if not, then the prices aforesaid, of them or such of them as may not be had. We also command you, that of the goods and chattels of the said A. B. in your bailiwick, you cause to be made \$20.10 which to the said C. D. in the same Court were adjudged as well for his damages which he sustained by occasion of the detention of the said slaves, as for his costs by him about his suit in that behalf expended; whereof the said A. B. is convict, as appears of record. And that you have the same before the Justices of our said Court at the Court-House, on the first day of next May Court, to render unto the said C. D. of the damages and costs aforesaid; and that you also, then and there make known to the said Justices, how you shall have executed our precept of *Distringas* aforesaid. And have then there this Writ. Witness, etc.

Hence, if the defendant proved obdurate, there was no mode at common law of obtaining possession of the chattel itself. Now, however, it is provided by statute in Virginia that a writ of possession may be issued for the recovery of specific property, real or personal, and, furthermore, that when the judgment is for personal property, the plaintiff may, at his option, have a *feri facias* for the alternative value, instead of a writ of possession, and the damages and cost, or he may have a writ of distringas.<sup>14</sup> It will be observed that the plaintiff has the election in Virginia either to take the specific personal property, or its alternate value.

### § 135. Preservation of property.

Under the Virginia statute, no provision is made for giving the plaintiff possession of the specific property sued for until his right thereto has been determined by the action, but provision is made for the sheriff to take possession of the property in advance of the decision of the action, where affidavit is made by the plaintiff, his agent or attorney, that there is good reason to believe that the defendant is insolvent, or that the property will be sold, removed, secreted or otherwise disposed of by the defendant, or that the property will be destroyed or materially damaged or injured by neglect, abuse or otherwise if permitted to remain longer in the possession of the defendant. Before this can be done, the plaintiff is to give bond with condition, prescribed by the statute, and thereafter provision is made for the property to be returned to the defendant upon his giving bond with condition to pay costs and to have the property forthcoming to answer the judgment.<sup>15</sup>

14. Code, §§ 3584, 3585.

15. Code, § 2907, ff. See *post*, § 147, showing how a plaintiff frequently gets possession of property at the beginning of the action.

## CHAPTER XVI.

### INTERPLEADER.

§ 136. Nature of the proceeding.

§ 137. Rights of officer.

§ 138. Rights of creditor.

§ 139. Rights of claimant.

§ 140. Proceedings by the court.

#### § 136. Nature of the proceeding.

The summary proceeding of interpleader given by § 2998 of the Code, by which a defendant disclaims all interest in the subject matter of a suit, applies only to a defendant in a *pending action*, is sufficiently set out in the statute, and is of such rare occurrence as not to require discussion.<sup>1</sup>

The proceeding proposed to be discussed in this chapter is wholly statutory, and is to be distinguished from the bill of interpleader in equity which is not taken away.<sup>2</sup> The present proceeding is a statutory petition of interpleader given by §§ 2999 and following of the Code. It is in part a substitute for replevin, which was abolished by the Code of 1849, and its object is to test the ownership of property levied on by a warrant of distress, execution, or attachment and the remedy is available to the officer making the levy, to the plaintiff in the distress warrant, execution, or attachment, and to the claimant of the property.

#### § 137. Rights of officer.

It is the duty of an officer holding a warrant of distress, an execution, or attachment to levy on the personal chattels of the defendant and sell the same to pay the claim. If he levies on property, not in the defendant's possession, but claimed by any other person than the defendant, two courses are open to him: (1) He may demand an indemnifying bond of the plaintiff in the execution, warrant, or attachment, and if it is given he may proceed to sell the property and leave the parties to their rights under the indemnifying bond. He is then fully protected, and has no right to file a petition of interpleader under the statute,

1. See *Runkle v. Runkle*, 112 Va. 788, 72 S. E. 695.

2. Report of Revisors (1849) 764.

or to take any other steps to test the ownership of the property levied on.<sup>3</sup> If the indemnifying bond be not given within a reasonable time after notice, the officer may refuse to levy on or attach the property, or, if he has already done so, may restore it.<sup>4</sup> (2) Where no indemnifying bond has been demanded or given, the officer holding the warrant or execution may apply to the circuit court of his county, or the circuit or corporation court of the corporation in which the property is taken, or to the judge of such court in vacation to cause to appear before such court the party claiming the property as well as the party issuing the process and have their rights with reference to the property determined.<sup>4a</sup> This application on the part of the officer is generally made where the plaintiff in the execution or warrant is a fiduciary, and does not wish to give the indemnifying bond which would be required of him, and the proceeding generally assumes this shape by an agreement between the plaintiff and the officer.<sup>5</sup> If the levy is on property in the defendant's pos-

3. Code, §§ 3001, 3002, 3003. The condition of the indemnifying bond is given in § 3001, quoted on p. 218, *post*.

4. Code, § 3002.

4a. Code, § 2999. This section does not apply to attachments.

5. The following is a copy of the petition filed in *Edmunds v. Hobbie Piano Co.*, 97 Va. 588, 34 S. E. 472:

"To the Honorable J. A. Dupuy, Judge of the Circuit Court of Roanoke city, Virginia:

"Your undersigned petitioner, T. R. Tillett, sergeant of the city of Roanoke, would respectfully show unto your Honor that on the 14th day of October, 1899, there issued from the clerk's office of the Circuit Court of Roanoke city, Virginia, an execution in favor of J. E. Edmunds and C. M. Blackford, trustees of the Traders' Bank of Lynchburg, Virginia, against the Hobbie Piano Company (a corporation), for the sum of \$1,515.60, with interest and costs, a copy of which execution is herewith filed as a part hereof. Said execution came into the hands of your undersigned petitioner at nine o'clock a. m. on the 14th day of October, 1898, and on the 19th day of October, 1898, your petitioner levied said execution on the following goods in the possession of the Hobbie Piano Company, in No. — Salem avenue, S. W., city of Roanoke, Virginia, to wit:  
[Here insert description of property levied on.]

"Your petitioner would further show that various parties claim to own the above-described property, and inasmuch as no indemnifying bond has been given, your petitioner prays that the said Ed-

session but claimed by another, the mode of procedure is that pointed out in §§ 139 and 348, *post*.

### § 138. Rights of creditor.

The creditor in any execution, attachment or distress warrant may give an indemnifying bond to the officer and let him proceed to sell, unless the claimant has the title to the property tested,<sup>5a</sup> or the creditor in any execution or distress warrant may, without giving the indemnifying bond, make application to the court to try the title to the property in the same summary way pointed out in the last preceding section.<sup>6</sup>

### § 139. Rights of claimant.

When property claimed to be liable by virtue of a distress warrant, execution, or *attachment* is in the possession of any of the parties against whom such process was issued but is claimed by any other person or persons, or is claimed to belong to any other person or persons, it is made the duty of the officer to proceed to execute the same, notwithstanding such claim, unless the claimant of the property, or some one for him, shall give a suspending bond to suspend the sale, and shall, within *thirty days* after such bond is given, proceed to have the title to such property settled by like proceedings to those hereinbefore pointed out; and in case such claimant, or some one for him, fails to give such bond or, having given it, fails to have such proceedings instituted as aforesaid to settle the title thereof, such property shall be conclusively presumed to be the property of the party in possession, and the officer who executes the process shall not be liable to any such claimant for any damages resulting from the proper execution of such process as is required by the section quoted in the margin.<sup>7</sup> It will be observed that for this section to apply, the property levied on must be in the pos-

munds and Blackford, trustees, also Hobbie Piano Company, Smith and Barnes Piano Company, Newman Bros. Co., Home Building and Conveyance Co., First National Bank of Roanoke, Virginia, be summoned to appear before your Honor to litigate their respective claims to the property levied on by your petitioner."

5a. Code, §§ 3001, 2999.

6. Code, § 3000.

7. Section 3001 of the Code is as follows:

"If any officer levies or is required to levy an execution or a warrant of distress on property, or to attach money or property under

session of some of the parties against whom the process was issued and must be claimed by another person, and that when that is the fact the claimant must, within thirty days after the suspending bond is given, proceed to have the title to the property determined. If the property is *not in the possession of a defendant* in the case, and an indemnifying bond has been given, the claimant of the property may give a bond to suspend the sale, and then file his petition to try the title to the property.<sup>7a</sup> The stringent provisions of § 3001 of the Code do not apply in this case. Provision is made not only for the claimant of the property to give the *suspending* bond hereinbefore mentioned, but if he wishes in the meantime that the possession of the property shall remain unchanged pending the

an attachment issued either by a justice or by the clerk of any court, and a doubt shall arise whether the said money or property is liable to such levy or attachment he may give the plaintiff, his agent or attorney at law, notice that an indemnifying bond is required in the case; bond may thereupon be given by any person, with good security, payable to the officer in a penalty equal to double the value of the property, with condition to indemnify him against all damage which he may sustain in consequence of the seizure or sale of said property and to pay to any claimant of such property all damage which he may sustain in consequence of such seizure or sale, and also to warrant and defend to any purchaser of the property such estate or interest therein as is sold: provided, however, that when the property claimed to be liable by virtue of the process aforesaid is in the possession of any of the parties against whom such process was issued but is claimed by any other person or persons, or is claimed to belong to any other person or persons, the officer having such process in his hands to be executed shall proceed to execute the same notwithstanding such claim unless the claimant of said property or some one for him shall give a suspending bond as provided by section three thousand and three of the code of Virginia, and shall within thirty days after such bond is given proceed to have the title to said property settled in accordance with the provisions of this chapter. And in case such claimant or some one for him fails to give such bond, or having given such bond fails to have such proceedings instituted as aforesaid to settle the title thereto, said property shall be conclusively presumed to be the property of the party in possession, and the officer who executes such process shall not be liable to any such claimant for any damages resulting from the proper execution of such process as is required by this section."

7a. Code, § 2999.

settlement of the question of its ownership, to give a forthcoming bond conditioned to have the property forthcoming at such a place and day of sale as may thereafter be lawfully appointed. But if the property is expensive to keep or perishable, a sale thereof may be ordered notwithstanding the forthcoming bond has been given.<sup>8</sup>

#### § 140. Proceedings by the court.

The application should be in written form, but is not required to be sworn to, though Prof. Minor thinks that that is certainly the safer course to pursue. The application, of course, should set forth the facts of the issuing of the process and its levy, stating upon what it was levied and how the claim arose, and the names of the parties in interest, and it should conclude with a prayer that the court should cause the proper parties to come before it to try the title to the property. The statute designates the parties to be summoned as the party issuing the process and the party making the claim. The defendant in the process is not named as a party, and it would seem need not be. When the petition is filed, the court, or judge in vacation, orders that the plaintiff in the writ and the claimant of the property appear before the court at its next term to litigate their respective claims to the property. When the parties appear, the court, by proper order, designates who shall be plaintiff and who shall be defendant, and directs their respective claims to the property to be determined by a jury unless a jury be waived.<sup>9</sup> The judge is authorized to make all such rules and orders, and to enter such judgment as to cost and all other matters as may be just and proper.<sup>10</sup>

8. Code, § 3004.

9. *Edmunds v. Hobbie Piano Co.*, 97 Va. 590, 34 S. E. 472.

10. Code, § 3000.

## CHAPTER XVII.

### REPLEVIN.

- § 141. Nature of action at common law.
- § 142. The declaration.
- § 143. Different kinds of replevin.
- § 144. The defence.
- § 145. The judgment.
- § 146. The modern action of replevin.
- § 147. Replevin in Virginia.

#### § 141. Nature of action at common law.

At common law, as will be remembered, the landlord had the right in person or by an agent selected by him, called a bailiff, to distrain or take possession of the personal property of his tenant as a security for his rent. As might reasonably have been expected, landlords sometimes distrained when no rent was due, or upon goods not liable to distress, and otherwise illegally possessed themselves of the goods of their tenants. It became necessary, therefore, to devise some means by which the right of the tenant to the possession of his *personal property* might be tried, and it was desirable that the tenant should have possession of his property pending litigation to try the right of distress. To accomplish this result the tenant was allowed to make complaint to the sheriff (or in chancery, at an earlier date), of a wrongful seizure of his goods, and (upon giving security to prosecute a suit against the landlord for his wrongful seizure, and if cast in the suit, to return the goods to him), a writ was issued by the sheriff to his bailiff, called a writ of replevin, directing him to replevy the goods; that is, take them from the landlord and deliver them to the tenant. Whereupon, or at the same time, the tenant instituted his action (called an action in replevin) against the landlord, for the purpose of recovering *damages* for his wrongful seizure and detention of the goods. Having gotten the goods themselves in the first instance, if he now recovers damages for the unlawful seizure and detention and the costs of his suit, this would do him complete justice. The right to recover damages,

however, necessarily involved the legality of the seizure and detention.

### § 142. The declaration.

The declaration in replevin recites that the landlord has been summoned to answer the tenant of a plea "Wherefore he took the cattle" of the tenant "and unjustly detained the same against sureties and pledges until;" etc. (or, if written out in full, "until they were replevied by the sheriff"), "and thereupon the tenant, by his attorney, complains for that the landlord, on the \* \* \* day of \* \* \*, in the parish of \* \* \*, at the county of \* \* \*, in a certain close, took the cattle of the tenant, of great value, to-wit, of the value of \* \* \*, and unjustly detained the same against sureties and pledges, until, etc. (as above), wherefore the tenant says that he is injured and hath sustained damages to the amount of \* \* \*, and therefore he brings his suite." Great particularity was required in describing the goods taken and their value, and the *place* where they were taken.

### § 143. Different kinds of replevin.

It seems reasonably certain that such was the origin of the action, but it was soon extended to all kinds of wrongful *taking*, whether by a landlord or other person. It did not apply to a wrongful detention, where the taking was lawful. Usually the sheriff found the property and replevied it, and hence the owner only needed to be reimbursed his damages for the wrongful seizure. Where this was true, it was said to be replevin in the *detinuit*, but if he could not find the goods so as to replevy them, the declaration was so changed as to allege that the defendant *detains* (i. e., now *detains*), the goods of the plaintiff, and he sought to recover their value as a part of his damages. This was replevin in the *detinet*. If he found and replevied only a part of them, then the action would be in the *detinuit* as to those found, and *detinet* as to the residue.

### § 144. The defence.

The defendant might deny ever having taken the goods at all. Then his plea would be *non cepit*. If he admitted the

taking, but sought to justify, as for a trespass, etc., he did so by a plea in confession and avoidance, admitting title in the plaintiff, but setting up a counterclaim as for rent due, or damages suffered, and praying a return of the cattle, or a security therefor. If this defence was set up by a defendant who had seized the cattle in his own right, he was said to make an *avowry*, if by one who acted in the right or for the benefit of another, he was said to make *cognizance*. As both avowry and cognizance asked for a return of the cattle, or security to answer for a claim therein set forth, there were two actors in the action—both plaintiff and defendant were actors. The claim of the defendant was set forth in full and with particularity in the avowry or cognizance, and to this the plaintiff pleaded just as an ordinary defendant would plead to a declaration of a plaintiff. The avowry or cognizance was treated as a complaint, and the nominal plaintiff became a real defendant to a cause of action asserted by the nominal defendant. To avoid confusion, the words “plaintiff” and “defendant” will be used to designate the parties as they stood at the beginning of the action.

### § 145. The judgment.

If the plaintiff succeeded in the action, judgment was given in his favor for damages and costs. If he already had the specific property, this would be full justice, if not, the same end was attained by including in his damages the value of the specific property detained. If the defendant succeeded, there was generally a judgment for the restitution of the property and for costs, or a money judgment for the value of the goods and the costs. It seems that the defendant had the option of taking the latter if he desired. The characteristic feature of the action was the restitution of the specific property to the plaintiff *in the beginning of the action* instead of the end.

### § 146. The modern action of replevin.

This applies to all kinds of wrongful *taking or detention*, and is brought for the recovery of specific personal property, and not mere damages. When the *taking* is wrongful, it is called

replevin in the *cepit*, when the taking is lawful but the *detention* not, it is called replevin in the *detinet*. The action lies for the recovery of specific personal property. The title requisite to maintain the action is the same as in detinue. If the original taking and the subsequent detention were wrongful, no demand before action brought is necessary, but the rule is otherwise if the *detention only* is wrongful. Generally statutes require (where property is to be delivered to the plaintiff at the beginning of the action), of the plaintiff a bond, with sufficient sureties, conditioned to prosecute the action, and to return the property if a return is ordered, and to pay all costs and damages adjudged to the defendant. When the action is brought, and the bond given, the sheriff is directed to seize the property mentioned and deliver it to the plaintiff. If no bond is given, and the sheriff makes the seizure and delivery, he is liable on his official bond for whatever damages the defendant suffers by reason thereof.<sup>1</sup>

### § 147. Replevin in Virginia.

The action of replevin has been abolished in Virginia and is substituted by detinue in most cases, and by delivery or forthcoming bonds, and interpleader proceedings in others. Under the Virginia statute relating to detinue, while the plaintiff cannot obtain possession of the specific property sued for at the beginning of the action, yet upon affidavit that there is good reason to believe that the defendant is insolvent so that recovery against him would prove unavailing, or that the property would be sold, removed, secreted, or otherwise disposed of, or that it would be destroyed or materially damaged or injured by neglect, abuse, or otherwise, if permitted to remain longer in the possession of the defendant, and upon giving the bonds required, the property may be taken from the possession of the defendant into the custody of the officer, and

1. The following authorities are applicable to the several sections of this chapter: 1 Chit. Pleading 145, *et seq.*; 3 Bl. Com. 147, 151; Martin's Civil Code, Pro., § 105, *et seq.*; Phillips' Code Pl., §§ 106, 107, 491, 492. For form of complaint under Codes, Phillips, § 492; 24 Am. & Eng. Encl. L. (2nd Ed.) 475, *et seq.*

unless the defendant gives a proper forthcoming bond, it is the duty of the officer to hold the property until the decision of the action.<sup>2</sup> While there is no provision of law authorizing or requiring it, the officer is generally well content to turn the property over to the plaintiff who has given the bond to be held by him until the action is decided, so that in the practical application of the law the plaintiff very frequently gets possession of the property at the beginning of the action.<sup>3</sup>

2. Code, § 2907 and following.

3. For history of the action of replevin in Virginia, see *Allen v. Hart*, 18 Gratt. 722; for procedure on a forthcoming bond given for rent, see *ante*, § 10.

## CHAPTER XVIII.

### TRESPASS AND TRESPASS ON THE CASE.

§ 148. Meaning of terms.

§ 149. Distinction between trespass and case.

§ 150. Species of trespass *vi et armis*.

Trespass to the person.

Trespass *de bonis asportatis*.

Trespass *quare clausum fregit*.

Trespass to try title.

False Imprisonment.

§ 151. Species of trespass on the case *ex delicto*.

§ 152. General issues.

#### § 148. Meaning of terms.

The action of trespass *vi et armis* is usually spoken of simply as "trespass" and the action of trespass on the case simply as "case."

#### § 149. Distinction between trespass and case.

The action of trespass is used to recover damages for injuries to persons or property which result *directly* from the force applied, while the action of trespass on the case is used to recover damages for injuries to persons or property which result *indirectly* from the force applied. At common law and in the early English cases this distinction was insisted upon, but frequently it was difficult to determine which of the two actions should be brought, and so in a number of cases they were held to be concurrent, and it was said that "where an act, though not wilful, is the result of negligence and the immediate and direct cause of the injury, trespass *vi et armis* will lie, and that trespass on the case will also lie though the act be violent and the injury immediate, unless wilful, if occasioned by the carelessness or negligence of the defendant."<sup>1</sup> Finally the question was put at rest in Virginia, as it has been generally elsewhere, by declaring that "in any case in

1. *Jordan v. Wyatt*, 4 Gratt. 159.

which an action of trespass will lie, there may be maintained an action of trespass on the case."<sup>2</sup> In an early Virginia case,<sup>3</sup> where the defendant negligently discharged his gun in a public street, wounding the plaintiff in the leg, it was held that trespass and not case was the proper action. This case discusses the distinction between trespass and case, and reaches the conclusion that if the injury is the direct and immediate result of the force set in motion by the defendant, the action should be trespass, although the force was set in motion by negligence and not by intention, thus making the immediateness of the injury, and not the intention or want of intention, the test. It was also held that charges for expenses paid to doctors, nurses, and other incidental expenses of being cured, may be shown in aggravation of damages and be recovered. It is further said that in trespass *vi et armis* it is immaterial whether the injury be committed wilfully or not.<sup>4</sup> In a later Virginia case, the court (after quoting *Scott v. Shepherd*, 3 Wilson 403 (The Squib Case), to the effect that "whether the injury occasioned by the act be immediate and direct or not is the criterion, and not whether the act be wilful or not. If the injury be immediate and direct, it is trespass *vi et armis*, if consequential it would be trespass on the case;") further discusses the distinction between trespass and case as follows: "The distinction thus taken is perhaps as well drawn as it could be in a brief definition, but there is some degree of vagueness in the terms employed, so as to vary the sense according to the mode or circumstance of the act in reference to which they are understood; and this requires some precision and even nicety in ascertaining the proper mode or circumstance. The terms 'immediate' and 'consequential' should, as I conceive, be understood, not in reference to the time which the act occupies, or the space through which it passes, or the place from which it is begun, or the intention with which it is done, or the instrument or agent employed, or the lawfulness or unlawfulness of the act; but in reference to the *progress and termination of the act*,

2. Code, § 2901.

3. *Taylor v. Rainbow*, 2 Hen. & Munf. 423.

4. See also *Jordan v. Wyatt*, 4 Gratt. 151; *Stephen on Pl.*, § 80; 1 *Smith's Lead. Cas.* 803.

to its being done on the one hand, and its having been done on the other. If the injury is inflicted by the act, at any moment of its progress, from the commencement to the termination thereof, then the injury is direct or immediate; but if it arises after the act has been completed, though occasioned by the act, then it is consequential or collateral, or, more exactly, a collateral consequence.

“There is no better illustration of the distinction than the familiar case, commonly put, of throwing a log into a highway which, in its flight or fall, hits or strikes a person: there the injury is immediate, and the remedy may be trespass; but if, after it has fallen and while lying on the ground, a passenger stumbles over it and is hurt, the injury is consequential, and the remedy must be case.”<sup>5</sup>

It will be observed from the section of the Virginia Code quoted above that the common-law action of trespass *vi et armis* is left as it was at common law and that it is only the scope of the action of trespass on the case that is changed. Inasmuch as trespass on the case may be brought in all instances where trespass would lie, the action of trespass *vi et armis* has practically disappeared except in the single instance of assault and battery, or other direct injury to the person. All other injuries to persons and property are redressed by the action of trespass on the case. An assault and battery may also be redressed by the same action under the Virginia act and similar acts in other states.

### § 150. Species of trespass vi et armis.

It is stated in Stephen on Pleading<sup>6</sup> that “there are three species of this action distinguished by reason of the principal subject of the action.

“*Trespass to the person*, as assault, assault and battery, false imprisonment, and the like cases, where actual or implied force is always present, though it may be slight, or not offensively used. It is an appropriate remedy with case for seduction in cases where there were no grounds for trespass *quare clausum*.

5. *Jordan v. Wyatt*, 4 Gratt. 154, 155.

6. Stephen on Pl., § 80.

"*Trespass de bonis asportatis* is brought, not to recover the identical thing taken, but *damages for the illegal taking and loss* of the same when the original taking is forcible and unlawful; while trover is the remedy for the unjust detention and conversion of property, although the original taking was lawful and proper.<sup>7</sup> To maintain trespass to personal property the plaintiff must have possession, or the right to immediate possession, or constructive possession.<sup>8</sup>

"*Trespass quare clausum fregit* is the remedy for all forcible entries upon land by persons not entitled to the possession. But since the enactment of the statutes against forcible entry and detainer, it has been held by some courts that trespass will lie for a forcible entry by the owner against the will of one in possession, while other courts hold the contrary.<sup>9</sup> The gist of trespass *quare clausum fregit* is injury to the possession. Title *may* come in question, but it is not essential that it should.<sup>10</sup> Where one is entitled to the exclusive profits, or crops growing on land, this is equivalent to a right of possession, and he may maintain trespass *quare clausum*.<sup>11</sup> At common law he must have had actual possession, but possession is now held to follow ownership.<sup>12</sup> And the owner may maintain an action for trespass to lands unless another held the possession under him at the time the act was committed, or unless it was held in adverse possession by another.<sup>13</sup> A lessee under a void lease may maintain the action against a wrong-

7. *Dame v. Dame*, 43 N. H. 37.

8. *Howall v. Caryll*, 50 Mo. App. 440.

9. The English decisions are not in harmony upon the question. That the action will lie is held in *Reedy v. Purdy*, 41 Ill. 279; *Duster v. Cowdry*, 23 Vt. 635. The contrary is held in *Hyatt v. Wood*, 4 John 150, 4 Am. Dec. 258; *Tribble v. Frame*, 7 J. J. Marsh 598, 23 Am. Dec. 439. See *Forcible Entry and Detainer*.

10. 1 *Chitty*, Pl. 195; *Lambert v. Stroother*, Willes 221; *Stahl v. Grover*, 80 Wis. 650.

11. *Wilson v. Mackreth*, 3 Burr. 1824; *Stultz v. Dickey*, 5 Binn. 285; *Myers v. White*, 1 Rawle 353.

12. *Smith v. Wunderlich*, 70 Ill. 426; *Chandler v. Spear*, 22 Vt. 383; *Dean v. Comstock*, 32 Ill. 173; 2 *Waterman on Trespass*, 358; *Yahoola River Co. v. Irby*, 40 Ga. 479.

13. *Collins v. Beatty*, 148 Pa. St. 65.

doer.<sup>14</sup> At common law one in possession against the right of the owner could not maintain the action for an entry by him.<sup>15</sup>

"*Trespass quare clausum fregit* was deemed an appropriate remedy for seduction, where the seduction took place on the premises of the parent or master. The seduction was shown in aggravation of the breaking, the declaration alleging *per quod servitium amisit*. It was early held that a count for trespass and a count stating the debauchery might be joined. Now either an action of trespass *vi et armis* may be maintained, or an action on the case founded merely on the consequences of the seduction.<sup>16</sup>

"*In trespass quare clausum* with an allegation of other wrongs, etc., when the real cause of action was the seduction of the plaintiff's daughter, if the defendant justified the unlawful entry under a license from the plaintiff, the latter may now assign the seduction as the real cause of the action; and if the license was merely the implied license of law, i. e., by custom, the recovery would cover the whole declaration by the doctrine of trespass *ab initio*; otherwise if the license was an express invitation."<sup>17</sup>

*Trespass to try title.* There is another form of trespass known as *trespass to try title*. As stated by Stephen, it is in form an action of trespass *quare clausum fregit*, but with the additional element of a notice attached that it is brought to try title to the land in controversy as well as to recover damages. It is a statutory action entirely, in common use in a number of States, and in some of them has wholly superseded the action of ejectment. Like ejectment, however, the plaintiff must recover on the

14. *Graham v. Peat*, 1 East. 244; *Stahl v. Grover*, 80 Wis. 650.

15. See *Forcible Entry and Detainer*; 1 Chitty 195; *Stahl v. Groover*, 80 Wis. 650.

16. *Blagge v. Ilesley*, 127 Mass. 191, 34 Am. Rep. 361; *White v. Murtland*, 71 Ill. 250; *Parker v. Meek*, 3 Sneed (Tenn.) 29; *Ellington v. Ellington*, 47 Miss. 329. See *Hubbell v. Wheeler*, 2 Aiken (Vt.) 359; *Vanhorn v. Freeman*, 6 N. J. L. 322, and note; *Martinely v. Gerber*, 2 M. & G. 88.

17. *Hubbell v. Wheeler*, 2 Aik. (Vt.) 359; *Moran v. Dawes*, 4 Cow. 412.

strength of his own title and not on the weakness of that of his adversary. Mr. Chief Justice McIver<sup>18</sup> thus points out the difference between an action *quare clausum fregit* and an action of trespass to try title: "There is this fundamental difference between these two actions, viz.: That in the former, the object being to recover damages for trespass, upon the possession of the land, it is not necessary for the plaintiff to show title himself, but possession merely; while in the latter the plaintiff, in order to recover, must show title in himself, and must recover upon the strength of his own title, and not upon the weakness of his adversary's title. Accordingly, in an action of trespass *quare clausum fregit*, when the plaintiff proves that he is in possession of a given tract of land, and that defendant has trespassed upon it, he is entitled to recover, unless the defendant shows that he has title to the land himself—not that the title is in some third person, as would be sufficient to protect him, if the action were an action of trespass to try titles, or that he entered upon the land and did the acts complained of as trespasses, by the permission or under a license, from the true owner of the land." The statement in Stephen that the action has been abolished in South Carolina is incorrect.<sup>19</sup> The general issue in the case is not guilty, the effect of which is to deny both the plaintiff's title and the trespass on the part of the defendant. Where the defendant is in possession, and the plaintiff succeeds in his action, he recovers the land as well as the damages and may have a writ of possession.<sup>20</sup> Statutes generally also provide for recovery by defendant of compensation for permanent and valuable improvements put upon the land where the defendant in good faith believed that he had title thereto.

*False imprisonment.* The action of trespass *vi et armis* was also the proper action at common law to recover damages for false imprisonment. Of course under the Virginia statute either trespass or case will lie. "False imprisonment is restraint of one's liberty without any sufficient legal excuse therefor

18. Connor *v.* Johnson, 59 S. C. 115, 37 S. E. 240.

19. Warren *v.* Wilson (S. C. July 5, 1911), 71 S. E. 818.

20. See on the subject generally 21 Encl. Pl. & Pr. 924 ff; Stephenson Pl., § 74; Warren *v.* Wilson (S. C. July 5, 1911), 71 S. E. 818.

by words or acts which he fears to disregard, and neither malice, ill-will, nor the slightest wrongful intention is necessary to constitute the offense."<sup>21</sup> Malice and want of probable cause are only material as aggravating the damages. It is otherwise in malicious prosecution where want of probable cause is material, and must be shown by the plaintiff. If special damages are claimed in an action for false imprisonment, they must be alleged in the declaration and proved at the trial.<sup>22</sup> Under the Virginia statute, and in fact generally under the statutes in other States, slander, malice, malicious prosecution, and false imprisonment may be united in one action. This could not have been done at common law as the action for false imprisonment there would have been trespass and not case.<sup>23</sup>

At common law no action would lie for *death* occasioned by the *wrongful act or neglect of another*. It was a personal action which died with the person. This has generally been changed by statute in the States of the Union. Ample provision has been made for it in Virginia, and the action is safeguarded against abatement by the death of either party.<sup>24</sup> The form of the action is not prescribed by the statute, but the form usually and most properly adopted is that of trespass on the case, and not trespass *vi et armis*. There is one case which it has been held that the Virginia statute upon the subject of death by wrongful act does not cover. If a party inflicts a mortal wound on another and then dies before his victim, no action lies in favor of the representative of the victim against the representative of the wrongdoer either at common law or under the Virginia statute.<sup>25</sup>

### § 151. Species of trespass on the case ex delicto.

It will be recalled that the action of *assumpsit* is a species of the action of trespass on the case, but it is at present entirely a contract action and consequently is not treated in this connection. This form of action is generally subdivided into:

21. Note 67 Am. St. Rep. 408.

22. 8 Encl. Pl. & Pr. 841.

23. *Womack v. Circle*, 29 Gratt. 192; 13 Encl. Pl. & Pr. 424; 67 Am. St. Rep. 408.

24. Code, §§ 2902, 2906.

25. *Beavers v. Putnam*, 110 Va. 713, 67 S. E. 353.

(1) Trespass on the case generally; (2) trover and conversion; (3) slander, and (4) libel. Trespass on the case generally lies to recover damages resulting from fraud, negligence, malicious prosecution, or any other tort not resulting directly from force applied by the wrongdoer.<sup>26</sup> It is the great action in common use to recover for negligent injuries and may, under the Virginia statute, be used to recover for an injury to person or property whether the injury be intentional or not. The specific forms of malicious prosecution, trover, slander and libel will be separately treated.

### § 152. General issues.

The general issue in each of the actions of trespass and case is "*not guilty*." In trespass the defendant says that he is not guilty of the said trespass above laid to his charge, or any part thereof, in manner and form as the said plaintiff hath above thereof complained, and of this he puts himself upon the controversy. In case the plea is the same except the defendant says he is not guilty of the premises. In trespass *vi et armis* the general issue of "*not guilty*" is a narrow general issue, confined to a denial of the allegation of the case set forth in the plaintiff's declaration.<sup>27</sup> The general issue of "*not guilty*" in trespass on the case, on the contrary, is a very broad general issue, and is not at all confined to a denial of the case made by the plaintiff's declaration, and the defendant is permitted not only to test the truth of the declaration, but (with a few exceptions such as the act of limitations and one or two others) to prove any matter of defence that tends to show that the plaintiff has no right of action though such matters be in avoidance of the declaration, as for example, a release given, or satisfaction made.<sup>28</sup>

26. 4 Min. Inst. 437.

27. Stephen on Pl., § 149.

28. Stephen on Pl., § 151; 4 Min. Inst. 775.

## CHAPTER XIX.

### MALICIOUS PROSECUTION.<sup>1</sup>

§ 153. Forms and essentials of the action.

§ 154. Parties.

§ 155. Termination of prosecution.

§ 156. Effect of conviction.

§ 157. Guilt of plaintiff.

§ 158. Probable cause.

§ 159. Malice.

§ 160. Evidence.

§ 161. Damages.

§ 162. Civil malicious prosecution.

#### § 153. Forms and essentials of the action.

The proper form of the action is trespass on the case generally. In order to sustain the action, it must be alleged and proved: (1) That the prosecution was set on foot by the now defendant and that it has terminated in a manner not unfavorable to the now plaintiff; (2) that it was instituted, or procured by the co-operation of the now defendant; (3) that it was without probable cause, and (4) that it was malicious.<sup>2</sup> It is sometimes a question as to whether the action should be for malicious prosecution, or for false imprisonment. It is said: "The essential difference between malicious prosecution and false imprisonment is that in malicious prosecution the imprisonment must have been under legal process issued as a result of a prosecution commenced or continued maliciously and without probable cause, while false imprisonment lies for an imprisonment which is extra-judicial and without legal process, and from which the prosecutor cannot escape liability by proving that he acted upon probable cause without malice."<sup>3</sup>

1. This subject is very fully discussed in a monographic note in 26 Am. St. Rep. 123, and by Judge Green in *Vinol v. Core*, 18 W. Va. 1.

2. *Scott v. Shelor*, 28 Gratt. 891, 899; *Singer Man. Co. v. Bryant*, 105 Va. 403, 54 S. E. 320.

3. Note, 26 Am. St. Rep. 123.

### § 154. Parties.

All concerned in originating and carrying on a malicious prosecution are jointly and severally responsible. It is not necessary that all should have joined in the affidavit making a criminal charge. It matters not who is the party on the record, the real prosecutor may be disclosed by parol evidence, and he will be held liable if the prosecution proceeded by his procurement or authority.<sup>4</sup> As between principal and agent, if the agent acts within the scope of his authority, the principal is liable for actual damages. Malice, which is an ingredient of the offense, implies a wrongful purpose or intent and this would require knowledge, and in the absence of such knowledge the principal is not liable for exemplary damages. Knowledge of the agent in such case will not be imputed to the principal. Actual knowledge, however, is not necessary if there was a full delegation of authority in the premises. This may arise where the agent is vested with authority to do whatever he thinks necessary or proper in the matter of instituting proceedings. The principal, of course, is bound if he ratifies the act, or, knowing it, does not repudiate it. Corporations are also liable for prosecutions set on foot by their agents.<sup>5</sup>

### § 155. Termination of prosecution.

It is immaterial how the prosecution was terminated, whether by verdict of acquittal on the merits, by discharge of committing magistrate, refusal of grand jury to indict after hearing the evidence, entry of *nolle prosequi*, or otherwise. If the effect is a discharge on that indictment, dismissal for failure to prosecute, or any other method which ends the particular prosecution in a manner not unfavorable to the party prosecuted is all that is necessary. It was at one time held in Virginia<sup>6</sup> that the dismissal by a justice without hearing testimony, or the entry of a *nolle prosequi* was not a sufficient termination of a criminal prosecution to authorize the defend-

4. *Scott v. Shelor*, 28 Gratt. 891; *Cooley on Torts* (Students' Ed.) 182.

5. *Forbes v. Hagman*, 75 Va. 168; *Singer Man. Co. v. Bryant*, *supra*.

6. *Ward v. Reasor*, 98 Va. 399, 36 S. E. 470.

ant therein to institute an action for malicious prosecution based thereon. This holding, however, has been overruled,<sup>7</sup> and it is now held that it is sufficient if the prosecution has terminated in such manner that it cannot be re-instated nor further maintained without commencing a new proceeding, and that it is immaterial that a new proceeding for the same offense may be set on foot. To procure the issuance and execution of a search-warrant for goods alleged to have been stolen is such a prosecution as may be made the basis of an action for damages for having sued the warrant out maliciously and without probable cause, and the failure to find the goods upon the execution of the warrant is a termination of that proceeding. No other trial or acquittal is necessary to support the action for malicious prosecution.<sup>8</sup>

#### § 156. Effect of conviction.

The conviction of the accused on the criminal charge generally prevents an action for malicious prosecution therefor as it establishes probable cause, but this would probably not be true where the plaintiff has had no opportunity to be heard, as in some jurisdictions where surety of the peace is *required* on *ex parte* affidavits, or if conviction was obtained by fraud or perjury.<sup>9</sup>

#### § 157. Guilt of plaintiff.

Although there was no probable cause for setting on foot the criminal prosecution against the now plaintiff, and no reasonable ground to have believed him guilty of the offense charged, if he was in fact guilty, he cannot maintain an action for malicious prosecution. The whole foundation of the action is injury to an innocent man. It is said that: "The action for malicious prosecution was designed for the benefit of the innocent and not of the guilty. It matters not whether there was probable cause for the prosecution, or how malicious may have been the motives of the prosecutor, if the accused is guilty

7. *Graves v. Scott*, 104 Va. 372, 51 S. E. 821.

8. *Spangler v. Booze*, 103 Va. 276, 49 S. E. 42.

9. Note, 26 Am. St. Rep. 142; *Carpenter v. Sibley* (Cal.), 15 L. R. A. (N. S.) 1143.

he has no legal cause of complaint."<sup>10</sup> His guilt, therefore, may always be shown notwithstanding his acquittal.

### § 158. Probable cause.

No accurate definition can be given of probable cause, but "belief in the charge, on the facts, based on sufficient circumstances to reasonably induce such belief in a person of ordinary prudence" will suffice. The prosecutor must believe in the guilt of the accused, and there must be reasonable grounds on which to base the belief. Both must concur. At least, many of the cases so hold, but upon this point there is some conflict. What constitutes probable cause is generally a question for the court. Whether it exists is a question for the jury, and the better practice seems to be to submit the case to the jury upon hypothetical instructions. The test of probable cause is to be applied as of the time when the action complained of was taken.<sup>11</sup> Whether a conviction reversed on appeal is conclusive or *prima facie* evidence only of probable cause is not settled. In *Womack v. Circle*, 32 Gratt. 324, the action of the justice in requiring security of the peace was held to be conclusive evidence of probable cause which barred an action for malicious prosecution. Two judges dissented under the phraseology of the statute under which the complaint was made, and held that the action of the justice, although reversed on appeal, was only *prima facie* evidence of probable cause.

In *Blanks v. Robinson*, 1 Va. Dec. 600, the dissenting opinion in the former case was approved, and it was held that the decision of the justice of the peace convicting a party of crime, although reversed on appeal, was only *prima facie* evidence of probable cause. This latter holding was cited with approval in *Jones v. Finch*, 84 Va. 208, 4 S. E. 342. In *Evans v. Atlantic C. L. Ry. Co.*, 105 Va. 72, 53 S. E. 3, the plaintiff in malicious prosecution had been convicted of larceny before a justice of the peace. Subsequently on appeal the prosecution was dismissed, and the defendant in that prosecution sued to

10. *Newton v. Weaver*, 13 R. I. 617; Note, 26 Am. St. Rep. 138; *Cooley on Torts* (Students' Ed.) 172.

11. *Cooley on Torts* (Students' Ed.) 170, 172; Note, 26 Am. St. Rep. 127; *Singer Man. Co. v. Bryant*, 105 Va. 403, 54 S. E. 320.

recover damages. No question appears to have been raised as to the right of the plaintiff to maintain the action, but the case was proceeded with upon the supposition that the conviction before the justice was *prima facie* only of probable cause; and, while the case was reversed, it was not because the judgment before the justice was conclusive evidence of probable cause. In the recent case of *Saunders v. Baldwin* (June 8, 1911), 112 Va. —, 71 S. E. 620, it is held that conviction of larceny before a justice, though reversed upon appeal, is conclusive evidence of probable cause, unless it be shown that it was procured by the defendant through fraud, or by means of testimony which he knew to be false, and bars an action for malicious prosecution. This conclusion was arrived at after mature deliberation and consideration, and settles the question in Virginia. It seems to be sound upon principle, and well supported by authority.

*Advice of counsel* is recognized everywhere as a good defence to the action for malicious prosecution. Whether the advice of counsel is received simply to repel malice or also to show probable cause, is a subject of conflict of authority. If only to repel malice, the malice might be otherwise shown, and then the advice of counsel would be unavailing. The true ground would seem to be that it is admissible for the purpose of showing probable cause. In order to defeat the action, however, the party seeking to make the defence must show that he made a full and free disclosure of all the facts with an honest purpose of being informed as to the law, and was in good faith guided by such advice in causing the arrest of the plaintiff.<sup>12</sup> There is also serious conflict as to whether a defendant will be deprived of his defence of "advice of counsel" by reason of want of diligence in not ascertaining all the facts. In Virginia it is held that he will be deprived unless he makes a disclosure, not only of the facts within his knowledge, but of those which would have been within his knowledge had he made a reasonably careful investigation bearing on the guilt

<sup>12</sup> 26 Am. St. Rep. 143, 144; Cooley on Torts (Students' Ed.) 173; *Evans v. Atlantic C. L. Ry. Co.*, 105 Va. 72, 53 S. E. 3; *Vinol v. Core*, 18 W. Va. 1.

of the plaintiff.<sup>13</sup> The contrary is held in West Virginia.<sup>14</sup> In Iowa it is held that a party is required to make to counsel a full and fair statement of all the facts known to him, and further, that if he has reasonable grounds for believing that facts exist which tend to exculpate the accused from the charge, good faith requires that he shall either make further inquiry with reference to these facts and communicate the information obtained to counsel, or that he should inform him of his belief of their existence in order that he may investigate with reference to them, and, in forming his opinion, take into account the information obtained with reference to them, but he is not required to do more than this. He is not required to institute a blind inquiry to ascertain whether facts exist which would tend to the exculpation of the party accused.<sup>15</sup> The holding of the Iowa court commends itself as the sound doctrine.

Any licensed attorney not shown to be in bad standing will suffice. Good faith requires that the attorney shall not be known to be biased or prejudiced.<sup>16</sup>

### § 159. Malice.

What constitutes malice is a question of law for the court. Its existence is a question of fact for the jury. The wilful doing of an unlawful act is malice sufficient to support the action. It is said "in a legal sense any unlawful act done wilfully and purposely to the injury of another is as against that person malicious."<sup>17</sup> Again "by malice is not meant merely malignity or ill-will, but it includes every sinister or improper motive, i. e., every motive other than a desire to bring to punishment a party believed to be guilty of crime."<sup>18</sup> Malice and want of probable cause must concur. Malice may well be inferred from

13. *Evans v. Atlantic Coast Line R. Co.*, *supra*.

14. *Vinol v. Core*, 18 W. Va. 1, 72.

15. *Johnson v. Miller*, 69 Iowa 562, 58 Am. St. Rep. 231; Note, 26 Am. St. Rep. 147.

16. Note, 26 Am. St. Rep. 147.

17. *Scott v. Shelor*, 28 Gratt. 891.

18. *Vinol v. Core*, 18 W. Va. 1; *Cooley on Torts* (Students' Ed.) 179.

the want of probable cause, but the latter will not be inferred from the former. The burden of proof of both is on the plaintiff, and although the want of probable cause is a negative, the burden is nevertheless on the plaintiff to prove it. This is said to be based on grounds of public policy.<sup>19</sup>

### § 160. Evidence.

In order to prove the want of probable cause the plaintiff may offer evidence of his previous good reputation and that it was known to his accuser, or should have been known to him. Evidence of ill-will on the part of the accuser is always admissible for the purpose of showing malice, and so evidence of other facts may be shown which tend to show that the prosecutor was not acting in good faith. On the other hand, the defendant is allowed to show the bad reputation of the plaintiff before the charge was preferred, both in mitigation of damages and also to show that the prosecution was not without probable cause. He may also give in evidence other facts tending to show that he acted in good faith.<sup>20</sup>

### § 161. Damages.

In an action for malicious prosecution for a crime alleged to have been committed by the plaintiff, the measure of damages is such an amount as the jury may find will compensate the plaintiff for the actual outlay and expenses about his defence in the prosecution against him, for his loss of time, and for the injury to his feelings, person and character by his detention in custody and prosecution, and the jury may also, if they find said prosecution to have been commenced or procured for private ends or with reckless disregard of the rights of the plaintiff, give such punitive damages as they think proper.<sup>21</sup> The general rule in such cases is to make *compensation* for the wrong done, including injury to the feelings, but in exceptional cases punitive damages may be allowed. If the

19. *Scott v. Shelor*, 28 Gratt. 891; *Singer Man. Co. v. Bryant*, 105 Va. 403, 54 S. E. 320; Note, 26 Am. St. Rep. 149.

20. Note, 26 Am. St. Rep. 156 to 162; *Vinol v. Core*, 18 W. Va. 1.

21. *Vinol v. Core*, 18 W. Va. 1.

case be one in which punitive damages may be properly allowed, evidence of the defendant's wealth and pecuniary ability is admissible as a means of determining what would amount to punishment, for what would amount to punishment to one defendant would be no punishment at all to another; but if the case is not one proper for punitive damages, evidence of the wealth or pecuniary ability of the defendant is inadmissible.<sup>22</sup> If recovery is sought for special damages, they must be alleged and proved. Counsel fees and costs incurred in securing acquittal are special damages and so are loss of profits in business, etc.

### § 162. Civil malicious prosecution.

Ordinarily no action lies against a plaintiff for bringing frivolous actions. The costs awarded against him in the civil action is usually sufficient penalty to deter repetition; but there are certain classes of civil actions, such as maliciously attempting to throw one into bankruptcy, attachment of his person or property, proceedings to have him adjudged insane or put under guardianship, and the like, which are injurious to property rights of a party by assaults on his credit. If such actions are set on foot maliciously and without probable cause they may be made the basis of an action for malicious prosecution. The same is true where there is a malicious abuse of process. Practically the same rules apply to this class of malicious prosecutions as to those charging one with a criminal offense.<sup>23</sup>

22. *Singer Man. Co. v. Bryant*, 105 Va. 403, 54 S. E. 320.

23. *McCormick v. Williams*, 93 Am. St. Rep. 454, and note; *Ailstock v. Moore Lime Co.*, 104 Va. 565, 52 S. E. 213 (maliciously suing out an attachment); *Forbes v. Hagman*, 75 Va. 168 (arresting a party and holding him to bail).

## CHAPTER XX.

### TROVER AND CONVERSION.

- § 163. Nature of the action.
- § 164. Plaintiff's title.
- § 165. What may be converted.
- § 166. What constitutes conversion.
- § 167. Demand.
- § 168. Return of property.
- § 169. Damages.
- § 170. General issue.
- § 171. Effect of judgment.

#### § 163. Nature of the action.

Trover and conversion, or trover as it is usually called, is a species of that legal class of actions known as "trespass on the case." It derives its name from the French word "*trouver*," to find, and the declaration alleges that the plaintiff casually lost his property and the defendant found it and converted it to his own use. The allegation of the loss and finding was a mere fiction and never traversable, and hence need not be alleged. The gist of the action is the unlawful conversion. The action is not to recover the specific chattel, but to recover damages for the conversion of the plaintiff's property by the defendant. It is said that even in the Code states, trover remains substantially the same as at common law.<sup>1</sup>

Frequently a plaintiff has an option to bring either trover or trespass, but it is important to notice the differences between the two actions. This is well pointed out by Cooley<sup>2</sup> as follows: "There are two principal differences between the actions of trespass and trover for personalty appropriated by the defendant; the first of which is, that in trespass there is always either an original wrongful taking, or a taking made wrongful *ab initio* by subsequent misconduct, while in trover,

1. *Bolling v. Kirby*, 90 Ala. 215, 24 Am. St. 789, and note; Cooley on Torts (Students' Ed.) 417; 21 Encl. Pl. & Pr. 1014.

2. Cooley on Torts (Students' Ed.) 418.

the original taking is supposed or assumed to be lawful, and often the only wrong consists in a refusal to surrender a possession which was originally rightful, but the right to which has terminated. The second is, that trespass lies for any wrongful force, but the wrongful force is no conversion where it is employed in recognition of the owner's right, and with no purpose to deprive him of his right, temporarily or permanently. Thus, if one take up the beast of another, in order to prevent his straying away, and afterwards turn him out again, he may be liable in trespass for so doing, but his act is no conversion, because the owner's dominion is not disputed, and the intent to make a wrongful appropriation is absent. In many cases either trover or trespass will lie."

### § 164. Plaintiff's title.

It is said that "to maintain trover, the plaintiff must show a conversion of personal property by the defendant, and that the plaintiff had, at the time of the conversion, a right of property in the thing converted, and also possession or right of immediate possession thereof. The right to the possession must be absolute and unconditional. It is essential that the plaintiff should have possessory title, i. e., the right to the immediate possession of the goods, but this possessory title may be either general or special. Possession with an assertion of title, or even possession alone, gives the possessor such a property as will enable him to maintain this action against the wrongdoer, for the possession is *prima facie* evidence of property."<sup>3</sup> The action of trover is given to redress an injury to the *right of possession*, and in order to maintain the action it is necessary for the plaintiff to show that he not only has the right of property in, but also that he had a right to the *immediate possession* of the thing converted at the time of the conversion.<sup>4</sup> Possession alone is sufficient as against a mere wrongdoer, but title alone is not sufficient unless the plaintiff either had possession or right to the immediate possession. A mere bailee in possession, however special the bailment, may

3. Haines *v.* Cochran, 26 W. Va. 719.

4. Philips *v.* Martiney, 10 Gratt. 333.

maintain the action against the wrongdoer and recover the whole value of the property, being accountable over, of course, to the general owner.<sup>5</sup>

### § 165. What may be converted.

Anything may be converted which is the subject of property and is personal in its nature, but the conversion must be of specific chattels, not of chattels generally. For instance, trover may be brought for the conversion of a particular horse, but not generally for the conversion of "a horse." The action lies only for the conversion of specific chattels, not of realty or things partaking of the nature thereof. It is sometimes said that it will not lie for the conversion of money *generally* i. e., unmarked money, money not in bags and the like. The conversion of money generally usually creates simply a money demand, and the appropriate action would be *assumpsit*. Upon this proposition, however, there is conflict of authority.<sup>6</sup>

### § 166. What constitutes conversion.

"Any distinct act of dominion wrongfully exerted over one's property in denial of his right, or inconsistent with it is a conversion."<sup>7</sup> Any appropriation of property in disregard or defiance of the owner's rights in it will amount to a conversion and this conversion may be proved in three ways: (1) By a tortious taking; (2) by any use or appropriation to the use of the person in possession, indicating a claim of right in opposition to the rights of the owner; (3) by refusal to give up the possession to the owner on demand. In the last case the possession may have been in the first instance lawful, but ceases to be lawful upon refusal to deliver to the owner on demand.<sup>8</sup> A misdelivery by a bailee is a conversion,<sup>9</sup> but the refusal of a carrier to deliver to the party entitled is not a conversion if under the circumstances the refusal was

5. Cooley on Torts (Students' Ed.) 420, and cases cited.

6. Note, 24 Am. St. Rep. 818; 21 Encl. Pl. & Pr. 1021, and cases cited.

7. Cooley on Torts (Students' Ed.) 423, and cases cited.

8. Haines v. Cochran, 26 W. Va. 719.

9. A. D. Blowers & Co. v. Can. Pac. R. Co. (C. C.), 155 Fed. 935.

qualified and reasonable, and made upon the ground that the person making the demand had not supported it by sufficient evidence of his ownership of the property, or his right to the possession thereof.<sup>10</sup> It is not necessary that there should be a manual taking of property in order to constitute a conversion. The conversion may be by words only. If the wrongdoer exercises dominion over the property to the exclusion of, or in defiance of the owner's right, it is in law a conversion.<sup>11</sup> And so a tenant in common in possession of property may be liable for a conversion in case of culpable loss or destruction by him.<sup>12</sup> If there has been a breach of bailment whereby the bailment is terminated, this usually constitutes a partial conversion and the bailor may bring trover, but the bailee in such case has the right to return the property bailed; but if there has been complete conversion, the owner is under no obligation to take the property back.<sup>13</sup> If a horse be hired for use at a particular place only, and the hirer carries the horse to another place, and it there contracts a disease of which it dies, the hirer is liable as for a conversion if the death was occasioned in consequence of the wrongful removal, the removal being held in such case to be a conversion.<sup>14</sup>

### § 167. Demand.

If the defendant has come into possession lawfully and without fault, it is generally necessary to demand possession before action brought. "The object of the demand is to afford the person in possession an opportunity to deliver the property up without cost if he have no claim. *Jones v. Dungan*, 1 McCord 129. Therefore when the person in possession has only a special property in the goods, such as bailee, a demand made after the goods have passed out of his possession and when he could not deliver

10. *Moore v. B. & O. R. Co.*, 103 Va. 189, 48 S. E. 887.

11. Note, 24 Am. St. Rep. 798.

12. *Cooley on Torts* (Students' Ed.), 432.

13. *Cooley on Torts* (Students' Ed.), 437, 438.

14. Note, 24 Am. St. Rep. 795; *Harvey v. Epes*, 12 Gratt. 153. In this latter case, the doctrine of breach of bailment by use of property for a different purpose or in a different manner from that contracted for is denied in an able opinion.

them, would not render his refusal to do so a conversion, or be evidence of conversion. But where the person in possession does not claim to hold for another, then it is immaterial whether the demand is made before or after he has parted with the possession, for if the goods have been disposed of, a demand will be considered as giving an opportunity of making satisfaction therefor, and not as affirming any pretended sale of them."<sup>15</sup>

### § 168. Return of property.

As hereinbefore pointed out, where there has been complete conversion, the defendant has no right to return the property, and the plaintiff is under no obligation to accept it; but where the conversion is temporary only, as by a breach of bailment in the case of hired property, it is probable that the bailee may return the property and the bailor will be bound to accept it. But it is said that no fixed rule can be announced on this subject, as it lies largely in the discretion of the court, but that where the taking was not unlawful, and the party is not essentially injured, the defendant should be allowed to surrender it upon paying the actual damages sustained.<sup>16</sup> It is provided in Virginia that "in any personal action the defendant may pay into court to the clerk a sum of money on account of what is claimed, by way of compensation or amends, and plead that he is not indebted to the plaintiff or that the plaintiff has not sustained damages to a greater amount than the said sum,"<sup>17</sup> and that "the plaintiff may accept the same, either in full satisfaction and then have judgment for his cost, or in part satisfaction and reply to the plea generally, and if issue thereon be found for the defendant, judgment shall be given for the defendant and he shall recover his cost."<sup>18</sup>

### § 169. Damages.

As a general rule, the measure of damages where the conver-

15. Haines *v.* Cochran, 26 W. Va. 719, 724; Cooley on Torts (Students' Ed.) 430, 431.

16. Note, 24 Am. St. Rep. 808, 809; Cooley on Torts (Students' Ed.), 434.

17. Code, § 3296.

18. Code, § 3297.

sion is complete is the value of the property converted at the time of the conversion, with interest thereon from that date, but there is great conflict of authority on this subject. Values may fluctuate greatly in a short time, especially in the matter of stocks. Probably as near justice as could be obtained would be to give to the plaintiff the value of the property at the time of the conversion, together with any advance which may have taken place within such time as is reasonably necessary to replace it. If the property has depreciated in value, it would seem on principle, that the owner should be allowed to recover its value as of the date of conversion, as he might on that day have sold it and realized its market value.<sup>19</sup> If property of one is delivered to another by mutual mistake of fact, and is converted by the latter, the owner may recover the value of the property at the time of conversion, with interest thereon from the date of the discovery of the mistake and demand made.<sup>20</sup>

### § 170. General issue.

The general issue in trover is "not guilty." This is a broad general issue and under it may be shown probably anything, except release, statute of limitations, and bankruptcy. The scope of this plea is so wide as to have led to the expression that there is no plea in trover but release and not guilty, and Lord Holt is quoted as saying "that he never knew but one special plea good in trover." Undoubtedly many special pleas have been held admissible in this action as not amounting to the general issue but the general issue, in the absence of statute, would seem to be of the scope indicated above.<sup>21</sup>

### § 171. Effect of judgment.

Probably the subject upon which the greatest diversity of opinion exists in connection with trover is, when does title to personal property pass? The great weight of authority is to the effect that title does not pass simply by the judgment, but only

19. Cooley on Torts (Students' Ed.) 435.

20. Craufurd v. Smith, 93 Va. 623, 23 S. E. 235.

21. 6 Rob. Pr. 599, and following.

upon satisfaction of the judgment,<sup>22</sup> and such is the English rule. In Virginia there is no direct authority on the subject, but in *Austin v. Jones, Gilmer*, 341, 348, which was an action of detinue, Judge Coalter in the course of his opinion said *obiter*: "But trover will lie although the property be dead, because the time of conversion gives the date to which the action relates, and the very conversion may cause the death of the property. Recovery in that action amounts to a sale of the property at the time of the conversion and vests the property in the defendant from that time, so that if he has sold it, even pending the suit or before, and the plaintiff never gets his damages, he cannot bring detinue against the purchaser." The opinion, however, was simply the individual opinion of Judge Coalter and not that of the court, and was not necessary to the decision of the case. In West Virginia it has been held that a judgment for the full value of property vests the title to it in the defendant, unless the property has been returned uninjured and unimpaired in value, in which event the plaintiff could only recover damages for the detention.<sup>23</sup> In this case there was a judgment for the full value of a horse, which it appears was in possession of the plaintiff's agent at the time the action was brought, that he was in no condition to be removed on account of wounds which he had received after the defendant had taken him from the plaintiff's possession, and that the plaintiff had never gotten the said horse from his agent nor ever received any pay for him; and it is not clear that the statement in the opinion that the judgment vested title in the defendant was necessary to the decision of the case.

22. *Lovejoy v. Murray*, 3 Wall. 1; *Miller v. Hyde* (Mass.), 42 Am. St. Rep. 424, and note; *Cooley on Torts* (Students' Ed.) 437.

23. *Arnold v. Kelly*, 4 W. Va. 642, 647.

## CHAPTER XXI.

### SLANDER AND LIBEL.

§ 172. What words are slanderous or libelous.

§ 173. Parties.

§ 174. The declaration.

§ 175. Malice.

§ 176. Defences.

§ 177. Evidence.

§ 178. Replication.

#### § 172. What words are slanderous or libelous.

Mr. Justice Clifford makes the following classification of words which are slanderous at common law: 1. "Words falsely spoken of a person which impute to the party the commission of some criminal offense involving moral turpitude, for which the party, if the charge is true, may be indicted and punished. 2. Words falsely spoken of a person which impute that the party is infected with some contagious disease, where if the charge is true, it would exclude the party from society. 3. Defamatory words falsely spoken of a person which impute to the party unfitness to perform the duties of an office or employment of profit, or the want of integrity in the discharge of the duties of such an office or employment. 4. Defamatory words falsely spoken of a party which prejudice such party in his or her profession or trade. 5. Defamatory words falsely spoken which though not in themselves actionable, occasion the party special damage."<sup>1</sup> The first four of these classes are slanderous *per se*, the other only when special damage results.

In Virginia it is provided that "all words which from their usual construction and common acceptation are construed as insults and tend to violence and breach of the peace, shall be ac-

1. Cooley on Torts (Students' Ed.), § 105; *Pollard v. Lyon*, 91 U. S. 225.

tionable. No demurrer shall preclude a jury from passing thereon."<sup>2</sup>

Libel is of somewhat wider extent than slander. All slander when written is libelous, and so is any "writing, print, picture, or effigy calculated to bring one into hatred, ridicule, or disgrace."

### § 173. Parties.

As words can only be spoken by individuals separately, there can, as a general rule, be no joinder of defendants in slander. The rule is otherwise in libel, where there may be a joint publication. In libel, as in other torts, all, or any one, or any intermediate number may be sued. Slander of several persons by the same words should generally be redressed by separate actions, though if a partnership, as such, is slandered, all may join, and, unless special damage is done to some one partner, it would seem on principle all should join; but if a slander be of a class of persons as, for example, all the students of Washington and Lee University, none can sue except for special damage shown to have been done him.<sup>3</sup> It was formerly held that a corporation could not be guilty of slander, but more recent cases hold corporations liable in damages for slander spoken by their agents when authorized or directed by the corporation. It is well settled that they are liable for libel.<sup>4</sup> Insane persons, it is presumed, are liable for the *actual* damage occasioned, but the authorities are not clear.<sup>5</sup>

### § 174. The declaration.

Common-law slander and statutory slander may be united in the same declaration in different counts, but not in the same

2. Code, § 2897. This statute applies to both spoken and written words, and it has been held that *no publication* of the words need be alleged or proven in an action under the statute. *Rolland v. Batchelder*, 84 Va. 664, 55 S. E. 695.

3. 13 Encl. Pl. & Pr. 29, and cases cited.

4. 18 Am. & Eng. Encl. Law (2nd Ed.) 1059; *Sun Life Ass. Co. v. Bailey*, 101 Va. 443, 44 S. E. 692; *Brown v. N. & W. R. Co.*, 100 Va. 619, 42 S. E. 664.

5. Note, 42 Am. St. 754; *Cooley on Torts* (Students' Ed.) 56.

count;<sup>6</sup> but even if united in the same count, it would simply present a case of duplicity, and objection on that account cannot be raised by demurrer.<sup>7</sup> In declaring for either libel or slander, the exact words (written or spoken) must be set out in the declaration *in hæc verba*. Not only must the words be given, but the pleading must purport to give them exact, though not all words charged need be proved. If the words are in a foreign language they should be pleaded in that language, followed by a proper and accurate translation and an averment (in slander) that they were understood by the hearers.<sup>8</sup>

The important features of the declaration are the averment, the colloquium, and the innuendo. If the words do not naturally and of themselves convey the meaning the plaintiff wishes to assign to them, or are ambiguous and equivocal, and require explanation by reference to some extrinsic fact to show that they are actionable, it must be expressly shown that such matter existed, and that the slander related thereto.<sup>9</sup> In other words, the existence of facts and circumstances which go to show the meaning of words should be set out so as to show the intended meaning of the defendant. This is called the averment. The colloquium is the conversation which takes place in which the slanderous words are uttered, and connects the plaintiff and the extrinsic facts with the slanderous words. It is necessary to aver that a conversation took place between the defendant and a third person, and generally that this conversation was concerning the plaintiff, and that in the conversation the slanderous words were spoken of and concerning the plaintiff. The innuendo is intended merely to explain such parts of the defamatory words as are equivocal, or obscure, or need explanation. The innuendo can never enlarge the meaning of the words used. The innuendo is simply explanatory of matter which has already been sufficiently expressed. The meaning and application of these terms is made clearer by the following illustration given by Prof. Minor from Barham's case: "Barham brought an action against Nethersal for saying of him, 'Barham burnt my

6. *Payne v. Tancil*, 98 Va. 262, 35 S. E. 725.

7. *So. Ry. Co. v. Simmons*, 105 Va. 651, 55 S. E. 459.

8. 13 Encl. Pl. & Pr. 45-47.

9. *Puterbaugh Pl.* 712.

barn (*innuendo* a barn with corn).’ The action was held not to lie; because burning a barn unless it had corn in it, was not a felony. And as was remarked by De Grey, Ch. J. in *Rex. v. Horne*, Cowp. 684, the plaintiff cannot by way of *innuendo*, say meaning ‘his barn full of corn’ because that is not an *explanation* of what was said before, but an *addition* to it. But if in the introduction the declaration had *averred* that the defendant had a barn full of corn, and that in a discourse about the barn (*colloquium*), the defendant had spoken the words charged in the libel of the plaintiff, an *innuendo* of its being the barn full of corn would have been good; for by coupling the *innuendo* with the introductory *avermment* ‘his barn full of corn,’ it would have been complete. Here the extrinsic fact that the defendant had a barn full of corn, is the *avermment*. The allegation that the words were uttered in a conversation about the barn, is the *colloquium*; and the explanation given to the words thus spoken, is the *innuendo*.<sup>10</sup>

### § 175. Malice.

It is generally stated that malice in both slander and libel must be alleged and proved, and no doubt the allegation is necessary, but it must be understood, at least so far as the proof is concerned that malice is not used in its common acceptation, but rather in the sense of legal malice which means a wrongful act done intentionally without just cause or excuse. A party who thoughtlessly repeats a slander is liable for it, and so a newspaper publisher who copies an article from another paper may be absolutely devoid of malice, and yet in each case the party is guilty of legal malice. The absence of actual malice in its common acceptation in either case will not defeat the action, though it may prevent exemplary damages.<sup>11</sup> If the words were spoken or written under circumstances which render the communication privileged, then the burden of proving malice is upon the plaintiff. In such case malice will not be presumed from the mere speaking of the words, but must be otherwise shown. If it is

10. 4 Min. Inst. 462.

11. Cooley on Torts (Students’ Ed.) 223; *Dillard v. Collins*, 25 Gratt. 343.

otherwise shown, the words are still actionable, otherwise not. The effect of establishing the privilege is simply to change the burden of proof.<sup>12</sup> Express malice, that is, actual malice, must be shown in two cases: (1) To entitle the person defamed to recover punitive or exemplary damages: (2) To repel the inference that would arise from a qualified privilege.<sup>13</sup>

### § 176. Defences.

The defendant may, as to common-law slander, demur to the declaration on the ground that it does not state a case. If the words be declared upon merely as insulting under the Virginia statute, then it is expressly provided that no demurrer shall preclude the jury from passing thereon.<sup>14</sup> The language of the statute is broad enough to cover a demurrer to the declaration as well as to the evidence, but the statute applies only to insulting words, and not to common-law slander, and as to the latter, a demurrer may still be filed. Hence it is necessary to aver in the declaration that you sue for the *insult* under the statute. The same words may be slanderous at common law, and also insulting under the statute, but a declaration will not be held to have been founded upon the statute unless there is something on the face of it to show that the plaintiff intended to base his action on the statute.<sup>15</sup> While it is provided, as stated above, that no demurrer shall preclude a jury from passing on the words, still this statute was enacted for the benefit of plaintiffs, and if they choose to waive it they may do so; hence if the defendant demurs to the evidence in an action for slander or libel, and the plaintiff joins in the demurrer without objection, the case will be treated as other cases of demurrer to the evidence, and the plaintiff held to have waived the benefit of the statute enacted for his benefit.<sup>16</sup>

The defence may be made either by pleading the general issue, or by special pleas. The most usual of the special pleas is a plea of justification. The general issue is "not guilty," and un-

12. Dillard *v.* Collins, *supra*.

13. 18 Am. & Eng. Encl. Law (2nd Ed.) 1001, 1002.

14. Code, § 2897.

15. Hogan *v.* Wilmoth, 16 Gratt. 80, 88, 89.

16. Brown *v.* N. & W. Ry. Co., 100 Va. 619, 624, 42 S. E. 664.

der it the defendant may adduce evidence to disprove any of the material allegations of the declaration, including special damages. He may also show that the words were spoken in good faith and without malice, but he cannot show the truth of the words. This fact must be specially pleaded.<sup>17</sup> The defendant may also show the bad general character of the plaintiff on the subject involved in the litigation in mitigation of damages.<sup>18</sup> Neither side is permitted to show the good or bad character of the defendant, as that would be immaterial. The defendant, under the plea of the general issue, may also show that the words were spoken upon a privileged occasion. It is said that confidential or privileged communications are of four classes: (1) Where the author or publisher of the slander acted in the *bona fide* discharge of a public or private duty, legal or moral, or in the prosecution of his own rights or interests; (2) anything said or written by a master in giving the character of a servant who has been in his employment; (3) words used in the course of a legal or judicial proceeding, however hard they may bear upon the party of whom they are used; (4) publications duly made in the ordinary mode of parliamentary proceedings.<sup>19</sup> In the first three classes the words must be used in good faith, and be relevant and pertinent to the matter under consideration.<sup>20</sup> Words spoken in the presence of a mayor of a town with reference to the inefficiency of a policeman in the town are privileged and are not actionable unless shown to have been spoken with a malicious purpose. The conduct of public officers is open to public criticism, and it is the right and duty of a citizen to make complaint of any misconduct on the part of officials to those charged with supervision over them; it is also the right and privilege of a citizen to discuss the misconduct of such officers if taxpayers in the town in which they live.<sup>21</sup> As already pointed out, the only effect of showing that a communication is

17. 6 Rob. Pr. 864, 874, 885.

18. McNutt v. Young, 8 Leigh 542; Dillard v. Collins, 25 Gratt. 343.

19. Dillard v. Collins, *supra*.

20. 5 Va. Law Reg. 1.

21. Tyree v. Harrison, 100 Va. 540, 42 S. E. 295; Gatewood v. Garrett, 106 Va. 552, 56 S. E. 335.

privileged is to change the burden of proof, and throw upon the plaintiff the necessity of showing malice.

The defendant may also by special plea justify by alleging and proving the truth of the words spoken. This is specially provided for in Virginia by statute.<sup>22</sup> While the statute says that the *truth* may be shown in *any action* for defamation, there are some exceptions. The defendant will not be allowed to gratify his malice and aggravate his outrage by proving the truth of words which have no tendency to show that there was anything in the character or conduct of the plaintiff worthy of blame or reproach, and it would seem that the truth *may not be shown* in justification if it imputes no fault or misconduct to the party of whom the words were spoken.<sup>23</sup>

### § 177. Evidence.

Like slanderous words, whether spoken before or after those charged, may be shown to affect the measure of damages after the words laid have been proved, but not before.<sup>24</sup> If like slanderous words are proved, the defendant will be allowed to show their truth in mitigation, as he had no opportunity of pleading to them.<sup>25</sup> The time and place of speaking are generally immaterial, and one place may be alleged and another proved.<sup>26</sup> The words charged, or some of them, must be proved. The words must be at least substantially the same. Words equivalent or of similar import are not sufficient.<sup>27</sup> As hereinbefore pointed

22. Section 3375 of the Code is as follows: "In any action for defamation, the defendant may justify by alleging and proving that the words spoken or written were true, and (after notice in writing of his intention to do so, given to the plaintiff at the time of, or for pleading to such action), may give in evidence, in mitigation of damages, that he made or offered an apology to the plaintiff for such defamation before the commencement of the action, or as soon afterwards as he had an opportunity of doing so, in case the action shall have been commenced before there was an opportunity of making or offering such apology.

23. *Hogan v. Wilmoth*, 16 Gratt. 80, 88, 89.

24. *Hansbrough v. Stinnett*, 25 Gratt. 495.

25. 6 Rob. Pr. 873.

26. 16 Encl. Pl. & Pr. 60.

27. 16 Encl. Pl. & Pr. 63.

out, the defendant may prove the bad general character of the plaintiff in mitigation of damages, as a person of bad reputation is not entitled to the same measure of damages as one whose character is unblemished. In Virginia, the plaintiff also may show his general good character before any evidence is offered by the defendant on the subject.<sup>28</sup> Expressions of regret after the defamatory words were spoken, and especially after suit brought, are not admissible in evidence in mitigation of damages.<sup>29</sup> But the fact that an apology was made or offered as soon as the defendant had an opportunity to do so is allowed to be shown under statute in Virginia in mitigation of damages.<sup>30</sup>

### § 178. Replication.

The general replication *de injuria* is a proper replication to a plea of justification in actions for oral and written slander.<sup>31</sup>

28. *Adams v. Lawson*, 17 Gratt. 250.

29. *McAlexander v. Harris*, 6 Munf. 465.

30. Code, § 3375.

31. 1 Chitty Pl. 590; *Puterbaugh Pl.* 728.

## CHAPTER XXII.

### RULE DAYS AND OFFICE JUDGMENTS.<sup>1</sup>

§ 179. Nature of rules.

§ 180. Object and purpose of rule days.

Theoretically.

Practically.

§ 181. Proceedings at rules.

§ 182. Rules in federal courts.

§ 183. Dilatory pleas and time of filing.

§ 184. Powers of court over proceedings at rules.

§ 185. Setting aside office judgment.

Judgment on an issue of fact made by a dilatory plea.

#### § 179. Nature of rules.

Rules are orders made by clerks of courts of record on days appointed by law (called rule days), for the purpose of

1. The following sections of the Code bear particularly upon proceedings at rules: Sec. 3236. "In the clerk's office of every circuit and corporation court, and of the chancery court of the city of Richmond, rules shall be held on the first and third Mondays of every month, except that when the term of a circuit court, or of the chancery court of the city of Richmond, or the term of a corporation court designated for the trial of civil cases in which juries are required, happens to commence on the first or third Monday in a month, or on either of the two following days, the rules which would otherwise have been held on the first or third Monday, as the case may be, shall be held on the Monday of the preceding week. The rules shall continue three days."

Sec. 3237. "There shall be a docket of the cases at rules, wherein the rules shall be entered; and the books in which rules and orders are entered, in chancery cases, shall be separate from those in which rules and orders are entered in other cases."

Sec. 3238. "When there is no clerk to take a rule in a case, it shall stand continued until the next rule day after there is a clerk."

Sec. 3239. "The rules may be to declare, plead, reply, rejoin, or for other proceedings; they shall be given from one rule to the next rules."

Sec. 3240. "A defendant may appear at the rule day at which the process against him is returnable, or, if it be returnable in term, at the first rule day after the return day, and, if the declaration or bill

maturing cases for hearing. They are in effect orders of the court in which the case is pending, as they are subject to the control of the court at the next succeeding term, which may reinstate a case discontinued, set aside any of the proceedings at the rules, correct mistakes therein, and make such orders therein as may appear to be proper.<sup>2</sup> At common law

be not then filed, may give a rule for the plaintiff to file the same. If the plaintiff fail to do this at the succeeding rule day, or shall, at any time after the defendant's appearance, fail to prosecute his suit, he shall be non-suited, and pay to the defendant, besides his costs, five dollars."

Sec. 3241. "If one month elapse after the process is returned executed as to any one or more of the defendants, without the declaration or bill being filed, the clerk shall enter the suit dismissed, although none of the defendants have appeared."

Sec. 3242. "When a summons to answer an action or a bill is against a defendant whom the officer (receiving it) knows not to reside in his county or corporation, he shall, unless he finds him therein before the return day, return him a non-resident; whereupon, if the court from which such process issued have jurisdiction of the case only on the ground of such defendant's residence in such county or corporation, the suit shall abate as to him."

Sec. 3258. "No plea in abatement for a misnomer shall be allowed in any action, but in a case wherein, but for this section, a misnomer would have been pleadable in abatement, the declaration may, on the defendant's motion, and on affidavit of the right name, be amended by inserting the right name."

Sec. 3258a. "That whenever it shall appear in any action at law or suit in equity heretofore or hereafter instituted by the pleadings or otherwise that there has been a misjoinder of parties, plaintiff or defendant, the court may order the action or suit to abate as to any party improperly joined and to proceed by or against the others as if such misjoinder had not been made, and the court may make such provision as to costs and continuances as may be just."

Sec. 3259. "In other cases, a defendant, on whom the process summoning him to answer appears to have been served, shall not take advantage of any defect in the writ or return, or any variance in the writ from the declaration, unless the same be pleaded in abatement. And in every such case the court may permit the writ or declaration to be amended so as to correct the variance and permit the return to be amended upon such terms as shall seem to it just."

2. *Wakeford v. Trinkle*, 90 Va. 227, 231, 17 S. E. 873.

there were no such things as rules or rule days, but the proceedings were for the most part oral altercations at the bar of the court until issues were reached. Probably, at a later day, time was given from one court to another to file answers to the antecedent pleadings, and, in more recent times, the pleadings are written out and delivered to the opposing party or his counsel, until the issue is reached; but rules are wholly a creature of the statute, and hence the statute is to be substantially, if not literally, complied with. These rules in Virginia are held on the first and third Monday of each month, and the two succeeding days, unless within some of the exceptions mentioned in the statute. It is now expressly provided that the rules *shall continue* three days, so that the question involved in *Botts v. Pollard*, 11 Leigh 433, is now regulated by statute.<sup>3</sup> In every civil case in Virginia in which the common-law form of action is adopted, it is manifest that rules must be held, and when the proceedings at rules have terminated, then, and not till then, the clerk must put the case on the court docket.<sup>4</sup>

### § 180. Object and purpose of rule days.

*Theoretically*, the object and purpose of rule days is to compel

3. The statute then provided that rules should be held in the clerk's office "on the first Monday of every month, and *may* be continued from day to day not exceeding six days." 1 Rev. Code, ch. 128, § 69. The clerk closed the rules, so far as affected the reception of pleas, on the first day of the rules, and refused to receive a plea at a later day, and this was held to be error.

4. Code, §§ 3236, 3378.

Sec. 3260. "Where the declaration or bill shows on its face proper matter for the jurisdiction of the court no exception for the want of such jurisdiction shall be allowed unless it be taken by plea in abatement. No such plea or any other plea in abatement shall be received after the defendant has demurred, pleaded in bar, or answered to the declaration or bill, nor after a decree nisi or conditional judgment at rules."

Sec. 3261. "No plea in abatement, for the non-joinder of any person as a co-defendant, shall be allowed in any action, unless it be stated in the plea that such person is a resident of this state, and unless the place of residence of such person be stated with convenient certainty in an affidavit verifying the plea."

defendants not only to bring forward their dilatory pleadings at an early stage, but also to mature the case for hearing on its merits, so that the parties may be informed before the court meets what issues are to be tried. *Practically*, the only effect of rule days is to compel defendants to bring forward their dilatory pleas at an early stage, and also to enable them to force a trial on the merits at the next succeeding term, or compel the plaintiff to show cause for a continuance. As will be seen later, dilatory pleas cannot be filed in a regular action except at rules, and hence the defendant is compelled at an early stage to file his dilatory pleas. But an office judgment against a defendant is not final, and the penalty imposed for suffering an office judgment is so slight that defendants, as a rule, pay no attention whatever to the proceedings at rules. If they make up the issue at rules, they thereby inform the plaintiff in advance of the term of court what their defence is, and this is generally not considered desirable, so that it is rare that a plea in bar is ever filed at rules. If, however, a defendant is anxious for trial, he will make up the issues at rules, so that when the case is called on the docket the plaintiff will not be entitled to a continuance as a matter of right, but, having been advised before hand of what the issue would be, will be compelled to go to trial or to show cause for a continuance, or else submit to a non-suit. If the defendant waits until the term of the court to file his pleas in bar, this generally gives the plaintiff a right to a continuance as a matter of right; but, as stated, the rule is otherwise where the issues are made up at rules. Practically, then, the only effect of the statute with reference to proceedings at rules is to compel the filing of dilatory pleas at an early stage and to enable the defendant to force the plaintiff to a trial on the merits, or else to show cause for a continuance when his case is called on the docket.

### § 181. Proceedings at rules.

Rules in Virginia are required to be held for three days.<sup>5</sup> For most purposes, they are regarded as but one day, but

5. Code, § 3236.

for some purposes there is a severance. All process which is returnable to rules is *returnable* to the first day of the rules, but may be *executed on or before* the first day, but not after.<sup>6</sup> The sheriff may make his return on any one of the three days, but *cannot serve* process later than the first. If the process is returned not executed, an *alias* or other proper process may be issued.<sup>7</sup> If the process is returned executed, it is the duty of the plaintiff to file his declaration at the return day of the process, and if he fails to do so, the defendant may give him a rule to declare, and then unless the declaration is filed at the next succeeding rules, he will be non-suited, and required to pay to the defendant \$5 damages, and the costs.<sup>8</sup> If one month elapses after the process is returned executed as to any one or more of the defendants without the declaration being filed, it is made the *ex officio* duty of the clerk to dismiss the action, although none of the defendants have appeared, subject, however, to be reinstated at the next term for good cause shown.<sup>9</sup> If process be returned executed and the declaration be filed in time the defendant may:

(1) *Stay away altogether* and pay no attention to the rules in which event there is entered against him what is called the common order (because it is the usual order), or conditional judgment, which is but another name for the same thing, and called a conditional judgment because it threatens the defendant with a judgment against him at the next rules if he fails to appear and plead. If a defendant fails to make any appearance at all at the next or second rules, a judgment is entered against him in the office, with or without a writ of enquiry, as necessity may require. Having failed either to appear or plead at the first rules, all dilatory pleas are cut off but at the second rules he may, if he elect, plead to the issue; or,

6. Code, § 3220.

7. Code, § 3221. If the process is *not returned* on the return day thereof, it is made the *ex officio* duty of the clerk to issue a rule against the officer to whom the process was directed returnable to the first day of the next term of the court to appear and show cause why he shall not be fined for his said default. Code, § 900.

8. Code, § 3240.

9. Wickham *v.* Green, 111 Va. 199, 68 S. E. 259.

(2) At the rules at which the declaration is filed he may simply *enter an appearance*, but file no plea whatever. When this is done, there is given him a rule to plead at the next rules, and if he fails to plead at the next rules judgment is given against him by a *nil dicit*, i. e., he appeared and said nothing. If, however, he elects to plead at the second rules he may plead either a dilatory plea, or a plea to the merits. The statute allows dilatory pleas after a rule to plead, but not after demurrer, plea in bar, or conditional judgment. If he pleads, issue is made up on the plea and the case is put on the issue docket of the court; or,

(3) He may appear by counsel who says that he is *not informed* of any material defence the defendant has to make. When this is done judgment is given against the defendant by *non sum informatus*.<sup>10</sup> This is a very rare occurrence, as a client can get no benefit from it, and would simply be at the expense of employing an attorney for nothing; or,

(4) He may in any case, whether an action was previously pending or not, and although the case be on the court docket *confess judgment* for the amount of the plaintiff's demand.<sup>11</sup> This may be done by the defendant either in person or by an attorney in fact.

Rules are supposed to be taken on rule days, and while the parties may file their pleadings on any one of the three days they must file them early enough for the clerk to take the rules, presumably during business hours, else they will be too late.<sup>12</sup> The proceedings at the rules are such that every regular action at law must result in an order at the rules in awarding either (1) a writ of enquiry, or (2) an issue, or (3) an office judgment, and the court docket is arranged accordingly. If the action be one that sounds in damages, or if any damages have to be assessed, and the case is not within any of the exceptions hereinafter noted, then the final order at the rules is that a *writ of enquiry* be ordered. If the parties plead to issue at the rules, the case is simply put on the *issue* docket. If there

10. 4 Min. Inst. 956.

11. Code, § 3283.

12. *Botts v. Pollard*, 11 Leigh 433.

is a default of appearance, or even if there has been an appearance and subsequently a judgment by a *nil dicit* at the rules, and, in either event, the case is one in which the statute declares that no writ of enquiry shall be necessary, then the case is put on the *office judgment* docket. But no judgment entered in the clerk's office is a final judgment except a judgment by confession, which is also subject to the qualification stated in the statute.<sup>13</sup> "*Office judgments*," as hereinbefore defined, automatically become final unless set aside in the manner provided by statute, but are not *per se* final. On the above arrangement of the court docket, writs of enquiry come first, then issues, then "office judgments." *Writs of enquiry* being entered in cases where there has been no appearance for the defendant, take but a short while to dispose of, and if neither party requires a jury, the writ may be executed and final judgment entered by the court. There can be no final disposition of the case until the writ has been executed, and it will stand perpetually on the court docket, and be continued from time to time, until the writ is executed. If, when the case is called on the writ of enquiry docket, a plea is filed, the issue is made up on the plea, and the case is then put on the issue docket, and usually either a day is set for the trial during that term, or the case is continued until the next term. The next portion of the docket, called the *issue docket*, comprises those cases in which issues have been made up, either at rules or in term time, and which require the presence of witnesses, jurors, counsel, etc., and constitutes the principal business of the court. Of course, a case standing on the issue docket remains there until the issues are disposed of.<sup>14</sup> The next portion of the docket

13. Code, § 3283.

14. When a case stands upon the writ of inquiry docket, nothing remains to be done except to assess the damages, there being no plea and no issue, the jury should be sworn to inquire of the damages sustained by the plaintiff by reason of the matters and things set forth in the declaration. It is said to be error to swear the jury to try the issue as there is no issue, but at present the error would probably be regarded as harmless. Upon this inquiry of damages, the defendant may call witnesses to show matters in mitigation of damages, but not in bar of the plaintiff's right of action. (10 Encl. Pl. & Pr. 1156-9; Graves' Notes on Pl. (new) 92, 93.) The

is what is known as the "*office judgment*" docket. This need not be called at all, as the judgment entered in the clerk's office becomes final automatically unless set aside by a plea to the issue as hereinafter set forth.<sup>15</sup> An "*office judgment*" in this connection, and in the common acceptation of the term, means a judgment by default in the clerk's office, in a case in which there is no order for an enquiry of damages. It is necessary, therefore, to consider when an enquiry of damages shall be ordered.

The general rule is that a writ of enquiry is necessary in an action which sounds in damages, or in which any damages are to be assessed. The statutory provisions in Virginia on the subject are given in the margin.<sup>16</sup> It will be observed that the

question, however, as to the rights of the defendant in such a case is a purely academic one, and one which seldom arises except by oversight. Pleadings, as a rule, are not required to be sworn to in Virginia, and even where the defendant does not expect to contest the plaintiff's right of recovery, but only the amount thereof, the uniform practice is to enter a plea. There is no prohibition on his right to enter a plea, nor any conditions annexed thereto, and as he runs no risk by pleading, and may run some by failure to plead, the practice is as stated.

If a case stands on the issue docket, the jury are sworn to try the issues joined, that is, to decide the points in dispute, as fixed by the pleadings. The jury, however, has a further duty imposed upon it, which is to assess the damages. (*McNutt v. Young*, 8 Leigh 544). No separate jury is ever called to assess damages where there is already a jury to try the issues. "Where an issue is made by the pleadings and it is tried by a jury, then the jury at the same time that they try the issue assess the damages, so that in such case no writ of inquiry is necessary. This is the usual and immemorial practice." (*Geo. Campbell Co. v. Geo. Angus Co.*, 91 Va. 438, 22 S. E. 167.)

15. Code, §§ 3287, 3288. See *post*, § 185.

16. Sections 3285 and 3286 of the Code are as follows: Sec. 3285. "There need be no such inquiry in any action upon a bond or other writing for the payment of money, or against the drawer or endorser of a bill of exchange or negotiable note, or in an action or *scire facias* upon a judgment or recognizance, or in any action upon an account, wherein the plaintiff shall serve the defendant, at the same time and in the same manner that the process or summons to commence the suit or action is served, with a copy (certified by the clerk of the court in which the suit or action is brought) of the account on which the suit or action is brought, stating distinctly

Virginia statute dispenses with the enquiry *in any action* upon a bond or other writing for the payment of money, or against the drawer or endorser of a bill of exchange or negotiable note, or in an action or *scire facias* upon a judgment or recognizance, or in action upon an account where the plaintiff serves the defendant along with the summons to commence the suit with a duly certified copy of the account on which the action is brought, giving the information required by the statute; and that, in an action of assumpsit on any contract, express or implied, for the payment of money (except where

the several items of his claim, and the aggregate amount thereof, and the time from which he claims interest thereon, and the credits, if any, to which the defendant may be entitled. But this section shall not apply to any action on an account in which the process is served by publication."

Sec. 3286. "In an action of assumpsit on a contract, express or implied, for the payment of money (except where the process to answer the action has been served by publication), if the plaintiff file with his declaration an affidavit made by himself or his agent, stating therein, to the best of the affiant's belief the amount of the plaintiff's claim, that such amount is justly due, and the time from which the plaintiff claims interest, no plea in bar shall be received in the case, either at rules or in court, unless the defendant file with his plea the affidavit of himself or his agent, that the plaintiff is not entitled, as the affiant verily believes, to recover anything from the defendant on such claim, or stating a sum certain less than that set forth in the affidavit filed by the plaintiff, which, as the affiant verily believes, is all that the plaintiff is entitled to recover from the defendant on such claim. If such plea and affidavit be not filed by the defendant, there shall be no inquiry of damages, but judgment shall be for the plaintiff for the amount claimed in the affidavit filed with his declaration. If such plea and affidavit be filed, and the affidavit admits that the plaintiff is entitled to recover from the defendant a sum certain less than that stated in the affidavit filed by the plaintiff, judgment may be taken by the plaintiff for the sum so admitted to be due, and the case be tried as to the residue."

Section 3286 in large measure supersedes § 3285, as assumpsit is generally the form of action brought on an account, but it will be observed that § 3285 applies to *any action upon an account* (which, however, is not required to be sworn to), while § 3286 applies only to *assumpsit on a contract*, express or implied, to pay money, but it requires an affidavit as to the amount and justice of the plaintiff's claim, and the time from which he claims interest.

the process to answer the action has been served by a publication) if the plaintiff files with his declaration an affidavit made by himself, or his agent, as to the amount and justice of the plaintiff's claim and the time from which he claims interest, no plea will be received from the defendant, *either at rules or in court*, unless it be sworn to; so that in this case also there would be no enquiry of damages. But if a sworn plea is filed, the issue will be ordered. It is pointed out by Prof. Graves in his Notes<sup>17</sup> that before the enactment of this statute the writ of enquiry was necessary where a judgment was entered in the clerk's office in an action of debt on a *verbal* promise to pay a certain sum,<sup>18</sup> and in an action of debt on a bond with collateral condition,<sup>19</sup> and that the first of these cases has not been met by the present statute, so that in an action of debt on a *verbal* promise to pay a sum certain, a writ of enquiry is still necessary. It would seem also to be still necessary in an action of debt on a bond with collateral condition (e. g., a sheriff's bond), as this is not strictly a bond for the payment of money, but to secure the performance of a collateral thing; and this would seem especially to be necessary in view of the provision of the Virginia statute, which requires the declaration in cases of this kind to assign the breaches.<sup>20</sup> A writ of enquiry is also necessary in an action of ejectment as some damages, though nominal, are sought to be recovered.<sup>21</sup> Judge Moncure observes that the plaintiff "is at least entitled to nominal damages, and the only mode of recovering nominal damages where there is a judgment by default, is by an enquiry of damages. That a plaintiff is entitled to only nominal damages is not of itself a sufficient reason why there should not be an enquiry of damages. No action of debt sounds in damages; and yet an order for an enquiry of damages is necessary in every action of debt in which there is an office judg-

17. Graves' Notes on Pl. (new) 94.

18. Hunt v. McRae, 6 Munf. 454.

19. Ruffin v. Call, 2 Wash. 181; Henderson v. Hepburn, 2 Call. 195.

20. Code, § 3394.

21. James River, etc., Co. v. Lee, 16 Gratt. 424; Smithson v. Briggs, 33 Gratt. 180.

ment except those enumerated in the Code; and it is necessary *even in those cases if there be any apparent uncertainty as to the amount of the debt or the credits applicable thereto.* The function of such an enquiry is, not only to ascertain the amount of damages, but to remove any uncertainty which may exist as to the subject in controversy, or the amount thereof.”<sup>22</sup>

It is important to observe whether a case should be put on the office judgment docket or the writ of enquiry docket, because an “office judgment,” as hereinbefore pointed out, becomes final automatically, while a writ of enquiry never does, and it is necessary to have the office judgment set aside before it becomes final. The mistake, however, of the clerk in putting a case in the wrong place on the docket, e. g., on the writ of enquiry docket instead of the office judgment docket, cannot prejudice the plaintiff, nor affect the result. The question is not where

22. *James River, etc., Co. v. Lee*, 16 Gratt. 424, 432. On this subject, Prof. Graves makes the following comment at p. 95 of Notes on Pl. (new):

“**Filing Writing Sued on in Clerk’s Office.**—The words above in italics refer to the case of *Rees v. Bank*, 5 Rand. (Va.) 326, where it was said (as quoted in *James River, etc., Co. v. Lee*, *supra*, at p. 428): ‘A final judgment, when no plea is filed, may be rendered in the office at rules, for principal and interest, when the action is founded upon an instrument in writing for the payment of an ascertained sum of money. But if the plaintiff, by any paper filed by himself, shows that the defendant is *entitled to a credit*, the judgment ought either to be entered subject to such credit, or, if the plaintiff refuses to take a judgment in that way, a writ of inquiry should be awarded. In this case if it be doubtful whether the defendant is entitled to the credit endorsed on the (notarial) protest filed with the note, it was sufficient *prima facie* evidence to prevent a judgment being given for the whole sum without a writ of inquiry.’ It is probable that this decision is the foundation of the practice said to prevail with some clerks of entering an office judgment ‘with an order for the damages to be inquired into’ (§ 3284), unless the ‘bond or other writing’ be filed with the declaration, as *non constat* there may not be credits endorsed thereon; or, perhaps, the filing might be required as an assurance to the clerk that the action really is ‘upon a bond or other writing for the payment of money,’ when he is called upon to decide whether the office judgment shall stand upon a writ of inquiry or not. And see Va. Code § 3336.”

the clerk places the case on the docket, but where it should have been placed, and what the rights of the parties are, and although a case is put on the writ of enquiry docket if it in fact is a true "office judgment," it becomes final on the fifteenth day of the term, or the adjournment thereof, whichever first happens, and all subsequent proceedings are simply void.<sup>23</sup> In legal contemplation, parties are *held* at the rules until the issue is made up, or other final order at the rules is entered, and take knowledge of what is done there, hence none of the orders made at the rules are served upon the parties.

The statute makes no exception on account of the fact that the court may be in session during the time when rules should otherwise be held, and consequently rules may be taken during the session of the court as well as in vacation.<sup>24</sup> When the proceedings at the rules have been closed, as, for example, by the confirmation of the common order, the defendant is no longer held to be in attendance in expectation of anything further be done there, and the clerk has no power thereafter to correct any error or irregularity committed by him, either in confirming the common order, or prior thereto.<sup>25</sup>

### § 182. Rules in federal courts.

In actions at common law, rules are held in the federal courts on the same days and with like effect as in the state courts, and the proceedings are in all respects similar. Section 914 of the U. S. Revised Statutes, commonly called the Conformity Act, declares: "The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

In equity, however, there is only one rule day each month,

23. *Price v. Marks*, 103 Va. 18, 48 S. E. 499; *Gring v. Lake Drummond Co.*, 110 Va. 754, 67 S. E. 360.

24. *Abney v. Ohio L. R. Co.*, 45 W. Va. 446, 32 S. E. 256; 1 Rob. Pr. (old) 140.

25. *Southall v. Exchange Bank*, 12 Gratt. 312.

and that is the first Monday. Parties are required to mature their cases at rules, and if a bill be taken for confessed at rules, the order taking it for confessed can only be set aside for cause shown and upon payment of the costs of the plaintiff up to that time, or such part thereof as the court may deem reasonable.<sup>26</sup> Attention is called to the fact that the Supreme Court of the United States now has under consideration a complete revision of the equity rules, and that the revised rules will probably be promulgated in the near future.

### § 183. Dilatory pleas and time of filing.

All dilatory pleas are called pleas in abatement in Virginia. They are classified as follows:

Pleas are (I) Dilatory or (II) Peremptory.

#### I. *Dilatory pleas are:*

- (1) To the jurisdiction.
- (2) In suspension.
- (3) In abatement of the writ or declaration, or both.
  1. Disability of plaintiff or defendant to sue or be sued.
  2. Plea in abatement to declaration.
    1. Variance between writ and declaration.
    2. Defect in declaration.
      - (a) Matter apparent, e. g., return day too far off, etc.
      - (b) Matter *dehors* the writ.
        - (1) Misnomer.
        - (2) Non-joinder of co-contractor.
        - (3) Pendency of another action for the same cause.<sup>27</sup>

#### II. *Peremptory Pleas:*

1. Traverse.
  - (a) Common traverse, in the terms of the allegation traversed.
  - (b) Special traverse.
  - (c) General traverse, or the general issue.
2. Confession and avoidance.

<sup>26</sup> Equity Rule XIX.

<sup>27</sup> 4 Min. Inst. 750, *et seq.*

Both in Virginia and elsewhere all pleas must be pleaded in due order, which due order is given above, and failure to plead in that order is a waiver of those that should have been previously pleaded.<sup>28</sup> All pleas in abatement must be sworn to.<sup>29</sup> In this connection it may be noted that the following other pleas must also be verified by affidavit: Plea of *non est factum*,<sup>30</sup> pleas denying an endorsement, assignment, or the making of any other writing, where the same has been alleged in the pleadings;<sup>31</sup> pleas denying partnership or incorporation, where parties sue or are sued as partners or as a corporation;<sup>32</sup> and the plea of statutory recoupment.<sup>33</sup> In an action of assumpsit on a contract for the payment of money where the plaintiff swears to the amount and justice of his claim, etc., the defendant's plea must also be sworn to.<sup>34</sup>

Dilatory pleas must be good in form as well as in substance as they are not favored, and the strict technicality of the common law still prevails as to the form of dilatory pleas. Special demurrers have not been abolished in Virginia as to pleas in abatement.<sup>35</sup> The chief use of a plea to the jurisdiction in Virginia arises out of actions brought in the wrong county or corporation. Jurisdiction of the subject matter is fixed by statute, and objection on that account may be raised, not only by a plea in abatement, but by motion, or in almost any other way. Pleas to the jurisdiction must be in proper person, and not by attorney, because the appointment of an attorney of the court is said to admit jurisdiction, but other pleas in abatement may be by attorney because the jurisdiction of the court is not questioned.<sup>36</sup> It is believed that a corporation aggregate, which is incapable of personal appearance, must purport to

28. Stephen, § 97.

29. Code, § 3278.

30. Code, § 3278.

31. Code, § 3279.

32. Code, § 3280.

33. Code, § 3299.

34. Code, § 3286.

35. *Guarantee Co. v. Bank*, 95 Va. 480, 28 S. E. 909; Code, § 3272.

36. 1 *Chitty Pl.* 398, 441; *Stephen on Pl.*, § 98; *Hortons v. Townes*, 6 Leigh 47; *Davidson v. Watts*, 111 Va. 394, 69 S. E. 328.

appear by attorney, and it has been so held.<sup>37</sup> A plea in suspension is one which shows some ground for not proceeding in the suit at the present time, and prays that the pleadings may be stayed until that ground be removed. The principal plea of this kind at common law was the parol demurrer, interposed by an infant defendant, and praying that the proceedings in the cause be suspended until he attains his majority. It is provided by statute in Virginia that the proceedings shall not be stayed because of the infancy or insanity of a party, but that a guardian *ad litem* shall be appointed either by the court, the judge in vacation, or the clerk of the court, and that he shall be a discreet attorney at law,<sup>38</sup> if one is to be had. It is said that probably the only instance of a plea in suspension in Virginia is that the plaintiff, since the contract was made, has become an alien enemy.<sup>39</sup> It is probable also that a defendant who has been adjudged a bankrupt, but not discharged, and who wishes to plead his discharge in bar of the action, may be allowed to plead the fact of adjudication in suspension until such reasonable time as he can obtain his discharge.

In Englandoyer of the writ in a case is no longer allowed, and hence there can be no plea in abatement there on account of variance between the declaration and the writ; but such a plea is allowed by statute in Virginia.<sup>40</sup> The statute, however, is liberal in the allowance of amendments of the writ or declaration so as to correct the variance. Misnomer was a ground for a plea in abatement at common law, but it is provided by statute in Virginia that there shall be no plea in abatement for misnomer, but that the declaration may, on the defendant's motion, and on affidavit of the right name, be amended by inserting the right name.<sup>41</sup> Although a plea in abatement may be allowed in a proper case for the non-joinder of a co-defendant, it is provided in Virginia that it shall not be allowed unless it be stated in the plea that such person is a resident of this

37. *Kankakee Drain Dist. v. Coon*, 130 Ill. 261, 22 N. E. 607; *Puterbaugh Pl.* 45, and cases cited.

38. Code, § 3255.

39. 4 Min. Inst. 753.

40. Code, § 3259.

41. Code, § 3258.

state, and unless the place of residence of such person be stated with convenient certainty in the affidavit verifying the plea.<sup>42</sup>

*Giving Plaintiff a Better Writ.*—As we have seen, pleas in abatement of all kinds must be good in form as well as in substance, and as a general rule it is said that the plea must give the plaintiff a better writ so as to enable him to correct the error committed in his first writ. When the plea is to the jurisdiction of the court, it would seem that the better writ required should state some other court in the state in which the writ issued having jurisdiction of the cause of action, and it has been held that if the plea showed that there was no other court in the State having jurisdiction of the cause of action, the plea would for that cause be bad on demurrer;<sup>43</sup> but it has been held more recently that although it is true as a general rule that a plea to the jurisdiction must show a more proper and sufficient jurisdiction in some other court in the state wherein the action is brought, this requirement is not available when the plea shows a condition of facts under which no court in the State has jurisdiction.<sup>44</sup> The rule is not of universal application. It should be further noticed that in order to constitute a good plea to the jurisdiction every ground of jurisdiction mentioned in the statute must be negated in the plea, else the plea will be bad, and that a plea which does this, although it negatives jurisdiction on the several grounds set forth in the statute, is not bad for duplicity.<sup>45</sup>

*Waiver of Defects.*—It is a well-established rule that appearance to the merits of a case is a waiver of the defects in the process and the service thereof.<sup>46</sup> Undoubtedly there may be a special appearance for the purpose of making objections to defects,<sup>47</sup> but granting or accepting a continuance, or a motion to quash for other reasons than defects in the process

42. Code, § 3261.

43. *Beirne v. Rosser*, 26 Gratt. 537.

44. *Deatrck v. Ins. Co.*, 107 Va. 602, 59 S. E. 489.

45. *Deatrck v. Inst. Co.*, *supra*.

46. *New River Co. v. Painter*, 100 Va. 507, 42 S. E. 300; *post*, § 188.

47. *Post*, § 196.

or return, amount to a general appearance.<sup>48</sup> The execution, however, of an attachment bond by a defendant for the purpose of releasing the property attached does not amount to a general appearance.<sup>49</sup>

*Objections Other than by Dilatory Pleas.*—Notwithstanding the very comprehensive language of § 3259 of the Code, declaring that in cases other than misnomer, objections for defects in the writ or return or any variance in the writ from the declaration shall be made only by a plea in abatement, the objection may be otherwise made if it goes to the *validity* of the writ itself, that is, where the question is not only as to a defect in the writ, but as to matter rendering the writ absolutely void. If the objection is that the process is a void process, it may be raised not only by a plea in abatement, but also by a mere motion, or the objection may be taken by the court *ex officio*. Such would be the case, for instance, where in an action under § 3215 of the Code, process was sent out of the county for service when the case was not within any of the exceptions mentioned in § 3220, or where the process was returnable more than ninety days from its date, or returnable on the date of its issue, or to other than a rule day or term of the court. In other words, if the process be illegally issued or executed, the objection may be as well by motion to quash as by plea in abatement.<sup>50</sup> If the process has not been served at all, for example, in case of a foreign attachment which has been quashed, and there has been no process but an order of publication, the defendant may appear specially and move to dismiss the action.<sup>51</sup> In the case last cited, the court said: "The view relied upon by the plaintiffs in error [that the defence must be by plea in abatement] applies to a defendant who has been summoned to appear, or who, by appearance, has waived the summons. It, of course, cannot

48. *New River Co. v. Painter*, *supra*; *Lane v. Bauserman*, 103 Va. 146, 48 S. E. 857.

49. *Hilton v. Consumers Can Co.*, 103 Va. 255, 48 S. E. 899.

50. *Warren v. Saunders*, 27 Gratt. 259; *Raub v. Otterback*, 89 Va. 645, 16 S. E. 933; *Noel v. Noel*, 93 Va. 433, 25 S. E. 242; *Lane v. Bauserman*, *supra*.

51. *Hilton v. Consumers Can Co.*, *supra*.

be said that a defendant who is not before the court, either by appearance or summons, can be required to interpose any plea. \* \* \* The only appearance on the part of the defendant was for the purpose of asking the court to dismiss the suit because the defendant had not been properly brought before the court, and this motion was its proper and only remedy. 'To say that such an appearance would amount to a waiver of the objection, would be to say that the party must, from necessity, forfeit an acknowledged right by using the only means which the law affords of asserting that right.'

*Time of Filing Dilatory Pleas.*—It is provided by statute in Virginia that no plea in abatement shall be received after the defendant has demurred, pleaded in bar, or answered to the declaration, nor after a conditional judgment at rules.<sup>52</sup>

Prior to the present statute, the statute declaring that pleas in abatement should not be received "after the defendant has demurred, pleaded in bar, or answered to the declaration, nor after a rule to plead or a conditional judgment." The amendment consisted in dropping the words "nor after a rule to plead." It will be recalled that if the defendant *fails to appear* at the same rules that the declaration is filed, a conditional judgment is entered against him, and after that he cannot plead in abatement, but if he has his appearance entered at the same rules at which the declaration is filed, the order entered at the rules is a rule to plead, and hence under the present statute he may file a plea in abatement after a rule to plead. Formerly a plaintiff could delay filing his declaration until the last practical moment of the third rule day, and thereby in effect deprive the defendant of the opportunity of pleading in abatement. Now, in order to have the opportunity to inspect the declaration, the plaintiff has simply to have his appearance entered at the rules at which the declaration is filed; thereupon the clerk will give him a rule to plead, and he will have until the next rules—usually two weeks—in which to prepare his plea in abatement, and under these conditions the plea in abatement may be filed at the next rules after that at which the declaration is filed, but he cannot postpone it longer. But

<sup>52</sup>. Code, § 3260.

the defendant must be particular to have his appearance entered at the rules at which the declaration is filed in order to get this indulgence.<sup>53</sup> The defendant, however, cannot by any device he may resort to postpone the maturing of the cause at the second rules. If he pleads at the second rules, issue is made upon his plea; if he fails to plead the rule entered against him at the first rules is made absolute, generally by a judgment of *nil dicit*, and in either event the case is put upon the court docket.

### § 184. Powers of court over proceedings at rules.

The court has control over all proceedings at the rules during the preceding vacation. It may reinstate a case discontinued, set aside any of the proceedings, or correct any mistakes therein, and make such orders therein as may be proper.<sup>54</sup> If there is no clerk to take the rules, it is provided by statute that the case shall stand continued until the next rule day after there is a clerk.<sup>55</sup> But if there is a clerk and the process has been properly executed and he has simply failed to take the rules, but has put the case on the court docket, the court may either remand the case to rules,<sup>56</sup> or it may retain the case and require the clerk to enter the proper rules on the rule books, maturing the case for hearing, if it appears that the defendant will not be prejudiced thereby.<sup>57</sup> This, however, is a power to be exercised by the court in term, and cannot be exercised by the judge in vacation.<sup>58</sup> It is made the duty of the clerk *ex officio*, as hereinbefore pointed out, to dismiss the action if one month elapses after the process is returned executed without the declaration being filed. This the court, at the next succeeding term, has ample power to set aside, but it will not do it except for cause shown. If the failure to file the declaration within one month after the process has been returned executed is due simply to the negligence of coun-

53. Graves' Notes on Pl. 51; 6 Va. Law Reg. 484.

54. Code, § 3293.

55. Code, § 3238.

56. *Wall v. Atwell*, 21 Gratt. 401.

57. *So. Ex. Co. v. Jacobs*, 109 Va. 27, 63 S. E. 17.

58. *Chase v. Miller*, 88 Va. 791, 801, 14 S. E. 545.

sel, and especially if it will deprive the defendant of his plea of the statute of limitations, the court will not set aside the order of dismissal at the rules. The refusal to set it aside is not for lack of power, but because it is deemed unwise. The dismissal is in the nature of a non-suit, which the court will set aside for good cause, but will not disturb when occasioned by mere negligence.<sup>59</sup>

### § 185. Setting aside office judgment.

An office judgment is not a very serious matter, if proper steps are taken to vacate it. No terms or conditions whatever are imposed upon the defendant as the price of vacating it except that he shall plead to issue and shall file such plea before the judgment becomes final by mere operation of law. No consent of the court, or of anyone else, is necessary to filing of such plea. It is a matter of right. If no plea is filed, the judgment becomes final if the case be in the circuit court, on the last day of the next succeeding term, or the fifteenth day thereof, whichever shall happen first; and, if it be in a corporation court, on the last day of the next term designated for the trial of civil cases in which juries are required,<sup>60</sup> or on the fifteenth day thereof, whichever shall happen first; and if the case be in the circuit court of the city of Richmond or in the law and equity court of said city and be matured at rules and docketed during the term of the court, it becomes final on the last day of said term.<sup>61</sup> The phrase "next term" as used in this section does not include special terms, but only regular terms.<sup>62</sup> If a case has been regularly proceeded in at rules and is properly on the office judgment docket, the judgment will become final according to the terms of the statute, notwithstanding no endorsement of the proceedings at the

59. *Wickham v. Green*, 111 Va. 199, 68 S. E. 259, and cases cited.

60. This provision as to terms "designated for the trial of civil cases in which juries are required" has no application to Circuit Courts, although they may designate certain terms as quarterly terms at which such cases are to be tried. *Gring v. Lake Drummond Land Co.*, 110 Va. 754, 67 S. E. 360.

61. Code, § 3287.

62. *Stultz v. Pratt*, 103 Va. 536, 49 S. E. 654.

rules may have been made upon the papers in the case.<sup>63</sup>

The judgment entered in the clerk's office in an action of ejectment, as we have heretofore seen, is not what is commonly called an "office judgment," and does not become final automatically upon the adjournment of the next term without the intervention of the court or jury.<sup>64</sup>

*Dicta* in several Virginia cases state that an office judgment may be set aside by a plea to the merits on the *fifteenth* day of a term, but whether or not that is a correct interpretation of the statute is by no means free from doubt, and it would not be safe to defer pleading beyond the *fourteenth* day of the term.<sup>65</sup> All proceedings in an action at law after an office judgment in favor of the plaintiff has become final are a nullity, or should be set aside, so as to give the plaintiff the benefit of the final judgment in his favor. The fact that the plaintiff took issue on a plea filed after the office judgment became final, and also asked for a continuance does not constitute a waiver of the final judgment in his favor.<sup>66</sup> The statute in Virginia makes provision for setting aside the office judgment at any time before it becomes final by pleading to issue,<sup>67</sup> which excludes dilatory pleas. But it may be set aside by a general demurrer<sup>68</sup> which is considered an issuable plea, or by any plea to the merits. The office judgment may also be set aside and the plaintiff be estopped to claim the benefit of it by an agreement of counsel, made before the judgment became final, for a postponement of the case to a day during the term subsequent to the fifteenth day, and the judgment which is thus set aside by agreement of the parties cannot subsequently become final until it is entered up as a judgment of the court. The statute is enacted for the benefit of plaintiffs and they may waive it if they choose, and in case of an agreement of this kind will be deemed to have waived it.<sup>69</sup>

63. *Wall v. Atwell*, 21 Gratt. 401.

64. *Smithson v. Briggs*, 33 Gratt. 180.

65. *Enders v. Burch*, 15 Gratt. 64; *Baker v. Swineford*, 97 Va. 112, 33 S. E. 542; *Gring v. Lake Drummond Co.*, 110 Va. 754, 67 S. E. 360.

66. *Gring v. Lake Drummond I. Co.*, 110 Va. 754, 67 S. E. 360.

67. Code, § 3288.

68. *Syme v. Griffin*, 4 Hen. & M. 277.

69. *Pollard v. Amer. Stone Co.*, 111 Va. 147, 68 S. E. 266.

A defendant in an office judgment cannot be compelled by the court to plead until he chooses to do so. The court may *sound* the docket (that is, call it) for the purpose of ascertaining if any pleas are to be filed, and the defendant may, at his election, either say nothing or announce his intention to plead at a subsequent day, but the court can neither compel him to plead then, nor fix a day when he shall plead. He is within his legal rights if he pleads to issue at any time before the judgment becomes final. Up to this period he is master of the situation.

Attention is particularly called to the last paragraph of § 3287 of the Code providing that no judgment by default on a *scire facias* or summons shall become final within two weeks after the service of such summons or process. If the case is ended at rules, it is the duty of the clerk to put it on the court docket, but notwithstanding the fact that it is put on the court docket it does not become final if the court adjourns within two weeks after the service of process. The case should be continued on the court docket until the term next succeeding the expiration of the two weeks after the service of process.<sup>70</sup> A case in which there has been an order for an enquiry of damages at the rules and which stands on the writ of enquiry docket of the court is within the language of § 3288 of the Code, and the judgment thereon entered at the rules does not become final until the writ of enquiry has been executed, but after the writ of enquiry has been executed in court, the judgment entered in court will not be set aside except for good cause. The defendant has no right to plead after the writ has been executed except by leave of the court and for cause shown.<sup>71</sup>

*Judgment on an Issue of Fact Made by a Dilatory Plea.*—Intimately connected with the subject of dilatory pleas, which, we have seen, must be filed at an early stage of the case, is what

70. Dillard *v.* Thornton, 29 Gratt. 392.

71. Code, § 3288; Post *v.* Carr, 42 W. Va. 73, 24 S. E. 583; Philip Carey Man. Co. *v.* Watson, 58 W. Va. 189, 52 S. E. 515; Federation Glass Co. *v.* Cameron Glass Co., 58 W. Va. 477, 52 S. E. 518.

judgment should be entered where an issue of fact made by a dilatory plea is found against the defendant.

“When the sole issue in a cause is an issue of fact, which is tried and found *for the plaintiff*, whether the issue be joined upon a fact, upon a plea in abatement, or a plea in bar, the court, upon such issue being so found, will pronounce final and peremptory judgment against the defendant. The judgment upon a *demurrer* to a plea in abatement is stated on page 287 to be different (it is there *respondeat ouster*), for such is the prayer of the demurrer. The reason assigned for the difference is that every man is presumed to know whether his plea be true or false, and the judgment ought to be final against him if he pleads a fact which he knows to be false, and which is found to be false. But every man is not presumed to know the matter of law, which is left to the judgment of the court on demurrer.”<sup>72</sup>

The following statement is made in Puterbaugh on Pleading, for which a number of cases from Illinois are cited: “When an issue of fact is thus submitted to a jury for decision on a mere issue of the abatement of the writ, the effect is that the defendant admits the merits of the plaintiff’s claim, and if the issue of fact in abatement is decided for the plaintiff, the jury, by the same verdict, should assess the damages of the plaintiff.

“If the defendant is in default as to all issues except the one made by his plea in abatement, upon which he is defeated, he is entitled to participate in the investigation only for the purpose of reducing the amount of plaintiff’s recovery.”<sup>73</sup>

The statement quoted above from Robinson’s Practice would probably not be true now in Virginia, as it is expressly provided that the defendant “may file pleas in bar at the same time with pleas in abatement, or *within a reasonable time thereafter*, but the issues on the pleas in abatement shall be first

72. 1 Rob. Pr. (old) 388, 389; 1 Encl. Pl. & Pr. 31 to the same effect, and cases cited.

73. Puterbaugh Pl. 45.

tried.”<sup>74</sup> The corresponding statute in West Virginia is: “The defendant may plead in abatement and in bar at the same time, but the issue on the plea in abatement shall be first tried. And if such issue be found against the defendant, he may, nevertheless, make any other defences he may have to the action.”<sup>75</sup>

74. Code, § 3264.

75. Code, W. Va. (1906), § 3841.

## CHAPTER XXIII.

### VENUE AND PROCESS.

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§ 186. Venue.

At common law the jury was composed, as far as possible, of the witnesses who knew the facts, and consequently the *venire facias* was directed to that locality from which the jurors were to be taken. As a result of this, the plaintiff in his declaration

always stated the place at which the principal fact of his case occurred, or in other words laid a venue. This was called the venue in the action. Each successive pleading had to lay the place of the principal fact alleged in the pleading as the jury was to come from that place. This was called venue of the fact in issue. In Virginia and most of the states "places where actions at law and suits in equity may be brought are prescribed by statute and they cannot be brought elsewhere against *resident defendants*."<sup>1</sup> It is further said in *Carr v. Bates*, *supra*: "Whether they (actions or suits) can be brought as at common law against a *non-resident defendant* in the courts of any county or corporation in which such non-resident may be found and served with process as at common law, as was held in *Beirne v. Rosser*, 26 Gratt. 537, 541, 542, has been questioned;<sup>2</sup> but it would seem to be settled law that an action *in personam* prosecuted by a summons will not lie against a foreign corporation at common law, since under the common law conception a corporation could not migrate, but must dwell in the place of its creation."<sup>3</sup> If the venue of actions and suits against *residents* is prescribed by statute and such actions and suits cannot be brought elsewhere, it is not perceived why the same rule does not apply to actions and suits against *non-residents* also as the venue as to both sets of defendants is prescribed for the most part, if not entirely, by the same sections. The venue of actions at law as well as suits in equity in Virginia is prescribed by the sections of the Code quoted in the margin, which, however, are to be read and considered along with the sections on the subject of service of process which are also given in the margin.<sup>4</sup> It

1. *Carr v. Bates*, 108 Va. 371, 376, 61 S. E. 754; Va. & So. R. Co. v. Hollingsworth, 107 Va. 359, 58 S. E. 572.

2. See 4 Va. Law Reg. 361; 5 Va. Law Reg. 346.

3. It will be observed, however, from cl. 4 of § 3214, quoted in the margin that if the nonresident be a natural person he may be sued "in any county or corporation wherein he may be found and served with process."

4. Section 3214 is as follows: "Any action at law or suit in equity except where it is otherwise especially provided, may be brought in any county or corporation:

"First. Wherein any of the defendants may reside.

"Second. If a corporation be a defendant, wherein its principal

will be observed from reading §§ 3214 and 3215 of the Code that the plaintiff frequently has a choice of jurisdiction, as the provisions of these sections are cumulative, and the action may

office is, or wherein its mayor, rector, president or other chief officer resides.

"Third. If it be to recover a loss under a policy of insurance, either upon property or life, wherein the property insured was situated at the date of the policy, or the person whose life was insured resided at the date of his death or at the date of the policy.

"Fourth. If it be to recover land, or subject it to a debt, or be against a foreign corporation which has estate or debts owing to it within this State, wherein such land, estate, or debts, or any part thereof, may be; or if it be against a defendant who resides without, but has estates or debts owing to him within this State, wherein such debt or estate, or any part thereof, may be; or in any county or corporation wherein he may be found and served with process; or if it be against a defendant who resides without, but has no estate or debts owing to him within this State, in any county or corporation wherein he may be found and served with process.

"Fifth. If it *be on behalf* of the Commonwealth, whether in the name of the attorney-general or otherwise, it may be in the city of Richmond.

"Sixth. If it be an action or a suit in which it is necessary or proper to make any of the following public officers a party defendant—to-wit: the governor, attorney-general, treasurer, register of the land office, either auditor, superintendent of public instruction, or commission of agriculture; or in which it may be necessary or proper to make any of the following public corporations a party defendant—to-wit, the board of education or other public corporation composed of officers of government, of the funds and property of which the Commonwealth is sole owner; or in which it shall be attempted to enjoin or otherwise suspend or affect any judgment or decree on behalf of the Commonwealth, or any execution issued on such judgment or decree, it shall be only in the city of Richmond.

"Seventh. If a judge of a circuit court be interested in a case which, but for such interest, would be proper for the jurisdiction of his court, the action or suit may be brought in any county or corporation in an adjoining circuit."

*Section 3215* of the Code is as follows: "An action may be brought in any county or corporation wherein the cause of action, or *any part* thereof, arose, although none of the defendants reside therein."

*Section 3220* of the Code is as follows: "Process from any court, whether original, mesne, or final, may be directed to the sheriff or sergeant of any county or corporation, except that process against a defendant to answer in any action brought under section thirty-

be brought in one or the other of several places. For example, for a tort the defendant may be sued either where he resides or where the cause of action arose, or if suit be brought to subject

two hundred and fifteen, shall not be directed to an officer of any other county or corporation than that wherein the action is brought, unless it be an action against a railroad, express, canal, navigation, turnpike, telegraph, or telephone company, or upon a bond taken by an officer under authority of some statute or to recover damages for a wrong, or against two or more defendants, on one of whom such process has been executed in the county or corporation in which the action is brought. Process shall be issued before the rule day to which it is returnable, and may be executed on or before that day, except that if it be to answer in an action brought under section thirty-two hundred and fifteen, and be executed on the defendant without the county or corporation in which the action is brought, it must be executed at least ten days before the return day of such process. If it appear to be duly served and good in other respects, it shall be deemed valid, although not directed to any officer, or if directed to an officer, though executed by any other to whom it might lawfully have been directed. It shall be returnable, within ninety days after its date, to the court on the first day of a term, or in the clerk's office, to the first or third Monday in a month, or to the first day of any rules, except that a summons for a witness shall be returnable on whatever day his attendance is desired, and process awarded in court may be returnable as the court shall direct."

*Section 3224* of the Code is as follows: "Any summons or scire facias may be served as a notice is served under section thirty-two hundred and seven, except that when such process is against a corporation the mode of service shall be as prescribed by the following section; the clerk issuing such process unless otherwise directed shall deliver or transmit therewith as many copies thereof as there are persons named therein on whom it is to be served."

*Section 3225* of the Code is as follows: "Process against or notice to a corporation may be served as follows: "If the case be against a city or town, on its mayor, recorder, or on any alderman, councilman, or trustee of such city or town; if against a bank, on its president, cashier, treasurer, or any one of its directors; if against a railroad company, on its president, cashier, treasurer, general superintendent, or any one of its directors; if against some other corporation created by the laws of this State, on the president, rector, or other chief officer, cashier, treasurer, secretary, or any one of its directors; trustees, or visitors; if against a corporation created by some other State or country or in any case if there be not in the county or corporation wherein the case is commenced any other person

land to a debt it may be either in the county where the land lies, or where any one of the defendants resides.<sup>5</sup>

on whom service can be aforesaid, on any agent of the corporation against which the case is (unless it be a case against a bank) or on any person declared by the laws of this State to be an agent of such corporation, and if there be no such agent in the county or corporation wherein the case is commenced and affidavit of that fact and that there is no person in said county or corporation on whom there can be service aforesaid, publication of a copy of the process or notice once a week for four successive weeks in a newspaper printed in this State shall be a sufficient service of such process or notice, except that in the case of an insurance company created by the laws of this State process or notice shall be directed to the sheriff or sergeant of the county or corporation wherein the chief office of such company is located; and in case of any insurance company or surety company not created by the laws of this State but doing business in this State, process or notice shall be served in the manner prescribed by sections twelve hundred and sixty-six and twelve hundred and sixty-seven chapter fifty-three of the Code of Virginia. When the publication is of process it shall be made on an order directing the same in the case in which the process issues. The order may be entered either in court or by the clerk of the court at any time in vacation."

*Section 3227* of the Code is as follows: "Service on any person under either of the two preceding sections shall be by delivering to him a copy of the process or notice in the county or corporation wherein he resides, or his place of business is, or the principal office of the corporation is located; and the return shall show this, and state on whom and when the service was; otherwise, it shall not be valid. If the process or notice be served on an agent, or be served in any other county or corporation than that wherein the suit or other proceeding is brought or had, it shall be served at least ten days before the return day of such process or notice. The term 'agent,' as employed in each of the two preceding sections, shall be construed to include a telegraph operator, telephone operator, depot or station agent of a railroad company, and toll-gatherer of a canal or turnpike company."

5. Note by Prof. Lile, 6 Va. Law Reg. 475, 476.

Attention is called in this connection to the fact, as pointed out in the above note, that while § 3214 of the Code applies both to actions at law and suits in equity, § 3215 is confined to actions at law.

Clause 5 of § 3214 allows a suit or action on behalf of the commonwealth to be brought in the city of Richmond. In *Commonwealth v. McCue*, 109 Va. 302, 63 S. E. 1066, it is held that the auditor

In all jurisdictions a defendant may be sued where he resides; and it has been held that a defendant's place of residence is not changed by the fact that he is serving a term of penal servitude in the state prison.<sup>6</sup>

Under § 3215 allowing an action in any county or corporation wherein the cause of action, or any part thereof, arose, although none of the defendants reside therein, it has been held that if any part of the cause of action arose in the jurisdiction in which the action is brought there may be entire recovery for the whole damage.<sup>7</sup> In the case cited in the margin the action was brought to recover for negligent injury to a carload of horses in course of transportation. One of the horses was slightly injured in the city of Lynchburg, but the principal damage occurred before they reached that city, and the action was allowed in the circuit court of that city to recover the entire damage. In *N. & W. Ry. Co. v. Crull*, 112 Va. ———, 70 S. E. 521, the action was against two corporations, one a resident and the other foreign, to recover damages for failure to deliver in good condition a carload of horses shipped from St. Louis to Norfolk. The horses were very seriously injured in consequence of gross neg-

of public accounts is the only officer empowered to institute proceedings for the collection of costs due the State in a criminal prosecution, and that if the claim for such costs be asserted by the local attorney for the commonwealth, without the consent and approval of the auditor, it is a proceeding without authority, and that the State does not become a party thereto, and is not bound by any decree affecting her rights. The State cannot be impleaded without her consent.

Clause 6 of § 3214 provides that actions and suits to which certain public corporations are necessary defendants shall be brought in the city of Richmond. It has been held that this statute does not authorize a suit in the circuit court of the city of Richmond by one public corporation against another. *Western State Hospital v. General Board*, 112 Va. —, 70 S. E. 505.

Under clause 7 of § 3214 it has been held that the word "may" is permissive only and although a circuit judge may sue in any county or corporation in an adjoining circuit, he is not precluded from suing in the circuit court of any county of any corporation in his own circuit in which any of the defendants reside. *Harrison v. Wissler*, 98 Va. 598, 36 S. E. 982, 6 Va. Law Reg. 471, and note.

6. *Guarantee Co. v. Bank*, 95 Va. 480, 28 S. E. 909.

7. *Ches. & O. R. Co. v. Bank*, 92 Va. 495, 23 S. E. 935.

lect of one or the other or both of the carriers, in consequence of their failure to give them proper care and attention; and it was held that, where a railroad company undertakes to deliver a shipment in good condition at a point on the line of another railroad, and the shipment is delivered in bad condition, the breach of duty which gives rise to a cause of action is the failure to deliver in good condition at the point of destination, and hence the cause of action arose at the place of destination, and that there might be a joint action against the two.

### § 187. How process is obtained.

In England actions were generally commenced by suing out an original writ, the function of which was not only to summon the defendant, but to confer jurisdiction on the court to try the case. This writ was obtained as a matter of course upon filing a *præcipe*, which was a petition asking for the writ and setting out the whole cause of action fully, so that the chancellor could see what sort of writ to issue, and to what sheriff to address it. For this *præcipe* a small fine was exacted. It was necessary that the writ should conform to the *præcipe*, and any variance was fatal.<sup>8</sup> All actions were instituted in one of the three law courts at Westminster, regardless of where the parties resided, and all issues of fact were referred to a jury for determination. Regularly this jury would have convened at Westminster, but in order to save the expense and annoyance of bringing the parties, jurors, etc., to Westminster, the *venire facias* for the jury commanded the sheriff to summons the jurors to be at Westminster on a given day to try the issues *unless before (nisi prius)* that day the king's judges should be in the county to try the matter. These judges appeared in every county of the kingdom twice a year, and as they generally tried these *præcipe* actions they became known as *nisi prius* judges, and trial courts are to this day frequently spoken of as *nisi prius* courts, and the judges as *nisi prius* judges.<sup>9</sup> Now venue is fixed by statute, and all of our writs are what are known as judicial writs, such as are pre-

8. Stephen on Pl., §§ 63, 64, 191, 192, and notes; Graves' Notes on Pl. 43.

9. 4 Min. Inst. 225, 226; Burrill's Law Dict., Title *Nisi Prius*.

scribed by the constitution or statute. It is no longer necessary to lay venue in the pleadings in purely personal actions, nor to aver jurisdiction, nor to allege any matter not traversable.<sup>10</sup> In modern times, an action is begun by going to the clerk's office and making an appropriate memorandum or *præcipe* as a guide to the clerk to make out the writ to be issued by him. This memorandum is generally spoken of as a memorandum, though in some jurisdictions, as in Florida, it is called a *præcipe* or memorandum. It is said to be the chart by which the clerk is to be controlled in issuing the writ.<sup>11</sup> No fine, as such, is imposed for issuing this summons, but the state imposes what is called a writ tax, regulated by the amount claimed by the plaintiff,<sup>12</sup> and the action is then commenced by the issuance and service of the process, which in Virginia is designated a summons. Instead of the common law *præcipe* we now have the memorandum, instead of the fine, a writ-tax, instead of an original writ a summons, the only function of which is to notify the defendant of the time and place at which he is to appear, and the nature of action which he is to answer. These memoranda are for the most part very simple. The following would be sufficient:

In *Debt*. John Smith *v.* Henry Jones, Debt for \$500, with legal interest thereon from Jan. 1, 1910, until payment. Damages \$20. To 1st Oct. Rules.

Baker, p. q.

If damages are material, as they would be in an action of debt on a bond with collateral condition, they should be laid high enough to cover any possible recovery, generally twice as much as you expect to recover, and in the above memorandum instead of \$20 would be inserted a larger sum. If the action should be for two or more debts, for instance, a bond for \$1,000 due Jan. 1, 1910, and a note for \$500, due July 1, 1910, the memorandum should cover both, and state that it is an action of debt for \$1,500, with interest on \$1,000, a part thereof, from Jan. 1, 1910, and on \$500, the residue thereof, from July 1, 1910. At least this

10. Code, §§ 3243, 3244, 3245.

11. *Turner v. Barraud*, 102 Va. 324, 46 S. E. 318.

12. Code, page 2197, cl. 14.

is the better method of procedure, though as seen in treating of the action of Debt, it is not necessary to claim interest in the writ.

In *Assumpsit*, the memorandum would be: John Smith *v.* Henry Jones, Assumpsit, damages \$1,000. To 1st Oct. Rules.  
Bevin, p. q.

Here damages are material, and must be laid high enough to cover any possible recovery.

In *Covenant*, the form of memorandum would be: John Smith *v.* Henry Jones, Covenant broken. Damages \$1,000. To 1st Oct. Rules.

Brown, p. q.

The damages in *Covenant* are material, and should be laid sufficiently high to cover any possible recovery.

*Motion for Judgment.* Here there is no writ and consequently no memorandum. The proceeding, in this case, does not originate in the clerk's office. The notice takes the place of both the writ (summons) and the declaration.

*Unlawful Detainer.* In this action the memorandum would be John Smith *v.* Henry Jones, issue writ of summons to defendant in Unlawful Detainer, for that he unlawfully withholds from the plaintiff the possession of a certain house and lot on the east side of Main street, in the town of Lexington, Virginia, commonly called the Lexington Hotel, bounded on the north by the Main street of said town, on the east by a ten foot alley, on the south by the lot of James Allen, and on the west by the lot of Frank Glasgow, which possession the defendant has unlawfully withheld from the plaintiff for a period not exceeding three years, to-wit, since the — day of ————. Damages \$500. To 1st Oct. Rules.

Baumbach, p. q.

This memorandum is required to be very full and explicit, as it will be remembered in this case no declaration is filed.

*Ejectment.* In the action of ejectment no writ issues, but the notice appended to the declaration takes the place of a writ, and hence no memorandum is made in the clerk's office. This action does not originate in the clerk's office. It will be observed that the two actions for the recovery of land depart somewhat from

the regular procedure in common law actions. In Unlawful Detainer there is a writ but no declaration, in Ejectment there is a declaration but no writ.

*Detinue.* John Smith *v.* Henry Jones, Detinue, for one diamond ring, containing the initials N. D. of the value of \$500. Damages \$500. To 1st Oct. Rules. Duncan, p. q.

*Interpleader.* These proceedings are initiated either by affidavit under section 2998, or a petition filed in court under section 2998, and are not commenced by a summons, as the ordinary actions at law are. The form of the petition is given, *ante*, § 137, note.

*Trespass Vi Et Armis.* John Smith *v.* Henry Jones, Trespass *vi et armis* for assault and battery, damages \$5,000. 1st Oct. Rules. Allen, p. q.

*Trespass on the Case.* John Smith *v.* Norfolk & Western Railway Company, Trespass on the Case. Damages, \$10,000. To 1st Oct. Rules. Mann, p. q.

*Trover.* John Smith *v.* Henry Jones, Trover and Conversion for one black horse 5 years old, named Jack, now in the possession of the defendant and formerly in the possession of the plaintiff. Damages \$1,000. To 1st Oct. Rules.

Hardy, p. q.

*Slander and Libel.* John Smith *v.* Henry Jones, Trespass on the case in Slander (or in Libel, as the case may be). Damages \$10,000. 1st Oct. Rules. Johnson, p. q.

### § 188. Nature of process.

The old method of commencing an action by a *capias ad respondendum* was abolished by the Code of 1849, except in the single case of a defendant who was about to quit the state, which is treated hereinafter in the chapter on Attachments. Process to commence a suit is ordinarily a summons commanding some officer to summon the defendant to answer the complaint of the plaintiff at a time and place mentioned in the summons. It generally emanates from some court having jurisdiction of the controversy, or from some officer designated by law. The time fixed for the officer to return the process is called the return

day of the summons.<sup>13</sup> But from whatever source it emanates, the defendant should receive *notice* of the *time* and *place* at which he is to make answer, and be afforded a reasonable opportunity to be heard. In some jurisdictions the summons is called a *subpœna*, but in Virginia that name is generally applied to the first process to secure the attendance of a *witness*, and not a defendant to a suit. This process may be issued at any time, in term-time or vacation. The clerk's office is always open for the purpose of instituting actions.<sup>14</sup>

If from any cause a summons is not executed, another summons called an *alias* summons may be issued, and if this be not executed a *pluries* summons may be issued, and so on from time to time until there is a return of "executed." Every summons subsequent to the *alias* is called a *pluries* summons.<sup>15</sup> The language of the statute is: "*If, at the return-day of any process, it be not returned executed, an alias or other proper process may be issued, etc.*"<sup>16</sup> But, when must this *alias* or *pluries* be issued? *Must* it issue at that rules, or *may* it issue then or *thereafter*? The question becomes important chiefly as affecting the bar of the statute of limitations. It would seem that process to commence a suit must be *continuous* until a return of "executed" is obtained, and therefore that the *alias* or *pluries* summons can only issue at the rules at which the previous process was returned unexecuted; that a failure *then* to issue the *alias* or *pluries* would cause a hiatus in the action and operate a discontinuance; and that to hold otherwise would be to permit a plaintiff to continue his case indefinitely at the rules and save the running of the statute of limitations for any length of time he chose. No doubt an *alias* subsequently issued would be good as an *original* process, but is it good as an *alias* so as to stop the running of the statute from the date of the original summons? This latter question seems to be answered in the affirmative, summarily and without discussion of the statute,<sup>17</sup> and the decision is

13. Stephen on Pleading, § 86.

14. Abney v. Ohio, 45 W. Va. 446, 32 S. E. 256.

15. Danville, etc., R. Co. v. Brown, 90 Va. 340, 18 S. E. 278.

16. Code, § 3221.

17. Va. Fire Ins. Co. v. Vaughan, 88 Va. 832, 14 S. E. 754. The return in this case was "executed," but it was *void* because not executed ten days before the return-day (Staunton B. Ass'n v. Haden, 92 Va. 201, 23 S. E. 285) and, as the writ was valid, the return was,

believed to accord with the practice in some of the circuits, but its soundness may well be questioned. If the writ has been returned unexecuted it is *functus officio*, and if no new writ is *then* sued out, there is nothing upon which to base the pendency of an action. The action once commenced by suing out the original writ has ceased to exist. Its life has become extinct. If the plaintiff may thus suspend his action for a month, on the same principle he may suspend it for a year or any other length of time, and thus hold the defendant in court for an indefinite length of time, without service of process, and defeat a plea of the statute of limitations which would be otherwise good.

The Constitution of Virginia provides that all writs shall run in the name of the Commonwealth of Virginia, and be attested by the clerks of the several courts.<sup>18</sup> The Constitution of West Virginia contains a similar provision, and it has been held in that State that an attestation by a deputy clerk in his own name is not sufficient.<sup>19</sup> The statute in Virginia provides that an action shall be commenced by a summons to be issued on the or-

in effect, a return of "not executed." Counsel for the defendant in error relied upon the provisions of § 3259 of the Code as sufficient to protect his rights, and possibly the case may be explained on the hypothesis that it was the duty of the clerk to have issued the *alias* and that the court simply corrected this error of the clerk, but the language of the statute hardly justifies the idea that this was an *ex officio* duty of the clerk.

In *U. S. Oil Co. v. Garland*, 58 W. Va. 267, 52 S. E. 524, there is some discussion tending to sustain the holding in the *Vaughan* case, *supra*, but it is wholly foreign to the point there at issue. No question of limitation of actions was there involved, nor was it necessary to decide whether or not the original action was kept alive by the issuance of an *alias*. The question involved was whether or not an action was pending to which an attachment could be ancillary. The *alias* may not have been good as an *alias*, and in fact was not, and yet was all sufficient as an *original process* to commence an action to which the attachment was ancillary. The fact that it was called an *alias* was immaterial. The opinion in the case concedes that the contention of the text is the law in Tennessee and Kentucky, where it is held that "an *alias* should be tested at the time of the return of the former summons, and the same to be continued from term to term until service is secured."

18. Virginia Constitution, § 106.

19. *Pendleton v. Smith*, 1 W. Va. 16.

der of the plaintiff, his attorney or agent, and shall not, after it is issued, be altered nor any blank therein filled up except by the clerk.<sup>20</sup> The order for the issue of the summons is generally the memorandum for the institution of the action, such as is set forth in § 187, *ante*.

It has been made a question whether a friendly suit in which the defendant appears and answers without writ was properly begun, but it is plain that appearance without objection is a waiver of the necessity for a writ.<sup>21</sup> In case of confessions in the clerk's office, the proper method is for the summons to issue and for the defendant to acknowledge service, and then confess judgment.

"Though § 3283 of the Code prescribes how a judgment by confession may be entered by the clerk in his office in vacation with particularity, the statute has been held for the most part to be declaratory merely of the common law, and that such judgment or decree will be valid when there has been substantial compliance with the statute. Thus, the statute declares that in any suit the defendant may confess judgment. Nevertheless, it has been repeatedly held that such judgment is not invalid because there was no suit actually pending, and no previous process."<sup>22</sup>

In proceedings by motion under §§ 3210 and 3211 of the Code, the notice takes the place of both writ and declaration, and being presumed to be the act of the parties themselves, is to be liberally construed, so as to uphold the motion, if possible. No particular form is necessary. Any form will be sufficient if the defendant cannot mistake the object of the motion.<sup>23</sup> So also in ejection,

20. Code, § 3223, is as follows: "The process to commence a suit shall be a writ commanding the officer to whom it is directed to summon the defendant to answer the bill or action. It shall be issued on the order of the plaintiff, his attorney or agent, and shall not, after it is issued, be altered, nor any blank therein filled up, except by the clerk."

21. *Hunter v. Stewart*, 23 W. Va. 549.

22. *Brockenbrough's Ex'x v. Brockenbrough's Admr.*, 31 Gratt. 580, 599; *Shadrack's Admr. v. Woolfork*, 32 Gratt. 707; *Saunders v. Lipscomb*, 90 Va. 647, 19 S. E. 450; *Manson v. Rawlings*, 112 Va. —, 71 S. E. 564.

23. *Supervisors v. Dunn*, 27 Gratt. 608; *Morotock Ins. Co. v. Pankey*, 91 Va. 259, 21 S. E. 487.

in Virginia, there is no writ, but the notice takes its place, and so under the Code practice, copies of the pleadings served take the place of writs.

*Appearance* and pleading to the merits is a waiver of process.<sup>24</sup> But to have this effect the appearance must have been authorized. For instance, after the dissolution of a partnership one partner has no implied authority to employ an attorney to represent other members of the firm even as to firm matters, and if he does, and there is a judgment against such others upon an appearance by an attorney so employed, they may show by parol the lack of authority of the attorney to so appear and have the judgment against them vacated.<sup>25</sup>

### § 189. Who are exempt from service.

Sovereign States are exempt generally except as they provide when and where and by whom they may be sued.<sup>26</sup> Section 3214 of the Code, hereinbefore quoted in the margin, shows where actions affecting the State may be brought. Ambassadors and public ministers, their families and servants, though actually resident in a foreign country, are considered as domiciled at their homes, and hence are not subject to service of process where actually resident. This exemption, however, does not extend to *consuls*, who are mere commercial agents, resident abroad.<sup>27</sup> Art. 1, § 6. U. S. Constitution, exempts representatives in congress from arrest during the session of congress and in going to and returning from same *in all cases* except treason, felony, and breach of the peace. The circuit court of the eastern district of Wisconsin has held that this provision exempts them at like times from service of summons in *civil cases*, and quite a number of authorities are cited to support it.<sup>28</sup> In Virginia we have a statute exempting from arrest members of the Legislature,<sup>29</sup> persons in military service,<sup>30</sup> and judges, grand jurors, witnesses, certain officers and ministers while officiating

24. *Norfolk & W. R. Co. v. Sutherland*, 105 Va. 545, 54 S. E. 465.

25. *Hall v. Laning*, 91 U. S. 160; *Bowler v. Huston*, 30 Gratt. 278-9.

26. *Kawawanakoa v. Pollyblank*, 205 U. S. 349.

27. 1 Kent Com. 389, and notes.

28. *Miner v. Markham*, 28 Fed. 387.

29. Code, § 198.

30. Code, § 355.

as such,<sup>31</sup> but as we have no arrest of *residents* on civil process this has always been supposed to refer to arrest on criminal charges, and not to summons in civil cases. The language of § 198 forbids *taking into custody and imprisonment*. We have no case in Virginia construing the above statute, and elsewhere the authorities are conflicting as to whether similar provisions extend to service of civil process.<sup>32</sup> In the note cited in the margin, it is said that resident parties and witnesses are exempt from service while in good faith obeying a summons in another case, and in going and returning.

As to a *non-resident party or witness* coming into the State to attend a case of his own, the law holding him exempt from such service is very strongly put by Judge Phillips of the Southern District of Missouri.<sup>33</sup> A great array of cases is cited by him; and the same view is sustained by Mr. Freeman in the note above referred to. Such is the great weight of authority, though it is said by Mr. Freeman that Rhode Island, Connecticut, Maryland and Maine hold otherwise. The basis of the doctrine is a sound public policy, which leaves suitors and witnesses free and untrammelled by fear in such cases. It is immaterial whether the witness or party was summoned or not. The exemption embraces the time of trial and a reasonable time before and after to go and come. It need hardly be said that a presence obtained by fraud will not avail for the purpose of service in another case.

A prisoner sent to the penitentiary does not thereby lose his former residence, but may be sued there as before.<sup>34</sup> He probably could not be sued at the place of confinement, but a suit at his place of abode with service on him in the penitentiary seems to have been recognized as sufficient.<sup>35</sup> Usually committees are appointed for the estates of convicts, and they and not the convicts are sued.<sup>36</sup>

Exemption from service of process is a personal privilege, and will be deemed to have been waived unless claimed in due time.

31. Code, § 898.

32. Note in 76 Am. St. Rep. 534, 535.

33. *Hale v. Wharton*, 73 Fed. Rep. 740.

34. *Guarantee Co. v. Bank*, 95 Va. 480, 28 S. E. 909.

35. *Neale v. Ultz*, 75 Va. 480.

36. Code, §§ 4115, 4121.

Courts will not notice it *ex officio*. It can only be obtained by plea, or by motion made at the proper time. Probably the appropriate method would be by a plea in abatement or suspension.<sup>37</sup>

### § 190. Who may serve process.

Generally the executive officer of the tribunal from which the process emanates serves the process. This is usually the sheriff or sergeant, but this is a matter regulated by statute. In Virginia process may be directed to the sheriff, of *any* county, or the sergeant of *any* corporation (except suits or actions brought under § 3215). If no sheriff or sergeant, or he is incompetent, then to the coroner,<sup>38</sup> if none, to a constable.<sup>39</sup> If duly served and good in other respects, it shall be deemed valid, although not directed to any officer, or if directed to an officer, though executed by any other to whom it might lawfully have been directed. Where service is by a deputy he must subscribe his own name as well as that of his principal to the return,<sup>40</sup> otherwise the return, on application, should be quashed.<sup>41</sup> If, however, the defendant appears, and does not object, the defect is waived.<sup>42</sup>

If a sheriff or sergeant die in office, it is provided by statute in Virginia that deputies in office at the time of their death shall continue in office until the qualification of a new sheriff or sergeant, and execute the same in the name of the deceased in like manner as if the sheriff or sergeant had continued alive, until such qualification, unless they have been previously removed in the manner pointed out by statute.<sup>43</sup> Attention is called to the fact that in Virginia it is provided by statute "that in divorce proceedings, notices for the taking of depositions, or for any other purpose, shall be served only by the sheriff of the county, or the sergeant or sheriff of the city, in which the service is sought to be had."<sup>44</sup> Under § 3224 of the Virginia Code of

37. *Prentis v. Com.*, 5 Rand. 697; *Turnbull v. Thompson*, 27 Gratt. 506.

38. Code, § 893.

39. Code, § 895.

40. Code, § 900.

41. *Mitchell v. Com.*, 89 Va. 826, 17 S. E. 480.

42. *Harvey v. Skipwith*, 16 Gratt. 410.

43. Code, § 892.

44. Code, § 3207.

1887, process to commence a suit could only be executed by an officer. As the possible consequences were so serious it was deemed proper to provide this safeguard, but the Legislature thought otherwise, and changed this section by Acts of 1891-2, p. 1083, so that now process may be executed by a private individual upon his making affidavit as to the time and manner of the service, but on service outside the State, it must appear from the affidavit that the person serving the process was not interested in the suit.<sup>45</sup> Section 3224 of the Code of 1887 provides that "any summons or scire facias may be served as a notice is served under § 3207, *except that such process (unless it be a summons for a witness) shall in all cases be served by an officer, etc.*" The amendment of this section consisted in omitting the words in italics. In view of this change, it would seem that a summons to commence an action may be served not only in the manner that a notice is served, but by the same persons. Before the change it had been held, construing §§ 893 and 895 of the Code, that unless the office of coroner was vacant, or the incumbent under disability, a constable could not lawfully serve a process directed to the sheriff, these sections providing then, as now, that when it was unfit for a sheriff to execute a process it should be executed by a coroner, and that when the office of coroner was vacant or he was interested and not authorized to act, the process should be directed to and executed by a constable.<sup>46</sup> If the above change applies to the persons who may execute the process as well as the manner of service, then it would seem that a return made by a constable may be made in his official capacity and will not be required to be verified by affidavit.

It would seem manifestly improper to direct process to a sheriff who was one of several defendants, but if so directed, and it be served by a deputy without objection on the part of the sheriff, the judgment will be valid. It is too late after the judgment to object to the manner of service.<sup>47</sup>

### § 191. When process to issue and when returnable.

In Virginia it must be issued before the rule day to which it is returnable, although it may be served on that day, and

45. *Raub v. Otterback*, 89 Va. 645; Code, § 3232.

46. *Andrews v. Fitzpatrick*, 89 Va. 438, 16 S. E. 278.

47. *Turnbull v. Thompson*, 27 Gratt. 306.

must be returnable within *ninety days* from its date.<sup>48</sup> If returnable more than ninety days after its date, it is invalid, and judgment by default thereon is void.<sup>49</sup> So, also, process not returnable to a legal return day (first day of a term or of rules), is a void process.<sup>50</sup> If returnable to rules it must be returnable to the first or third Monday (when they, as is usual, are rule days), and not to any other day of the rules, and if to a term of court, to the first day of the term.<sup>51</sup> It would seem that it must be executed not later than the first day of the rules to which it is returnable.<sup>52</sup> In West Virginia process to commence an action may issue on, be returnable to, and be served on the same first Monday, if a rule day.<sup>53</sup> This was formerly the law in Virginia.

### § 192. Service of process on natural persons.

The usual method of service is by delivering a copy to the defendant in person, and this method is to be observed except in so far as the same has been changed by statute. Where statutes have been enacted allowing a substituted service, they are to be strictly construed.<sup>54</sup> Most of the States, including Virginia, have provided for substituted service as to certain classes of defendants, and also for constructive service in other cases. The Virginia statutes are given in the margin of different sections of this chapter. Service is said to be

48. Code, § 3220. A writ issued Nov. 24, 1908, and returnable on the third Monday in January is returnable within ninety days from its date. The omission of the word "next" after January is immaterial and not calculated to mislead. (*Arminius Chemical Co. v. White*, 112 Va. —, 71 S. E. 637.) It may be noted in this connection that a *scire facias* on a recognizance may be returnable more than ninety days from its date, *Lewis v. Com.*, 106 Va. 20, 54 S. E. 999, and that the return day of a garnishment may be more than ninety days from its date. Code, § 3609.

49. *Lavell v. McCurdy*, 77 Va. 763.

50. *Kyles v. Ford*, 2 Rand. 1; *Coda v. Thompson*, 39 W. Va. 67, 19 S. E. 148.

51. Code, § 3220.

52. 5 Va. Law Reg. 490.

53. *Spragins v. West Va., etc., Co.*, 35 W. Va. 139, 13 S. E. 45; *Handlan v. Handlan*, 37 W. Va. 486, 16 S. E. 597; *Foley v. Ruley*, 43 W. Va. 513, 27 S. E. 268.

54. *Staunton P. B. & L. Co. v. Haden*, 92 Va. 201, 23 S. E. 285.

“substituted” when it is other than personal on one who is a resident of the state, and “constructive” when applied to a like service on a non-resident of the State; but whether it is one or the other there must be a substantial compliance with every requirement of the statute.<sup>55</sup>

In Virginia it is provided<sup>56</sup> that a summons may be served as a notice is served under § 3207, and the latter section provides: “A notice, no particular mode of serving which is prescribed, may be served by delivering a copy thereof in writing to the party in person; or, if he be not found at his usual place of abode, by delivering such copy and giving information of its purport to his wife or any person found there, who is a member of his family, and above the age of sixteen years; or if neither he nor his wife, nor any such person be found there, by leaving such copy posted at the front door of said place of abode. Any sheriff, sergeant, or constable thereto required, shall serve a notice in his county or corporation, and make return of the manner and time of service; for a failure so to do he shall forfeit twenty dollars. Such return, or a similar return by any other person who verifies it by affidavit, shall be evidence of the manner, and time of service: provided, however, that in divorce proceedings notices for the taking of depositions, or for any other purpose, shall be served only by the sheriff of the county or the sergeant or sheriff of the city in which the service is sought to be had.”

Personal service may be on the defendant anywhere he may be found in the officer's bailiwick, but the officer is not required to search for him at but one place, and that is at his usual place of abode, and if he be not found “*at his usual place of abode,*” then the officer may make the substituted service, but his return must show why he made the substituted service, and that reason must be the one given in the statute, else the return will be bad. The different methods of service provided by this section are not cumulative but successive. Service cannot be made upon a member of the family if the defendant be found at his place of abode, and there can be no posting if a member of the family above the age of sixteen years be

55. 19 Encl. Pl. & Pr. 625; Staunton P. B. & L. Co. v. Haden, *supra*.

56. Code, § 3224.

found at the place of abode of the defendant; and, when one method of service is substituted for another, the return must show a right to adopt the inferior method of service by negating ability to get the better service. The officer has no right to make the substituted service except when the statute so provides.<sup>57</sup> The substituted service may be upon the defendant's wife or any person *found there* who is a member of his family above the age of sixteen years. It is immaterial what the age of the wife is, but if served on a member of the family he or she must be over the age of sixteen years. But whether served on the wife or member of the family, the service can only be made at the defendant's usual place of abode and not elsewhere.<sup>58</sup> The officer may serve either on the wife or a member of the family at his option, there is no choice or preference between them. Furthermore, when this kind of substituted service is adopted the officer must give "information of its purport" to the person upon whom the service is made, and his return must show this. "To authorize a personal judgment on substituted service of process the terms of the statute authorizing such service must be strictly complied with. Courts cannot dispense with any of the statutory requirements, even though satisfied that the method actually adopted for giving the defendant notice was better than that prescribed by law.

"Service of a summons on a defendant by delivering a copy thereof to his wife is not sufficient where the officer's return fails to show that he gave her information of its purport, and a judgment by default on such service is void. The fact that the defendant actually received from his wife the copy left with her for him in time to have made defence to the suit is immaterial."<sup>59</sup>

It has been held by the Circuit Court of the United States for the Western District of Virginia<sup>59a</sup> (construing the Virginia statute) that when the service is upon the defendant's wife, the return must show that she was a member of defendant's family, as they might be living separate and apart from

57. *Settlemier v. Sullivan*, 97 U. S. 444.

58. *Smithson v. Briggs*, 33 Gratt. 183; *Crockett v. Etter*, 105 Va. 679, 54 S. E. 864. See also *Goolsby v. St. John*, 25 Gratt. 146.

59. *Park. L. & I. Co. v. Lane*, 106 Va. 304, 55 S. E. 690.

59a. *King v. Davis*, 137 Fed. 198, 11 Fed. Rep. 177.

each other, but this view seems to be too technical, and is in conflict with *Smithson v. Briggs, supra*. In the latter case the return was: "G. W. Smithson not being found at his usual place of abode, a true copy of the within rule was left with his daughter, at his residence, who is over the age of sixteen years and purport explained to her, this 28th day of August, 1871." No objection seems to have been made on the ground that the name of the person upon whom service was made was not given, but it was argued, and that was the view taken by Judge Anderson, that the return was bad because it did not show that the daughter was a member of the defendant's family, and also because the service was "at his residence" instead of "at his usual place of abode," but the majority of the court overruled both contentions, and held that the word "residence" in the connection in which it was used was synonymous with "usual place of abode," and that it would be presumed that the daughter was a member of defendant's family.

There is some conflict as to who is "a member of his family" within the meaning of the statute. It has been held that "a mere boarder, a stranger to his blood" is not<sup>60</sup> a member of the family, and also that he is.<sup>61</sup>

*Substituted* service by serving on a member of the family is generally held to have the same effect as personal service, and to be a sufficient basis for a personal judgment, provided the terms of the statute authorizing it have been strictly complied with. Certainly such service has been repeatedly recognized in Virginia and West Virginia.<sup>62</sup> Whether a service by posting at the front door of the residence when no one is found there is sufficient seems not to have been passed on in Virginia. The chief question is whether such posting constitutes "due process of law." Whatever else this expression may mean when applied to judicial proceedings, it means *notice* and a reasonable opportunity to be heard by a competent legal tribunal before which a party's rights may be fairly asserted

60. *Fowler v. Mosher*, 85 Va. 421, 7 S. E. 542.

61. *Segouine v. Auditor*, 4 Munf. 398; *Dobbins v. Thompson*, 4 Mo. 118.

62. 19 Encl. Pl. & Pr. 624; *Crockett v. Etter, supra*; *Park L. & I. Co., supra*; *Capehart v. Cunningham*, 12 W. Va. 750.

or defended. As stated, we have no *direct* decision in Virginia on the right to take a personal judgment by default against a defendant brought before the court by a notice or summons posted at his residence, but the right to take such judgment seems to have been tacitly admitted by the profession, as the question does not appear to have been raised in any reported case, nor is it discussed by either by Prof. Minor, or Mr. Barton. The validity of the statute seems to have been conceded in the cases arising under the statute, and the contest to have been waged on other grounds.<sup>63</sup> It seems plain from the language of the Virginia statute that where posting is allowed at all, it must be at the *then* residence of the defendant, and not at his former residence.<sup>64</sup>

Process against a *married woman* must be served personally. The provisions of the statute for the service of process must be substantially complied with, and the method of service cannot be otherwise than is there prescribed. The Virginia statute allowing a substituted service was enacted at a time when a

63. *Lewis v. Botkin*, 4 W. Va. 533; *Capehart v. Cunningham*, *supra*; *Earle v. McVeigh*, 91 U. S. 503. In the last-mentioned case, arising under the Virginia statute, it is said: "Notice to the defendant, actual or constructive, is an essential prerequisite of jurisdiction. Due process with personal service, as a general rule, is sufficient in all cases; and such it is believed is the law of the State where the judgments were recovered in this controversy, in all cases where such service is practicable. But the laws of that State also provide for service in three classes of cases in which personal service cannot be effected: (1) Residents who are temporarily absent from home. (2) Service may also be made upon persons not residents of the State. (3) Where the party resides in the State, in case it is not known in what particular county he has his residence.

"1. Temporary absence from home will not defeat service, as in that case the statute provides that notice may be given to the party by delivering a copy of the process to the party in person; or, if he be not found at his usual place of abode, by delivering such copy and giving information of its purport to his wife, or any white person found there, who is a member of his family, and above the age of sixteen years; or, if neither he nor his wife nor any such white person be found there, by leaving such copy posted at the front door of his usual place of abode."

64. *Earle v. McVeigh*, 91 U. S. 503; *Capehart v. Cunningham*, 12 W. Va. 750.

married woman could not be sued alone at law, and has not been altered since her disabilities have been removed, and while it is true that this would make no difference if the language of the statute were broad enough to cover the case, and that § 5, clause 13 of the Code provides that "a word importing the masculine gender only, may extend and be applied to females as well as males," still there is no authority for substituting "husband" for "wife," nor for making the family her family when the husband is still alive and the head of the family. The substituted service is only allowed, under the statute, if *he* be not found at *his* usual place of abode, and the copy is to be delivered to "*his wife*," or to a member of *his* family. Such language seems to be wholly inapt to describe substituted service on the wife, and to hold it applicable to her would not be a substantial compliance with the statute. Furthermore, there may be good reasons for not allowing such service.

Service of process upon a *non-resident* found within the jurisdiction is valid, and will warrant a personal judgment against him unless, for some reason, he is exempt from service.<sup>65</sup> But process of a State cannot extend beyond its own borders, and there are no means by which one State can acquire jurisdiction over the person of a resident of another so as to render a personal judgment against him, so long as he does not submit to its jurisdiction, nor subject himself to service of process by going within its confines. Every State has and may exercise jurisdiction and sovereignty over persons and property *within* its territory, but not over persons without it. Whether the attempted service be by order of publication, or by actual service in the foreign State, it is equally void as a basis for a personal judgment or decree. The mere fact that the non-resident owns property within the State which may be subjected by appropriate proceedings for that purpose does not give jurisdiction over him personally. A personal judgment by default taken against a non-resident upon process served by publication, or by service outside the jurisdiction, is a nullity. For a personal judgment there must be personal service of process or what, in law, is deemed its equivalent.<sup>66</sup> Property within the

65. See *ante*, § 189.

66. *Pennoyer v. Neff*, 95 U. S. 714. This is the leading case on the subject. It has since been affirmed in numerous cases, State and federal.

State may be subjected because its location within the State confers jurisdiction to subject it by appropriate proceedings *in rem*, but this does not confer jurisdiction over the person of the non-resident. The jurisdiction to render a personal judgment against the non-resident must exist at the time the action is instituted. The following propositions taken from the head note in *Pennoyer v. Neff* state the law on these subjects: "A personal judgment is without any validity, if it be rendered by a State court in an action upon a money demand against a non-resident of the State, who was served by a publication of summons, but upon whom no personal service of process within the State was made, and who did not appear; and no title to property passes by a sale under an execution issued upon such a judgment.

"The State, having within her territory property of a non-resident, may hold and appropriate it to satisfy the claims of her citizens against him; and her tribunals may inquire into his obligations to the extent necessary to control the disposition of that property. If he has no property in the State, there is nothing upon which her tribunals can adjudicate.

"Substituted service by publication, or in any other authorized form, is sufficient to inform a non-resident of the object of proceedings taken, where property is once brought under the control of the court by seizure or some equivalent act; but where the suit is brought to determine his personal rights and obligations, that is, where it is merely *in personam*, such service upon him is ineffectual for any purpose.

"Process from the tribunals of one State cannot run into another State, and summon a party there domiciled to respond to proceedings against him; and publication of process or of notice within the State in which the tribunal sits cannot create any greater obligation upon him to appear. Process sent to him out of the the State, and process published within it, are equally unavailing in proceedings to establish his personal liability."

It may be observed, however, that a suit or proceeding to determine the personal *status* of a *citizen* is a *quasi* proceeding *in rem*, as in a suit for divorce, for example, and there may be constructive service by publication, but the right is limited

to the determination of such *status* and does not extend to a *personal* decree for costs, alimony and the like.<sup>67</sup>

A non-resident may, of course, submit to the jurisdiction of the court if he chooses to do so. He does submit by instituting an action in the court, or by filing a plea to the merits of an action brought against him by another, or by merely acknowledging due and legal service of the writ for the purpose of submitting. Mere acknowledgment of service is probably not sufficient, but if a party outside of the State acknowledges "due" or "legal" service of the writ, this is held, by the weight of authority, to be evidence of submission to the jurisdiction of the court and to warrant a personal judgment.<sup>68</sup> It has been held, however, in a poorly considered case in Virginia that an acknowledgment of "legal service" simply has the effect of an order of publication duly published and posted.<sup>69</sup>

If the object of the proceeding against a non-resident is to get a personal judgment, then the service of process must be *personal within the State from which it issues, or its equivalent*. Nothing short of this will suffice.<sup>70</sup> Personal service on a defendant outside the jurisdiction of the State can never warrant a personal judgment. It may have the effect of an order of publication duly published and posted, but it cannot have any greater effect.<sup>71</sup>

67. *Pennoyer v. Neff*, *supra*; *Garner v. Garner*, 56 Mo. 127; note, 50 L. R. A. 583, 584, and cases cited; Lile's Notes on Corporations 350.

68. *Jones v. Merrell*, 113 Mich. 433, 71 N. W. 838, and cases cited; 19 Encl. Pl. & Pr. 702. See, however, *White v. White*, 66 W. Va. 79, 66 S. E. 2.

69. *Smith v. Chilton*, 77 Va. 535; *White v. White*, *supra*. See in this connection § 3232 declaring that personal service of a summons, etc., on a nonresident defendant out of the State "shall have the same effect, and no other, as an order of publication duly executed." It has been held that the service under this statute must be made *fifteen days* before the return day, else it will be invalid. *Raub v. Otterback*, 89 Va. 645, 16 S. E. 933.

70. *Pennoyer v. Neff*, 95 U. S. 714; *Wilson v. St. Louis, etc., R. Co.*, 108 Mo. 588, 32 Am. St. Rep. 624, and note; *Galpin v. Page*, 18 Wall. 367.

71. *Hinton v. Ins. Co.*, 126 N. C. 18, 78 Am. St. Rep. 636; Code, § 3232; *Pennoyer v. Neff*, *supra*.

An action is *in personam* when its object is to obtain a personal judgment against the defendant, upon which a general execution may be awarded directing the collection of the judgment out of any property of the defendant anywhere to be found. It is *in rem* when it seeks to affect particular portions of his property only. After a personal judgment has been rendered, generally nothing but the jurisdiction of the court over the parties and the subject matter can be inquired into, either in the trial court or elsewhere.<sup>72</sup> But this always implies that there have been proper judicial proceedings on which to found the judgment. "Though the court may possess jurisdiction of a cause, of the subject matter and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgment. It must act judicially in all things, and cannot transcend the power conferred by law." A departure from established modes of procedure will often render a judgment void. If a party be duly cited, but a *hearing* be denied him, the procedure is not judicial, but a mere arbitrary edict not entitled to be regarded as a judgment anywhere.<sup>73</sup>

72. 1 Black on Judgments, ch. 13.

73. Windsor *v.* McVeigh, 93 U. S. 274; Nulton *v.* Isaacs, 30 Gratt. 726. An action may be brought on a judgment, foreign or domestic. If there was appearance to the merits, or general appearance, all defects in the process or the manner of its service are deemed to have been waived and the judgment is final and conclusive of the *then* rights of the parties. If the judgment was obtained by default, that is without appearance, and the record shows service of process there is conflict of authority as to whether the defendant in a *domestic* judgment may show that there was in fact no service. See Preston *v.* Kindrick, 3 Va. Law Reg. 431, and note.

If suit or action is brought on a *foreign* judgment which was obtained in the foreign court upon *default of appearance* of the defendant, the defendant may show:

1. That the foreign court did not have jurisdiction of either the defendant or of the subject matter. The record of the judgment showing *service of process* is not conclusive and may be impeached by parol. Thompson *v.* Whitman, 18 Wall. 457; Knowles *v.* Gas Light Co., 19 Wall. 58.

And although the foreign law may permit service on a partner to bind all members of the firm, it can have no extra territorial effect, and the partner not served will not be personally held in another

*Infants.* It is said by Prof. Minor that "process against infants must, it is believed, be served in like manner as on adults."<sup>74</sup> On this subject, the following views are expressed in 1 Va. Law Reg. 153: "Whether service of process on an infant defendant is essential to jurisdiction over his person, is a question upon which there is must diversity of opinion. In some of the States it is sufficient that a guardian *ad litem* be appointed, and appear on the infant's behalf; while in others it is held that service of process is as indispensable as in case of adult defendants. In many States the subject is regulated

jurisdiction, and even where there was appearance for the firm by attorney, if the firm had been dissolved before such appearance, the partner not served is not bound unless he authorized the appearance. *Hall v. Lanning*, 91 U. S. 160; *Bowler v. Huston*, 30 Gratt. 278, 279.

2. Although the foreign court had jurisdiction, it may be shown that it did not act judicially and did not afford the defendant an *opportunity to be heard*. *Windsor v. McVeigh*, 93 U. S. 274.

3. That the foreign court departed from established modes of procedure and did not permit the defendant to make defence in the *form required by law*, e. g., denied a jury trial where defendant was entitled to it. *Nulton v. Isaacs*, 30 Gratt. 726.

4. Fraud in obtaining the judgment, or any other fact that will show the judgment to be void.

Furthermore, it may be noted that a judgment or decree may be assailed even in the same jurisdiction in which it is rendered on the ground that the proceeding has not been judicial; or the party has been deprived of some right to which he was entitled. Independently of statute, while the receiver of a court may be a quasi-party to the suit in which he is appointed, the surety on his bond is not, and a decree against such surety on a rule is void and may be assailed collaterally. *Thurman v. Morgan*, 79 Va. 367. So likewise, a purchaser at a judicial sale becomes a quasi-party to the suit in which the sale is made, and is bound by all decrees made affecting his rights as purchaser, but the surety on his bonds for the purchase money is not such party, and a decree based on a rule against a surety is void, and may be collaterally assailed. *Anthony v. Casey*, 83 Va. 338, 5 S. E. 176. In each of these two cases the decree was held void because the defendant was, by the mode of procedure adopted, deprived of a jury trial. Provision is now made for both cases by allowing a jury trial on the hearing upon the rule. Code, § 3402a.

74. 4 Min. Inst. 645.

by statute, as it is in Virginia. The Virginia statute provides that: "The proceedings in a suit wherein an infant or insane person is a party, shall not be stayed because of such infancy or insanity, but the court in which the suit is pending, or the judge thereof in vacation, shall appoint some discreet and competent attorney at law as a guardian *ad litem* to such infant or insane defendant, *whether such defendant shall have been served with process or not.*"<sup>75</sup>

"The Virginia court of appeals seems to have been of opinion that service of process was not necessary, even before this statute was adopted.<sup>76</sup> The Supreme Court of the United States holds, however, that no personal decree can be had against an infant, in a federal court, without service of process, if the infant be at the time a non-resident of the State, though process be dispensed with by a statute of the State in which the court is sitting<sup>77</sup>—a principle which is a corollary from the doctrine of *Pennoyer v. Neff*; 95 U. S. 714, and the long line of subsequent cases affirming it, that no personal judgment can in any case be entered against a non-resident, without personal service of process within the State, unless he voluntarily appears."<sup>78</sup>

It must be borne in mind that what was once a mere matter of state policy is now a constitutional right, and that the Fourteenth Amendment of the United States Constitution provides that no State shall "deprive any persons of life, liberty, or property, without due process of law," and that what constitutes "due process of law is, in its last analysis, a question for the Supreme Court of the United States."<sup>79</sup> In view of the holding of the court in the great case of *Pennoyer v. Neff*, *supra*, and of the later case of *N. Y., etc., Ins. Co. v. Banks*, *supra*, it would seem that if the infant is a non-resident and

75. Code, 1887, § 3255.

76. *Parker v. McCoy*, 10 Gratt. 606.

77. *N. Y., etc., Ins. Co. v. Bangs*, 103 U. S. 435.

78. 1 Va. Law Reg. 153.

79. Section 11 of the Virginia Constitution also declares that no person shall be deprived of his property without due process of law. This provision, as a constitutional guaranty, appears for the first time in the Constitution of 1902.

a personal judgment is sought against him, personal service within the jurisdiction or voluntary appearance is *jurisdictional*, and essential to the validity of the judgment. If no judgment is sought against the non-resident infant, but it is only sought to affect his interest in property within the jurisdiction of the State the rule would be otherwise. If the infant is a resident of the State and a personal judgment is sought against him, personal service of process upon him if he is not married (no provision is made for a substituted service) *may* be necessary to constitute "due process," but there is much room for doubt as to this proposition as he is already subject to the general jurisdiction and sovereignty of the State, and the statute not only provides for the appointment of a guardian *ad litem* who shall faithfully represent the infant, but also that "it shall be the *duty of the court to see that the estate of such defendant is so represented and protected.*" At all events, the only safe course to pursue where a personal judgment is sought against an infant is to secure proper personal service of process upon him.

In West Virginia it is provided by statute that after the appointment of a guardian *ad litem* "no process need be served on such infant or insane person."<sup>80</sup> This statute has been upheld as sufficient to take the place of personal service on resident infants in cases seriously affecting their property rights, though no personal judgments were sought against them. It was further said that it was necessary for the guardian *ad litem* to signify his acceptance by filing an answer.<sup>81</sup>

The failure to appoint a guardian *ad litem* to defend the infant is generally held to be a fatal defect.<sup>82</sup> Moreover, as the guardian *ad litem* appointed is not obliged to accept the appointment, it is said that it is necessary for him to signify his acceptance of the trust by an answer filed in the cause.<sup>83</sup>

80. W. Va. Code (1906), § 3833.

81. *Alexander v. Davis*, 42 W. Va. 465, 26 S. E. 291; *Ferrell v. Ferrell*, 53 W. Va. 515, 44 S. E. 188.

82. *Turner v. Barraud*, 102 Va. 324, 46 S. E. 318; *Langston v. Bassette*, 104 Va. 47, 51 S. E. 218; *Westmeyer v. Gallencamp*, 154 Mo. 28, 77 Am. St. Rep. 747 and cases cited in note last above.

83. *Alexander v. Davis*, *supra*.

*Insane Persons.* The same statute in Virginia which provides for a guardian *ad litem* for infants, provides for a like guardian for insane persons. If action is brought before the defendant has been adjudged it is generally held that process must be served on the defendant. After adjudication, actions are generally brought against the committee or other custodian on the insane person under statutes authorizing the same. In Virginia "in a suit to subject the lands of a lunatic to the payment of his debts, the lunatic is not a necessary party, when he has a committee clothed with absolute authority to sue and be sued with respect to such estate. In a proceeding affecting the property rights of an insane person, it is the duty of the court, if he have no committee, to appoint a guardian *ad litem* to represent and protect his interest, but if he has a committee the appointment of a guardian *ad litem* is wholly unnecessary, except only where there is a conflict of interest between the committee and the lunatic."<sup>84</sup>

If, however, a proceeding be taken to determine the question of the sanity, or insanity of any person, it is believed that the insane person is entitled to notice and an opportunity to be heard, and, if denied, the proceedings are held in some States to be void, in others voidable only.<sup>85</sup>

The right to sue *court receivers* has been heretofore discussed.<sup>86</sup> It will be recalled that it is no longer necessary to obtain the consent of the court of their appointment in order to maintain an action against them. Provision is made in Virginia for service of process on the receivers, or their agents, and if none in the county or corporation wherein the action is commenced, then for the publication of the process as in case of actions against corporations.<sup>87</sup>

### § 193. Service of process on corporations.

At common law the method of service was on the president

84. *Howard v. Landsberg*, 108 Va. 161, 60 S. E. 769.

85. Code, § 1669; *Hess v. Gale*, 93 Va. 467, 25 S. E. 533; *Howard v. Landsberg*, *supra*; *Evans v. Johnson*, 39 W. Va. 303, 19 S. E. 624; *Karnes v. Johnson*, 58 W. Va. 595, 52 S. E. 658; 16 Am. & Eng. Encl. Law (2nd Ed.) 567, and cases cited.

86. *Ante*, § 53.

87. Code, § 3226.

or other chief officer of the corporation, personally,<sup>88</sup> but in all of the States statutes have been enacted prescribing the time and manner of service on both domestic and foreign corporations, and these statutes must be consulted as to matters of detail. While there is some variation in the details, there is a very marked similarity in the general method of service. As to domestic corporations they generally provide for service on certain enumerated officers, and, if there be none, upon agents, and if no agents, then publication of some kind, or by publication and notice sent out of the State or some like provision; and as to foreign corporations, they usually provide for service on agents, or, if none be found, by some species of publication. In Virginia, the service of process on corporations is regulated by §§ 3225 and 3227 of the Code, hereinbefore quoted in the margin, and is wholly separate and distinct from the method of service on natural persons, and the mode of procedure against foreign corporations is not altogether the same as that prescribed for domestic corporations. Federal courts, in the absence of an act of Congress, must follow the State statute as to the manner of service of process in actions at law, but not in equity.<sup>89</sup>

*Domestic corporations.* Section 3225 of the Virginia Code enumerates certain officers, other than mere agents, on whom service may be made. There is no preference among these, and service on any one of the particular class is sufficient, and the return need not make any reference to the others.<sup>90</sup> If none of the enumerated officers can be found in the county or corporation wherein the action is commenced (having residence or place of business there as provided by § 3227) then the plaintiff may either (1) have the process served on any agent residing, etc., in that county or corporation, or (2) if the action be against a railroad, canal, express, navigation, turnpike, tele-

88. 19 Encl. Pl. & Pr. 652.

89. *Amy v. Watertown* No. 1, 130 U. S. 301; *United States v. Bell Tel. Co.*, 29 Fed. 17; 19 Encl. Pl. & Pr. 673.

90. Special provision is made as to banks and domestic insurance companies. Process against a bank must be served on an officer, and not on an agent, and there can be no order of publication against a domestic insurance company. Sec. 3225.

graph or telephone company, or to *recover for a tort*, or where another defendant has been served in the county or corporation, he may send the process out of the county or corporation and have it served on such officer in the county or corporation wherein he resides, etc. (3) If there be *no agent* in the county or corporation in which the action was commenced upon whom there can be such service, then and then only may the plaintiff, upon affidavit of that fact, have the process published once a week for four successive weeks, and make such service the basis of a personal judgment against the defendant. It will be observed that there can be no service on an agent of a domestic corporation, if service can be had on any of the enumerated officers (fulfilling the conditions of the statute) in the county or corporation in which the action is commenced, and there can be no *publication* of process if there be in the county or corporation any agent residing or having his place of business there on whom there can be service. But even where publication is permissible, "service of process on the late president of a corporation which has ceased to exist is sufficient, though the process might have been served by publication, as prescribed by § 1103 of the Code. The latter method is simply cumulative."<sup>91</sup>

The word "agent" would probably exclude a mere "servant" in cases of this kind, but the Virginia statute<sup>92</sup> declares: "The term 'agent,' as employed in each of the preceding sections, shall be construed to include a telegraph operator, telephone operator, depot or station agent of a railroad company, and toll-gatherer of a canal or turnpike company."

Process against or notice to a corporation can only be *served* on an officer or agent of the corporation, under the Virginia statute, in the county or corporation "*wherein he resides, or his place of business is, or the principal office of the corporation is located,*" and the officer's return must show this.<sup>93</sup> If the action be brought under § 3215 the process cannot be *directed* to the officer of any other county or corporation than that

91. Richmond, etc., R. Co. v. N. Y., etc., R. Co., 95 Va. 386, 28 S. E. 573.

92. Code, § 3227.

93. Code, § 3227.

from which it issues, unless the case come within some one of the exceptions named in § 3220, but no matter to *whom directed*, it must be *served* as above stated. The service on an officer or agent of a corporation must be on him *in person*, and cannot be in any of the substituted methods provided by § 3207 of the Code. It cannot be on his wife, or a member of his family, nor by posting. This section (3207) is made applicable to service on natural persons by § 3224 of the Code, but the latter section expressly excepts corporations and provides "that when such process is against a corporation, the mode of service shall be as prescribed by the following section," and the section providing for service on an officer or agent declares that it "*shall be by delivering to him*" a copy of the process, and makes no provision for any kind of substituted service.<sup>94</sup> Usually service on a *de facto* officer has the same effect as if he were also an officer *de jure*.<sup>95</sup>

Whether a judgment by default can be taken on service by publication against a domestic corporation which is a going concern, with a known place of business within the State, without any effort to serve on an officer or agent of the corporation is a matter of serious doubt. The ground of this doubt is the constitutionality of the act allowing service by publication only. Both the State and federal constitutions<sup>96</sup> forbid the taking of property without "due process of law," and the question is whether this method of procedure constitutes "due process." It has been repeatedly held that a corporation is a person within the meaning of the constitution, and consequently is entitled to due process of law.<sup>97</sup> And while the legislature may undoubtedly authorize constructive service upon corporations, the method adopted should be such as is reasonably calculated to bring notice home to some of the officers or agents of the corporation, thus securing an opportunity to be heard and to make defence.<sup>98</sup> The right to take a personal judgment upon

94. Code, § 3227.

95. 19 Encl. Pl. & Pr. 657.

96. Va. Constitution, 1902, § 11; U. S. Constitution, Amendment XIV.

97. *Smith v. Ames*, 169 U. S. 466, 522, and cases cited.

98. *Pinney v. Prov. Loan Co.*, 106 Wis. 396, 80 Am. St. Rep. 41, 50 L. R. A. 577, and note.

service by publication *and mail* has been recognized in several cases,<sup>99</sup> but whether judgment by default may be taken on publication alone when the defendant has a known place of abode, with officers and agents upon whom process can be easily served, without any effort to make such service, is by no means free from doubt. It may be, as stated by Mr. Justice Field, "that a State, on creating corporations or other institutions for pecuniary or charitable purposes, may provide a mode in which their conduct may be investigated, their obligations enforced, or their charters revoked, which shall require other than personal service upon their officers or members, and parties becoming members of such corporations or institutions would hold their interest subject to the conditions prescribed by law," yet it is equally true that the State cannot deprive the corporation of due process of law. The State Corporation Commission may charter corporations, and provide a mode in which their conduct may be investigated, their obligations enforced, or their charters revoked, but it cannot, by charter provisions, or otherwise, nor can the legislature, deprive them of due process of law for the protection of their property. What constitutes "due process" is a judicial question, to be determined in the last resort by the Supreme Court of the United States, and while great respect will be paid to the legislative construction of the phrase, and what the legislature regards as constituting due process, the question is at last one for the courts, and the legislature cannot declare anything it pleases to amount to due process. The defendant is entitled to reasonable notice, and a reasonable opportunity to be heard. But the legislature is not the sole judge of the kind of notice to which the defendant is entitled. The kind of notice given is of the very essence of due process, and its sufficiency is the very question the courts are to determine. As said by the Court of Appeals of New York,<sup>1</sup> "the legislature is not vested with a power to arbitrarily provide that any proceeding it may choose to declare such shall be regarded as due process of law." On this subject, the authorities seem to hold that "the law of the land does not mean merely

<sup>99</sup> *Town of Hinckley v. Kettle River R. Co.*, 225 Ill. 197, 80 N. E. 109, 116 Am. St. 133.

1. *Colon v. Lisk*, 153 N. Y. 188, 47 N. E. 302.

an act of the legislature, for such a construction would abrogate all restrictions on legislative power.”<sup>2</sup>

It is not claimed that the State cannot provide for substituted service of process on corporations, nor, in proper cases, for service by publication. The specific claim is that: Service by publication as a basis for a personal judgment is not “due process” as against a domestic corporation, which is a going concern with a known place of business, where no effort is made or required to serve process on its officers or agents. Service by publication under such circumstances does not evince a *bona fide* effort to give notice to the defendant, and, as said in another case,<sup>3</sup> where service was made on the State Register of Deeds, “such service, if held to be effectual, would be well calculated to conceal from the officers and agents of the corporation the fact that such an action had been commenced,” and hence a statute which authorizes such a service is invalid. It has been held, however, in Florida and in Virginia, that a personal judgment may be taken against a domestic corporation based upon service by publication only, where there is no officer or agent of the corporation in the county on whom process may be served, and that such publication does constitute due process, within the meaning of the constitution.<sup>4</sup>

*Foreign Corporations.* Foreign corporations are not citizens within the meaning of the privilege and immunity clause of the federal constitution. They are recognized in foreign States only by comity.<sup>5</sup> The right to do business in the State rests absolutely in the discretion of the legislature. It may impose such terms as it pleases, whether they be reasonable or unreasonable, and may exclude them altogether. It is said, however, that there are some constitutional limitations upon this

2. 10 Amer. & Eng. Encl. Law (2nd Ed.), 292, and cases cited.

3. *Pinney v. Prov. Loan Co.*, 106 Wis. 396, 82 N. W. 308, 50 L. R. A. 577.

4. *Clearwater Mercantile Co. v. Roberts* (Fla.), 40 South. 436; *Ward Lumber Co. v. Henderson-White*, 107 Va. 626, 59 S. E. 476. On the other hand, it has been held that a personal judgment cannot be taken against a private person upon such service. *Bardwell v. Collins*, 44 Minn. 97, 20 Am. St. 547, and note; *Bear Lake City v. Budge*, 9 Idaho 703, 108 Am. St. Rep. 179.

5. *Paul v. Va.*, 8 Wall. 168.

rule. They have been expressed as follows:<sup>6</sup> "But the only limitation on the right of a State to impose restrictions upon the rights of foreign corporations to do business within the domestic State, so far as the federal constitution is concerned, are that the State cannot exclude from its limits a corporation engaged in interstate or foreign commerce,<sup>7</sup> that it cannot require foreign corporations not engaged in interstate commerce, as a prerequisite to doing business therein, to give its own residents a prior security on the assets of the corporation within the State,<sup>8</sup> and that it cannot impose restrictions on a corporation in the employ of the general government."<sup>9</sup> Statutes, however, which require an agreement not to remove causes to the federal courts, have generally been declared to be unconstitutional. But notwithstanding their unconstitutionality, if the agreement is violated, it has been held that the State may for that reason, and that reason only, revoke the license to do business in the State.<sup>10</sup> This is said to result from its right

6. 13 Am. Eng. Encl. Law (2nd Ed.) 861.

7. "Pensacola Tel. Co. v. West. Union Tel. Co., 96 U. S. 1; Fritts v. Palmer, 132 U. S. 282; Ex parte Stockton, 33 Fed. Rep. 95; People v. Wemple, 131 N. Y. 64, 27 Am. St. Rep. 542; Huffman v. Western Mort., etc., Co., 13 Tex. Civ. App. 169. For a full discussion of this subject, see the title Interstate Commerce."

8. "Blake v. McClung, 172 U. S. 239. See *infra*, this section, Statutes Requiring Preferences of Resident Creditors in Distribution of Assets."

9. "Stockton v. Baltimore, etc., R. Co., 32 Fed. Rep. 9; Pembina Consol. Silver Min., etc., Co. v. Pennsylvania, 125 U. S. 186; New Orleans, etc., Packet Co. v. James, 32 Fed. Rep. 21; People v. Wemple, 131 N. Y. 64, 27 Am. St. Rep. 542; Huffman v. Western Mortg., etc., Co., 13 Tex. Civ. App. 169.

"Illustration.—In the pursuit of business authorized by the government of the United States and under its protection the corporations of other States cannot be prohibited or obstructed by any State. If Congress should employ a corporation of ship-builders to construct a man-of-war, they would have the right to purchase the necessary timber and iron in any State in the Union, Stockton v. Balt., etc., R. Co., 32 Fed. Rep. 14; without the permission and against the prohibition of the State. Pembina Consol. Silver Min. Co. v. Pennsylvania, 125 U. S. 186."

10. Doyle v. Cont. Ins. Co., 94 U. S. 535. *But see* Cable v. U. S. Life Ins. Co., 191 U. S. 288, 307, and cases cited, and Herndon v. Chicago R. Co., 218 U. S. 135, 158, and cases cited.

to exclude altogether. The reason for the exclusion cannot be inquired into.

When a State has once prescribed terms upon which a foreign corporation may do business, the doing of business within the State is deemed an acceptance of the terms prescribed. But it is often a nice question as to what constitutes doing business within the State. It is not within the purview of these notes to go into this subject.<sup>11</sup> Attention, however, is called to the fact that a single act of business is not considered doing business in the State,<sup>12</sup> and that sales by drummers or traveling salesmen who simply take orders are not within the purview of the statute, and only those corporations are deemed to migrate and do business in another State who transact their business through resident or local agents. To prohibit sales by drummers would be an interference with interstate commerce. The business of insurance, however, is not commerce.<sup>13</sup>

The Virginia statute on the subject of service of process on foreign corporations, which has been hereinbefore quoted in the margin,<sup>14</sup> provides for service on any agent of the corporation, or upon any person declared by the laws of the State to be an agent, and, under certain conditions, by publication; and it is provided by statute,<sup>15</sup> that the term agent shall be construed to include a telegraph operator, telephone operator, depot or station agent of a railroad company, and toll-gatherer of a canal or turnpike company. The language of the statute is very comprehensive. It is "on *any* agent." The object of service of process is to give notice to the party to be affected so as to enable him to make defence, and there have been many cases discussing the subject as to whether the

11. A collection of the authorities will be found in 13 Am. & Eng. Encl. Law (2nd Ed.) 869 ff.

12. *Goldsberry v. Carter*, 100 Va. 438, 41 S. E. 858, 8 Va. Law Reg. 279 and note; *Cooper Man. Co. v. Ferguson*, 113 U. S. 727. See also note, 85 Am. St. Rep. 914 ff.

13. 1 Va. Law Reg. 306, and authorities cited; 13 Am. & Eng. Encl. Law (2nd Ed.) 869.

14. Note to § 186, *ante*.

15. Code, § 3227.

agent served was such an agent as is contemplated by law.<sup>16</sup> It would seem that the service should be such as would be reasonably expected to accomplish the purpose intended, and that ordinarily service upon subordinate agents or those in no way connected with the subject of litigation and having no knowledge of the defendant's business, or upon servants or employees, would not be sufficient. A foreign corporation before being subjected to a personal judgment is entitled to such service as amounts to "due process of law" and as is not unreasonable or contrary to the principles of natural justice.<sup>17</sup>

Officers of foreign corporations are not supposed to reside in Virginia, and consequently the Virginia statute makes no provision for serving process on such officers. The provision is for service on (1) any agent of such corporation, or any person declared by the laws of this State to be an agent, and if there be no such agent in the county or corporation in which the case is commenced, then (2) the process is to be served by publication. Nearly all the States, including Virginia, require non-resident corporations to designate some person in the State to represent the corporation, upon whom service may be made.<sup>18</sup> The process may be served, as in case of other defendants, either by an officer, or by a private person who makes affidavit to the return. As in case of domestic corporations, where service is on the agent, the service must be personal and cannot be by delivering to the agent's wife or a member of his family, or by posting, and it must also be served in the county or corporation wherein the agent resides or his place of business is, or the chief office of the company is located, and the return must show this.

Sections 3214 and 3215 of the Code fix the venue of all actions in Virginia. If the process is such as may, under § 3220,

16. *Mutual L. Ins. Co. v. Spratley*, 172 U. S. 602; note, 23 L. R. A. 490.

17. Note to *Pinney v. Prov. Ins. Co.*, 50 L. R. A. 589, 594; *Mutual L. Ins. Co. v. Spratley*, *supra*; Monographic Note, 85 Am. St. Rep. 905 ff. See particularly 85 Am. St. Rep. 929, citing cases to the effect that service on *any* agent, or even on an employee is sufficient.

18. Code, § 1104. This applies only to companies "doing business in this State," or intending to do business here.

be sent out of the county in which the action is brought, then the process may be served on any agent of the foreign corporation anywhere in the State, provided the service be on the agent in the county or corporation in this State,<sup>19</sup> wherein he resides or his place of business is, or the chief office of the company is located. It has been held under these sections that where an action is brought against a foreign corporation doing business in this State, to recover damages for a wrong in the county where the cause of action arose, the process commencing the action may be sent to the officer of the county or corporation in which the statutory agent of such foreign corporation resides, and that service upon such agent there would have the same effect in bringing such foreign corporation into court as if it were a home corporation and the statutory agent were its chief officer residing there.<sup>20</sup> As a necessary corollary of this holding, it was in effect also held, *obiter*, that a foreign corporation may be sued at the place of residence of its statutory agent, and a personal judgment rendered against it wherever, if it had been a domestic corporation, suit might have been brought where the president or chief officer resided. This accords with what had been previously held that "where none of the grounds of jurisdiction enumerated in §§ 3214 and 3215 exist, an action against a foreign corporation must be brought where the statutory agent of the corporation resides. It cannot be brought in another county or city and have process sent to the county or city in which such statutory agent resides."<sup>21</sup> If no agent of the corporation be found in the county or corporation in which the action is commenced, the process may be served by order of publication, but the statute does not undertake to say what is the effect of such order of publication. If it is a proceeding *in rem*, the order of publication is a valid mode of giving notice, but it must not be supposed that a personal judgment can be taken against a foreign corporation on an order of publication. If the proceeding *is in rem*, or *quasi in rem*, the property of the foreign corporation may be attached, and the judgment of the domestic State

19. *Dillard v. Cent. Va. I. Co.*, 82 Va. 734, 1 S. E. 124.

20. *Carr v. Bates*, 108 Va. 371, 61 S. E. 754.

21. *Deatrick v. State Ins. Co.*, 107 Va. 602, 59 S. E. 489.

will be valid to the extent of the property attached, but no further. The owner of property is supposed to be in possession of it, and when the property is seized he is presumed to have notice of that fact, either personally or through the medium of the agent or servant in possession. The proceeding, however, must be *in rem*. A foreign corporation by doing business in the State submits to the jurisdiction of the State at least by implication, and agrees to be bound by such laws of the domestic State as are not unreasonable or in contravention of natural justice. It does not surrender its right to "due process of law." There cannot be a personal judgment against a foreign corporation which does not submit to the jurisdiction of the court except upon personal service of process or its equivalent, that is, service on some agent or officer of the corporation in the State in which the action is brought. In the absence of such service or submission, a personal judgment by default against a foreign corporation is a mere nullity. It is void everywhere, and may be collaterally assailed.<sup>22</sup> If a foreign corporation does not do business in the State, the decided weight of authority is that process cannot be served on one of its officers casually in the State, or enticed there. This is the doctrine of the federal courts and of most of the State courts, but it is said that a different rule prevails in Louisiana, Michigan, Minnesota, Nebraska, New York and North Carolina, under the peculiar phraseology of their statutes.<sup>23</sup> If the foreign corporation is not doing business in the State, no personal judgment can be rendered against it either upon (1) service on an officer casually in the State, or (2) upon an order of publication, or (3) service on a State officer desig-

22. *Pennoyer v. Neff*, 95 U. S. 714; *Brooklyn v. Life Ins. Co.*, 90 U. S. 370; *St. Clair v. Cox*, 106 U. S. 350; *Mutual L. Ins. Co. v. Spratley*, 172 U. S. 602, and numerous other cases; *Lile's Notes on Corp.* 348, 350; *Lafayette Ins. Co. v. French*, 18 How. 404, 407.

23. 13 *Am. & Eng. Encl. of Law* (2nd Ed.) 893, and cases cited; *St. Clair v. Cox*, 106 U. S. 350; *Fitzgerald v. Fitzgerald*, 137 U. S. 98; *Aldneh v. Anchal Coal Co. (Oregon)*, 41 *Am. St. Rep.* 831, and note; *Lile's Notes on Corporations*, 327, 328; *Goldey v. Morning News*, 156 U. S. 518; 19 *Encl. Pl. & Pr.* 682-684 and notes; *Jester v. Balto. Steam Packet Co.*, 131 *N. C.* 54, 42 *S. E.* 447; *Monographic Note*, 85 *Amer. St. Rep.* 905.

nated by statute, or (4) even upon a director resident in the State.<sup>24</sup>

*Publication of Process.*<sup>25</sup> The subject of service of process by publication has already been discussed to some extent hereinbefore, but a few additional observations may be made on the subject. It has already been noticed that the Virginia court recognizes as valid a service by publication against a domestic corporation, without effort to effect service on an officer or agent at defendant's known place of abode, and that upon such service a personal judgment may be rendered. It has also been noticed that no personal judgment can be rendered against a foreign corporation doing business in the state upon a mere publication of process. In proceedings *in rem* the seizure of the *res* brings it into the custody of the court, but does not confer jurisdiction to

24. Note, 50 L. R. A. 577; *Cella Commission Co. v. Bohlinger* (C. C. A.) 8 L. R. A. (N. S.) 537, and note; *Conley v. Mathieson, Alkali Works*, 190 U. S. 406.

25. In Virginia the "order of publication" against a corporation consists in simply publishing the process or summons for four successive weeks in some newspaper published in this State. No posting is required. The summons is in the usual form, and notifies the defendant when and where it is to appear, and, in the most general way, of the nature of the action. This is essentially different from "the order of publication" against natural persons. The subject is discussed at length in 2 Va. Law Reg. 545, 548, and the essential differences between the two are there summarized as follows:

*Against Corporations.* 1. The process in the suit is alone published. 2. This process is in the ordinary form of a summons to commence a suit. 3. The defendant is summoned to a certain rule day. 4. The publication is to be made for four successive weeks in such newspaper printed in this State, as the clerk or court may prescribe. 5. No posting is required—publication in the newspaper "is sufficient."

*Against Individuals.* 1. The order of publication is alone published. 2. This order must give the abbreviated style of the suit and state briefly its object. 3. The defendant is ordered to appear within fifteen days after due publication of the order. 4. The publication is to be made in such newspaper as the court or clerk may prescribe, whether printed or published in this State or not. 5. The order must also be posted at the front door of the courthouse.

render a judgment *in rem*. It is just as essential in such a case that there should be constructive notice as it is in a personal judgment that there should be *personal* notice. There must be some kind of notification. "The manner of the notification is immaterial, but the notification itself is indispensable."<sup>26</sup> In a proceeding *in rem*, as already stated, an order of publication is a valid mode of giving notice to parties interested in the *res*, and so a bill for specific performance of a contract to convey real estate when authorized by statute to be maintained on an order of publication is substantially a proceeding *in rem*, and it is entirely competent for the State to provide by statute that the title to real estate within its limits shall be settled and determined by a suit in which a defendant, being a non-resident, is brought into court by publication.<sup>27</sup> In order to bind a party, however, by an order of publication, the statute must be strictly followed, and mistakes in the names of parties which do not come within the doctrine of *idem sonans* will vitiate the proceedings.<sup>28</sup>

An order of publication in Virginia against a natural person is now required to be posted at the front door of the court-house "on or before the next succeeding rule-day after it is entered,"<sup>29</sup> but no posting is required of an order of publication against a corporation.

#### § 194. Time of service.

Generally, in Virginia, process must be *issued before* the return day, but may be *served on or before* the first day of the rules to which it is returnable. It cannot be served later, and, as we have seen, the process must be returnable within ninety days from its date. Generally, service on Sunday is bad,<sup>30</sup> but

26. *Windsor v. McVeigh*, 93 U. S. 279, 281. There is a line of State cases, however, holding that the judgment is not void, but voidable only and cannot be collaterally assailed. Note, 50 L. R. A. 598.

27. *Clem v. Givens*, 106 Va. 145, 55 S. E. 567.

28. *Steinman v. Jesse*, 108 Va. 567, 62 S. E. 275.

29. Code, § 3231; Acts 1902-3-4, 623.

30. *Lee v. Willis*, 99 Va. 16, 37 S. E. 826; Code, § 2970; 19 Encl. Pl. & Pr. 600.

service on a legal holiday is held good in West Virginia under the phraseology of their statute,<sup>31</sup> and it is expressly provided in Virginia as to all legal holidays that the service shall be good.<sup>32</sup> Special provision is made for service of attachments on Sunday when necessary. There are two cases in which the statute requires the process to be executed at least *ten days* before the return day: (1) It is provided by § 3220 of the Virginia Code that if the process be issued in an action brought under § 3215 (where the cause of action arose) and be executed on the defendant without the county or corporation in which the action is brought, it must be executed at least ten days before the return day; (2) under § 3227, it is provided, with reference to actions against corporations, their trustees, lessees, or receivers, if the process be served on an agent of the corporation, or in any other county or corporation than that in which the action is brought, it shall be served at least ten days before the return day.<sup>33</sup> It is provided by statute in Virginia,<sup>34</sup> and such is believed to be the common law, "where a statute requires a notice to be given or any other act to be done a certain time before any motion or proceeding, there must be that time, exclusive of the day for such motion or proceeding, but the day on which such notice is given or such act is done may be counted as part of the time." If nothing is said about Sunday, it is to be included as one of the days unless the last day falls on Sunday, in which case the act may generally be done on the succeeding day, but if the act may be lawfully done on Sunday and the last day falls on Sunday, then Sunday is not to be excluded.<sup>35</sup> In West Virginia, process to commence an action may issue, be served, and be returnable on the same first Monday of rules.<sup>36</sup>

31. *Horn v. Perry*, 11 W. Va. 694.

32. Code, § 2844a.

33. *Va. F. & M. Ins. Co. v. Vaughan*, 88 Va. 832, 14 S. E. 754; *Staunton B. & L. Co. v. Haden*, 92 Va. 201, 23 S. E. 285.

34. Code, § 5, clause 8.

35. *Bowles v. Brauer*, 89 Va. 466, 16 S. E. 356. See also 49 Am. St. Rep. 217.

36. *Foley v. Ruley*, 43 W. Va. 513, 27 S. E. 268; *Spraggins v. W. Va. Co.*, 35 W. Va. 139, 13 S. E. 45; *Handlan v. Handlan*, 37 W. Va. 486, 16 S. E. 597.

**§ 195. Return of process.**

A return is a brief official statement by an officer endorsed on the process, stating what he has done in obedience to the writ, or why he has done nothing. It must be complete in itself, and cannot be added to by parol evidence. It must show that all of the statutory requirements for the particular return have been complied with.<sup>37</sup> It should be signed by the officer who makes it in order to authenticate it, but it has been held that the signature of the officer to the return is no part of the return.<sup>38</sup> It is provided by Code, § 3227, that in case of corporations, the return shall show on whom, and when, the service was made, and that it was by delivery of a copy to the person referred to in that section in the county or corporation wherein he resides, or wherein his place of business is, or the principal office of his corporation is located. If served by a deputy, he must sign not only his own name but that of his principal also.<sup>39</sup> If a return is made by a deputy in his own name alone, a motion to quash will be sustained.<sup>40</sup> If, however, the defendant appears, and does not object, the defect is waived.<sup>41</sup> If the return is defective in any respect pointed out by § 3227, it is declared that it shall be invalid. Any judgment by default rendered thereon is utterly void, and may be collaterally assailed.<sup>42</sup> Courts, however, are extremely liberal in allowing returns to be amended for the purpose of upholding judgments, and a return has been permitted to be amended years after a judgment by default, in order to validate a judgment that was otherwise invalid, notwithstanding the fact that the officer by whom the return was made had gone out of office,<sup>43</sup> or was dead. The amendment, how-

37. *Rowe v. Hardy*, 97 Va. 674, 34 S. E. 625; Lile's Notes on Corp. 336.

38. *Slingluff v. Collins*, 109 Va. 717, 64 S. E. 1055.

39. Code, § 900. ♦

40. *Mitchell v. Com.*, 89 Va. 826, 17 S. E. 480; Code, § 900.

41. *Harvey v. Skipwith*, 16 Gratt. 410.

42. *Staunton Per. B. & L. Co. v. Haden*, 92 Va. 201, 23 S. E. 285.

43. *Shenandoah R. Co. v. Ashby*, 86 Va. 232, 9 S. E. 1003; *Com. Ass. Co. v. Everhart*, 88 Va. 952, 14 S. E. 836; *Staunton, etc., Co. v. Haden*, 92 Va. 201, 23 S. E. 285; *Goolsby v. St. John*, 25 Gratt. 146.

ever, is not a matter of right, and cannot be made except by leave of court, and is only allowed in furtherance of justice, and in the exercise of an enlightened discretion after notice to the opposite party. It will not be permitted unless the court is satisfied that the amendment is true, and, for the purpose of ascertaining this fact, it may hear evidence, and if upon such hearing the evidence is contradictory, or the court is left in doubt and uncertainty as to what the truth is, it will not permit the amendment.<sup>44</sup> The amendment, however, when made, has the same effect as though it were an original return where the rights of third persons have not intervened, and it does not appear that injustice can result to any one. There is no specific time within which a return must be amended, but after a great lapse of time the amendment should be permitted with caution, and in no case should it be allowed unless the court can see that it is in furtherance of justice.<sup>45</sup> The form of the return is generally very simple; being a brief statement of the time and manner of execution of the process. But some particularity is required in the return on process against a corporation under § 3227 of the Code. The following forms are given for convenient reference:

*Service on Officer:*

Executed on the Norfolk and Western Railway Company, by delivering to F. J. Kimball, the president of the said company, in the city of Roanoke, Va., in which the principal office of the said company is located, a true copy of the within summons, this October 2, 1903.

R. R. WITT,  
Sergeant of Roanoke City.

*Service on Agent:*

Executed on the Norfolk and Western Railway Company, by delivering to S. O. Campbell, an agent of said company, in the county of Rockbridge, in which he resides, a true copy of the within summons, this October 2, 1903, there being no officer or other person in said county on whom said summons could be served.

HENRY JONES.  
Deputy for R. R. Witt, S. R. C.

44. *Park L. & I. Co. v. Lane*, 106 Va. 304, 55 S. E. 690.

45. *Slingluff v. Collins*, *supra*.

Returns made by officers are records that cannot be collaterally assailed.<sup>46</sup> Whether the return of an officer can be directly assailed is a question upon which there is serious conflict of authority. In Virginia it has been held that the return cannot be directly assailed whether the case be at law or in chancery—not even by a plea in abatement before judgment rendered.<sup>47</sup> Whether the weight of authority is with or against the Virginia holding is not material to inquire. The law is settled in Virginia, and the holdings elsewhere may be ascertained by consulting the references given in the margin. In addition to the reasons stated by the Virginia court for its holding, and they are certainly very cogent, it may be noted that the Virginia court discountenances special appearance by parties who have been actually served with process. The object of process is to give notice to defendants of actions against them, and when and where a hearing will be afforded them, and no great amount of grace should be extended to a defendant who admits that he has received notice in ample time to make defence, but claims that there is some technical defect about the manner of service. The court, seeing that no harm has come to such defendant, or can come to him, refuses to entertain an objection upon purely technical grounds.

It has been held in West Virginia that the same conclusive effect is not to be given to returns by private persons as to those made by sworn officers, and that they may be assailed in a direct proceeding for that purpose.<sup>48</sup>

### § 196. Defective service.

If the writ itself is valid and the service *personal*, ordinarily a judgment rendered on defective service is not void, but voidable only, and cannot be collaterally assailed,<sup>49</sup> but a judgment by de-

46. *Rader v. Adamson*, 37 W. Va. 582, 16 S. E. 808; *McClung v. McWhorter*, 47 W. Va. 150, 34 S. E. 470.

47. *Preston v. Kindrick*, 94 Va. 760, 27 S. E. 588, 3 Va. Law Reg. 431, and note; *Ramsburg v. Kline*, 96 Va. 465, 31 S. E. 608, 4 Va. Law Reg. 584, and note; *Sutherland v. Bank*, 111 Va. 515, 69 S. E. 341, 16 Va. Law Reg. 744, and note 949; *Earle v. McVeigh*, 91 U. S. 503; *Lile's Notes on Corp.* 340.

48. *Peck v. Chambers*, 44 W. Va. 270, 28 S. E. 706.

49. Note, 61 Am. St. Rep. 488.

fault on defective service which is *constructive* merely is utterly void, and may be collaterally assailed. For instance, if the service be on an agent of a corporation, the statute provides that the return shall show when and on whom the service was made, and that it was on the agent in the county in which he resides, or his place of business is, or the principal office of the corporation is located; otherwise, that the return shall be invalid.<sup>50</sup> So also where service was required to be ten days before judgment, and the return shows a less time, a judgment by default thereon is void. But where the service is on a defendant *personally*, although the statute requires the officer to return the *manner and time* of service, the failure to state the time and manner of service does not invalidate the judgment *per se*, but must be pleaded in abatement; in other words, the judgment could not be collaterally assailed.<sup>51</sup> But courts are extremely liberal in allowing amendments of returns, as has been pointed out in the last section, and many defects may be thus cured. Defects, however, in the process or the return thereon may be waived. If a defendant appears generally and defends on the merits, or makes or accepts a motion for a continuance, or makes any other motion which does not involve the question of the court's jurisdiction, he thereby waives all defects in the process and the return thereon.<sup>52</sup> Generally, if a party desires to raise a question as to the sufficiency of service of process, he should enter special appearance for this purpose, but in doing so he should be particular not to allow the appearance to assume such shape as will admit the jurisdiction of the court. "An appearance for any other purpose than questioning the jurisdiction of the court because there was no service of process, or the process was defective, or the service thereof was defective, or the action was commenced in the wrong county, or the like, is general and not special, although accompanied by the claim that the appearance is only special. A motion to vacate proceedings in a cause, or to

50. Code, § 3227.

51. *Barksdale v. Neal*, 16 Gratt. 318; 4 Min. Inst. 644; *Staunton Bldg. Co. v. Haden*, 92 Va. 201, 23 S. E. 285.

52. *New River Min. Co. v. Painter*, 100 Va. 507, 42 S. E. 300; *Lane v. Bauserman*, 103 Va. 146, 48 S. E. 857; *N. & W. v. Sutherland*, 105 Va. 545, 54 S. E. 465; *Burlow v. Quarrier*, 16 W. Va. 108.

dismiss or discontinue it, because the plaintiff's pleading does not state a cause of action, is equivalent or analagous to a demurrer, and amounts to a general appearance."<sup>53</sup>

Process may be merely defective, or it may be absolutely void. If merely defective the defendant appears specially, and, as a rule, pleads the defect in abatement, but if the process is not merely defective, but absolutely void, as where the writ in an action brought under § 3215 is improperly sent out of the county for service, or is illegally issued or executed, the objection may be raised not only by a plea in abatement, but by a mere motion, or the court may take notice of it *ex officio*.<sup>54</sup> In *Hilton v. Consumers' Can Co.*, *supra*, there was a motion to abate a foreign attachment which was sustained. The attachment was the only ground of jurisdiction of the court, and there was no personal service of the summons. Thereupon the defendant appeared specially and moved to dismiss the action. It was insisted by the plaintiff that the defence could only be made by a plea in abatement, but the court held: "A motion to dismiss for want of jurisdiction is the proper and only mode of procedure where the defendant has not been summoned, and has not waived the summons. One not before the court cannot be required to plead. A plea in abatement is proper only when the defendant has been summoned, or by appearance has waived the summons. Where the matter relied upon to abate an action is a fact not appearing on the record, or the return of an officer, it must be pleaded in abatement so as to give the other party an opportunity to traverse and try it, but where all the facts relied upon in abatement appear by the record, including the return of the officer, of which the court will take judicial notice without plea, there the action may be dismissed on motion."

53. *Norfolk & O. V. Ry. Co. v. Turnpike Co.*, 111 Va. 131, 68 S. E. 346. See also *Harkness v. Hyde*, 98 U. S. 476; *Hilton v. Consumers' Can Co.*, 103 Va. 255, 48 S. E. 899.

54. *Warren v. Saunders*, 27 Gratt. 259; *Lane v. Bauserman*, *supra*.

## CHAPTER XXIV.

### PLEAS IN BAR.

§ 197. Different kinds of pleas in bar.

    Traverse or denial.

        The common traverse.

        The special traverse.

        The general traverse, or the general issue.

    Confession and avoidance.

§ 198. Number of pleas allowed.

§ 199. Duplicity.

#### § 197. Different kinds of pleas in bar.

A plea in bar is one to the substantial merits of the case, and, as its name imports, purports to bar the rights of the plaintiff to recover at all, as distinguished from other pleas which simply deny the jurisdiction of the court over the parties, or seek to suspend or abate the present action, but do not prevent another action upon the same cause of action in another court, or under other conditions. Pleas in bar are also designated peremptory pleas, pleas to the action, pleas to the merits, pleas to the issue, or issuable pleas.<sup>1</sup> Pleas in bar, or peremptory pleas, as are hereinbefore pointed out, are generally either by way of traverse or denial, or by confession and avoidance;<sup>2</sup> and pleas by way of traverse are either (1) the common traverse, or (2) the special traverse, or (3) the general traverse, or the general issue as the last named is called. The common traverse denies the allegation of the declaration in the language of the allegation traversed,<sup>3</sup> and it is said that not many instances of it occur in pleas.<sup>4</sup> At present it is rarely encountered in pleading, and when it is, it is treated as the general issue. The special traverse, or traverse with an *absque hoc*, or formal traverse, or simple traverse has fallen into "innocuous desuetude," is rarely used, is

1. 4 Min. Inst. 760.

2. *Ante*, § 183.

3. Stephen on Pl., § 145.

4. 4 Min. Inst. 761.

seldom if ever of any value, and is of interest from an historical rather than a practical standpoint.<sup>5</sup> "The general traverse or general issue is a form of traverse which occurs only in the *plea* and at no subsequent stage of the altercation. It denies the allegations of the plaintiff's declaration in general terms and not in the terms of the allegation denied. It appears to have been denominated the *general issue* because it involves the *whole declaration*, or at least the main substance of it, and is more comprehensive than the issue tendered by the common traverse."<sup>6</sup> The general issue in each of the different common-law actions, and what is provable under each has been hereinbefore set forth in treating these actions. All pleas in bar which are not traverses are designated *special pleas*, and whenever it is said that a fact must or may be specially pleaded, it is simply meant that the defence relied on must or may be made by a plea in which the facts constituting the defence are specifically set forth as distinguished from pleading the general issue and proving the facts under that plea. In other words, if any plea in bar is not a traverse, or denial, then it is a special plea, and the defendant is said to plead specially. Not every defence, however, which is sufficient to defeat the plaintiff's claim can be pleaded specially. If the defence amounts to the general issue, it is required to be so pleaded. That is, the general issue is to be pleaded, but there are many facts which do not amount to the general issue, but are provable under the general issue. The latter only are allowed to be specially pleaded. The distinction between the two is thus drawn by Judge Parker, who says:<sup>7</sup> "I know of no rule which inhibits a party from pleading specially what he might give in evidence under the general issue, unless the matter pleaded amounts to the general issue, that is to say, denies the allegation which the plaintiff is bound to prove, but where the cause of action is avoided by a matter *ex post facto*, it *may always be* specially pleaded, whether it could be given in evidence under the general issue or not." If, then, a plea denies some fact which the plaintiff is obliged to prove in order to maintain

5. Stephen on Pl., § 156 ff. A modern instance of its use may be seen in *Townsend v. N. Ry. & L. Co.*, 105 Va. 22, 52 S. E. 970.

6. 4 Min. Inst. 761.

7. *Maggort v. Hansbarger*, 8 Leigh 532.

his action, it amounts to the general issue and must be so pleaded. For example, if a plaintiff sues for trespass upon his garden and carrying away his vegetables, and the defendant pleads specially that the plaintiff had no garden, this plea would be bad, because it is a necessary part of the plaintiff's case to prove that he had a garden, and that the defendant trespassed upon it and if he failed to prove it, he could not recover. In such case, the defendant is not permitted to plead the above fact specially, but is required to plead the general issue of not guilty. The test in all cases is, would the plaintiff be obliged to prove the fact in order to maintain his action. The distinction between what amounts to the general issue, and what is provable under the general issue, is further drawn by Moncure, Judge, as follows:<sup>8</sup> "A plea amounts to the general issue when it traverses matter which the plaintiff avers, or must prove to sustain his action, whether such traverse be direct or argumentative. \* \* \* The plaintiff must prove the facts to sustain his action, and a plea traversing any of them or averring facts inconsistent therewith must therefore amount to the general issue. \* \* \* Matter which amounts to the general issue cannot be specially pleaded. \* \* \* All matters of defence which give color of action to the plaintiff may be specially pleaded, and all matters of defence which do not give color of action amount to the general issue and must be given in evidence under it."<sup>9</sup> Commenting upon the above statements of Judge Moncure, Professor Lile says: "The test here laid down makes the application of the rule comparatively simple. Every defence which is by way of confession and avoidance, or gives color to the plaintiff's action, may be specially pleaded; but if it gives no such color, and denies by anticipation what the plaintiff must affirmatively prove, then it may not be specially pleaded, but must be set up under the general issue."<sup>10</sup> Notwithstanding the well-settled rule stated above, however, if the defendant should plead a matter specially which amounts to the general issue, and the plaintiff does not object to it but takes issue on it, or if he ob-

8. *B. & O. R. Co. v. Polly*, 14 Gratt. 447, 453.

9. 1 Chitty Pl. 526, 530.

10. 4 Va. Law Reg. 772.

jects on that ground but his objection is overruled it is no ground for reversal, but the defendant will probably be limited to the defence set up by his special plea.<sup>11</sup> If a defendant, therefore, should plead a matter amounting to the general issue in a special plea, it might be to the interest of the plaintiff to take issue on it, rather than object to it, so as to narrow the line of the defence of the defendant, but of course this would be unavailing if he pleaded that matter specially and *also* the general issue. It has been hereinbefore pointed out that the general issues in debt on simple contract, assumpsit, and trespass on the case,<sup>12</sup> are very comprehensive, and under them any defence may be made with a few exceptions hereinbefore noted. The defendant, however, is not obliged to make these defences under these broad general issues but may plead most of them specially. Whether he shall be allowed to plead specially a matter provable under the general issue, and how many special pleas he will be permitted to file, lies very largely in the discretion of the trial court, whose action ordinarily will not be reversed unless plainly erroneous. While the trial court should not permit such a multiplicity of pleas as would tend to confuse the jury, and while there are expressions in some of the cases indicating that special pleas are still not to be favored, still, as pointed out by Phlegar, Judge, the plaintiff is usually benefited rather than injured by special pleas, because they give full and specific notice of the real defence upon which the defendant intends to rely; and hence, unless some improper advantage is sought by a defendant, or is likely to be obtained by him by reason of pleading specially, such pleas should be favored.<sup>13</sup> The reason of the rule requiring matters amounting to the general issue to be so pleaded is said to be to prevent *prolixity* in pleading, and furthermore, as a general rule, such a plea will be either *argumentative* or will *want color*.<sup>14</sup> There is no limit to the variety of special pleas, but a few of those in most common use are treated separately in the next succeeding chapters. No pleas in bar are required

11. Norfolk & W. R. Co. v. Mundy, 110 Va. 422, 66 S. E. 61.

12. *Ante*, §§ 73, 93, 152.

13. Ches. & O. R. Co. v. Rison, 99 Va. 18, 33, 37 S. E. 320; 6 Va. L. Reg., valuable note at p. 679.

14. Stephen on Pl., § 247.

to be sworn to in Virginia, except those specially designated in some statutes.<sup>15</sup>

### § 198. Number of pleas allowed.

At common law in order to secure singleness of issue, the defendant was not allowed to plead but one matter of law or fact. He might demur or plead, but he could not do both. The plaintiff, however, was allowed to put several counts in his declaration, either upon different claims or varying statements of the same claim. To each of these several counts, or to distinct parts of the same count, the defendant could make one answer of law or of fact. This rule of the common law was modified in England by statute,<sup>16</sup> providing that "it shall be lawful for any defendant \* \* \* in any action or suit, \* \* \* in any court of record *with leave of the court* to plead as many several matters thereto as he shall think necessary." By a corresponding statute in Virginia, it is provided that "the defendant in any action may plead as many several matters, whether of law or fact, as he may think necessary, and he may file pleas in bar at the same time with pleas in abatement, or within a reasonable time thereafter, but issues on the pleas in abatement shall be tried first."<sup>17</sup> It is also provided by statute in Virginia that "it shall not be necessary to state in any second or other plea that it is pleaded by leave of the court, or according to the form of the statute, or to that effect."<sup>18</sup> It is pointed out by Professor Graves in his Notes on Pleading,<sup>19</sup> that the English and Virginia statutes differ in three particulars: (1) No leave of court is required in Virginia; (2) the Virginia statute extends to pleas in abatement as well as pleas in bar, and several dilatory pleas may be pleaded at the same time, and dilatory pleas and pleas in bar may be pleaded together; and (3) that the defendant in Virginia is permitted to both demur and plead to the declaration. It may be further noted that the English courts, under the rule requir-

15. Section 183, *ante*, points out the pleas which in Virginia are required to be sworn to.

16. 4 Ann. Ch. 16, § 4.

17. Code, § 3264.

18. Code, § 3270.

19. 1st Ed., Graves' Notes on Pl. 104.

ing leave of the court to file more than one plea, refused to allow inconsistent pleas to be filed, "but with us inconsistent pleas are allowable, and in trying one, the court cannot look to the existence of the other, for if it did they would neutralize each other, hence we look upon each branch of the pleading as totally separate and distinct from every other, and the defences under one cannot be straitened or curtailed by the existence of the other. Were it otherwise, the liberty of pleading several, and even contradictory, pleas would be defeated."<sup>20</sup> It will be observed that the Virginia statute, like the English statute, uses the word "plead" in a technical sense, and hence it applies only to the defendant's answer to the plaintiff's declaration, and does not apply to the replication, rejoinder, or any subsequent pleading. As to the replication, rejoinder, and all subsequent pleadings, the common-law rule still prevails in Virginia, and the pleader can make but one answer, whether of law or fact, to the antecedent pleading. He may demur or he may answer in fact, but he cannot do both.<sup>21</sup>

In West Virginia it is provided that "the defendant in any action or suit may plead as many several matters, whether of law or fact, as he shall think necessary, except that if he plead the plea of *non est factum*, he shall not without leave of the court be permitted to plead any other pleas inconsistent therewith. To any special plea pleaded by a defendant, the plaintiff may plead as many special replications as he may deem necessary."<sup>22</sup> This statute differs from the Virginia statute in two important particulars: (1) if the defendant pleads *non est factum*, it is necessary for him to obtain the leave of the court in order to be permitted to plead any other plea inconsistent therewith; (2) the plaintiff is permitted to make several replications to a defendant's plea, which cannot be done in Virginia, but this statute extends no further than the replication, and even though several replications of fact are permitted, the plaintiff is not permitted

20. Tucker, Judge, in *McNutt v. Young*, 8 Leigh 542, 553.

21. *Ches. & O. R. Co. v. Amer. Exch. Bank*, 92 Va. 495, 23 S. E. 935, 1 Va. Law Reg. 825, 836, note by Judge Burks.

22. W. Va. Code, 1906, § 3840.

both to demur and reply.<sup>23</sup> While only one replication is allowed at common law and in Virginia, if more than one is in fact filed, the defendant should move to strike out all but one and to require the plaintiff to elect on which replication he will rely, but if no such motion is made, no objection is raised, and issue is taken on each of the replications, it is presumed that the objection cannot be made in the appellate court for the first time, and that the defendant will be deemed to have waived the rule of law in his favor.<sup>24</sup>

### § 199. Duplicity.

It is a rule of pleading that pleadings should not be double. As applied to pleas, it means that the defendant should not be permitted to set up more than one defence in a *single plea*. He is permitted in Virginia to plead as many matters of law or fact as he chooses, but this does not mean that these defences can be set up in the same plea. Each defence must be set up by a separate and distinct plea, and if more than one defence is set up in a single plea, the plea is said to be double, and is objectionable on that account. The objection, however, is one of form and not of substance, and it is said could be taken advantage of at common law by special demurrer only,<sup>25</sup> and could not be taken advantage of by a general demurrer,<sup>26</sup> but special demurrers have been abolished in Virginia and West Virginia except as to pleas in abatement;<sup>27</sup> and there has been some dis-

23. *Camden Clay Co. v. New Martinsville*, — W. Va. —, 68 S. E. 118.

24. See *Stimmell v. Benthall*, 108 Va 141, 60 S. E. 765.

25. *Grayson v. Buchanan*, 88 Va. 251, 13 S. E. 457; *Sweeney v. Baker*, 13 W. Va. 158.

26. 5 Rob. Pr. 305; *Cunningham v. Smith*, 10 Gratt. 255.

27. Section 3272 of the Code is as follows: "On a demurrer (unless it be to a plea in abatement), the court shall not regard any defect or imperfection in the declaration or pleadings, whether it has been heretofore deemed mispleading or insufficient pleading or not, unless there be omitted something so essential to the action or defence, that judgment, according to law and the very right of the cause, cannot be given. No demurrer shall be sustained, because of the omission in any pleading of the words, 'this he is ready

cussion as to whether the objection could be raised at all in any other way. In Virginia it has been held that duplicity in a declaration is a defect of form only, and cannot be taken advantage of by a general demurrer;<sup>28</sup> and it is doubtful if the vice can be reached at all. If it can be, it is probably by a motion to compel the plaintiff to elect on which cause of action he will proceed. As to pleadings subsequent to the declaration, it has been held that "special demurrers having been abolished, the motion to reject or strike out can be made to obviate objections to pleadings, such as duplicity, and the like, which cannot now be raised by a demurrer."<sup>29</sup> And the same rule probably prevails elsewhere.<sup>30</sup> In West Virginia, it is stated in the syllabus of a case<sup>31</sup> that duplicity in a plea is no longer ground of demurrer or *objection* to it. It is doubtful if the opinion itself or the authorities cited go quite so far, but, as the syllabus is made by the court, it is of as much authority as the opinion itself.<sup>32</sup>

It must be remarked, however, that no matters, however multifarious, will operate to make a pleading double that together constitute but one connected proposition or entire point.<sup>33</sup>

to verify,' or 'this he is ready to verify by the record,' or, 'as appears by the record'; but the opposite party may be excused from replying, demurring, or otherwise answering to any pleading, which ought to have, but has not, such words therein, until they be inserted." W. Va. Code, 1906, § 3849.

28. N. & W. Ry. Co. v. Ampey, 93 Va. 121, 25 S. E. 226; So. Ry. Co. v. Blanford, 105 Va. 373, 54 S. E. 1; So. Ry. Co. v. Simmons, 105 Va. 651, 55 S. E. 459.

29. Ches. & O. R. Co. v. Rison, 99 Va. 18, 28, 37 S. E. 320; note, 1 Va. Law Reg. 836.

30. 18 Encl. Pl. & Pr. 651, 2.

31. Poling v. Maddox, 41 W. Va. 779, 24 S. E. 999.

32. It is provided both by the constitution of West Virginia (art. VIII, § 5) and by statute (Code, W. Va., § 4059) that the court shall prepare "a syllabus of the points adjudicated in each case." It is also provided in W. Va. that no decision of the court of appeals shall be binding on the inferior court, except in the particular case decided, unless it is concurred in by at least three judges of that court. Constitution, art. VIII, § 4; Code, § 4058.

33. As illustrating this rule, see Va. F. & M. Ins. Co. v. Saunders, 86 Va. 969, 11 S. E. 794; Reese v. Bates, 94 Va. 321, 26 S. E. 865; Deatrick v. Ins. Co., 107 Va. 602, 59 S. E. 489; and as illustra-

Although the objection for duplicity may be raised in Virginia and elsewhere than West Virginia, in the manner hereinbefore pointed out, yet it must be raised, if at all, in the trial court, and cannot be raised for the first time in the appellate court. If a replication or other subsequent pleading sets up two or more separate and distinct replies, but the defendant without objection takes issue thereon, and the court renders judgment on such issues, the objection on the ground of duplicity will be deemed to have been waived.<sup>34</sup>

tive of a plea in abatement held to be bad for duplicity, see *Guarantee Co. v. Bank*, 95 Va. 480, 28 S. E. 909.

**34.** *Stimmell v. Benthal*, 108 Va. 141, 60 S. E. 765; 18 Encl. Pl. & Pr. 651, 652.

## CHAPTER XXV.

### DEMURRER.

- § 200. Introductory.
- § 201. Definition—When not applicable—Time of filing.
- § 202. Forms of demurrer—General—Special—Applicability.
- § 203. Election to demur or plead.
- § 204. Who may demur.
- § 205. Causes of demurrer.
- § 206. Effect of demurrer.
- § 207. Effect of failure to demur—Pleading over.
- § 208. Judgment on demurrer.

#### § 200. Introductory.

Pleading is an orderly statement in a judicial proceeding of some ground of action or defence. The answer to every declaration or subsequent pleading must, with a few well established exceptions, assume one or the other of three forms. It must be either (1) a denial of the facts alleged, which is done by a pleading called a *traverse*, or (2) an admission of the truth of such facts, and the assertion of some new fact or facts which excuses or justifies the facts adversely alleged, which is done by a pleading by way of *confession and avoidance*, or (3) an admission of the facts adversely alleged accompanied by a statement that they do not state any legal ground of action or defence (as the case may be), which is done by a pleading called a *demurrer*. So, likewise, if any pleading fails to measure up to one or the other of these requirements, that is, is neither a traverse, confession and avoidance, nor demurrer, it is bad in law, and the means of determining whether it does so measure up or not is by a demurrer.

#### § 201. Definition—When not applicable—Time of filing.

A demurrer is a *pleading* by which the pleader objects to proceeding further because no case *in law* has been stated on the other side, and of this he demands the judgment of the court before he will proceed further. It lies only for a matter al-

ready apparent on the face of the pleadings, or which is made so to appear by *oyer*. It presents a question of law only, to be decided by the court. It in effect says: Admit all you say to be true, the law affords you no relief in the form sought. The word demurrer is derived from the Latin *demorari* and the French *demorer*, signifying a delay or halt in the progress of the action until the court has decided whether the pleading to which it is interposed states a case. It is the pleading by which the legal sufficiency of every other pleading is tested. It is not a mere statement, as it is sometimes called, nor is it a *plea*, in a technical sense, but it is a *pleading* raising a question of law for the decision of the court; and, being a pleading, is *per se* a part of the record, needing no bill of exception to make it such. The word demurrer when used alone always signifies an objection to a *pleading* as distinguished from a demurrer to the evidence. A demurrer is addressed to matters appearing on the face of the *pleadings*. In aid of it, the court cannot look to facts appearing in other parts of the record.<sup>1</sup> Objections to defects appearing in other parts of the record which are not pleadings, such as a failure to file an affidavit with a plea where such an affidavit is required, or a bill of particulars, or the filing of an insufficient account with a declaration, cannot be raised by demurrer. Neither the affidavit filed with a plea (as under Code, § 3299), nor a bill of particulars filed with a declaration, is any part of the pleadings, and hence defects therein cannot be reached by demurrer. The point should be raised in such cases by objecting to the reception of the plea, or a motion to strike it out, if already in, for the want of a proper affidavit; or an objection to the sufficiency of the bill of particulars or account, and in either case, if the objection is overruled, by filing a bill of exception.<sup>2</sup>

No time is fixed at which a general demurrer must be filed. It must, of course, be filed before final judgment by default, or

1. *Brooks v. Metropolitan Life Ins. Co.*, 70 N. J. Law 36, 56 Atl. 168.

2. *Lewis v. Hicks*, 96 Va. 91, 30 S. E. 466; *Spencer v. Field*, 97 Va. 41, 33 S. E. 380; *Geo. Campbell Co. v. Angus*, 91 Va. 438, 22 S. E. 167; *Columbia Accident Ass'n v. Rockey*, 93 Va. 678, 25 S. E. 1009; *Chestnut v. Chestnut*, 104 Va. 539, 52 S. E. 348; *Abell v. Penn. Ins. Co.*, 18 W. Va. 400; *Sheppard v. Peabody*, 21 W. Va. 368.

before the case is heard and decided on the issues of fact. It would come too late after verdict. But it is provided by statute in Virginia<sup>3</sup> that "the defendant in any action may plead as many several matters, whether of law or fact, as he shall think necessary," thereby putting issues of law (which are raised by demurrer) on the same footing as issues of fact, and permitting demurrers to be filed whenever a plea in bar might be. Logically, it would seem that issues of law should be first made up and decided, but under this statute the demurrer of a defendant to a plaintiff's declaration and pleas in bar are put on the same footing as to the time of filing. Whether, after the issues have been made up, a defendant should, at a subsequent term, be permitted to demur or to add additional pleas would seem to rest in the sound discretion of the trial court. In an early case, the defendant, *three years* after he had pleaded, was permitted to withdraw his plea and demur to the declaration and tender a new plea, and the case was decided in his favor on the demurrer.<sup>4</sup> In practice, the defendant generally first demurs to the declaration and, if his demurrer is overruled, he is allowed, as of course, to plead to the merits,<sup>5</sup> or else files his demurrer and pleas in bar at the same time, and, if his demurrer is overruled, simply stands upon his pleas. The latter practice is commended.

### § 202. Forms of demurrer—General—Special—Applicability.

In the absence of statute no particular form is necessary. At common law defects of form as well as of substance could be relied on under a general demurrer assigning no cause except in the single instance of duplicity, which had to be mentioned specially. But by Statutes 27 Eliz., and 4 and 5 Anne, the judges were required to give judgment "according to the *very right* of the case and matter of law" without regarding any defect, imperfection or want of form, except those which the party demurring should "specially and particularly set down and, express in connection with his demurrer as causes of the same."<sup>6</sup>

3. Code, § 3264.

4. *Miller v. McLuer*, Gilmer 338.

5. 1 Rob. Pr. (old) 286.

6. *Martin on Civil Procedure*, 196, 197; 4 Min. Inst. 890, 891; *Stephen Pl.*, § 139; *Cunningham v. Smith*, 10 Gratt. 257.

A similar statute was enacted in Virginia at an early day<sup>7</sup> and so the law continued till 1849 when the revisors proposed and the legislature adopted what is now § 327<sup>2</sup> of the Code, declaring that "on a demurrer (unless it be to a plea in abatement) the court shall not regard any defect or imperfection in the declaration or pleadings whether it has been heretofore deemed misleading or insufficient pleading, or not, unless there be omitted something so essential to the action or defence that judgment, according to law and the very right of the case, cannot be given \* \* \* ." Under the English statutes and the earlier Virginia statute, mere formal defects could be taken advantage of on demurrer if they were "particularly set down and expressed," but the avowed object of the statute of 1849 was to abolish special demurrers in all cases except in the single case of pleas in abatement.<sup>8</sup>

The provisions of the English statute led to the division of demurrers into *general* and *special*, the former applicable to matters of substance, and the latter to matters of form. The latter were designated *special* because the grounds thereof were required to be "specially" set down, while the former were called *general* because they excepted to the sufficiency of the antecedent pleading in general terms without specifically pointing out the nature of the objection intended to be relied on.<sup>9</sup> Now, in Virginia, defects of form, except in pleas in abatement (which term includes all dilatory pleas), are no longer available as objections to pleadings.<sup>10</sup> Formerly, general demurrers were frequently pleaded orally, and the clerk noted their filing and the ruling of the court thereon in the order book, and they became a part of the record. No grounds were stated except in the oral argument. Now it is provided by statute that "the form of a demurrer or joinder in demurrer may be as follows: 'The defendant (or plaintiff) says that the declaration (or other pleading) is not (or is) sufficient in law:' provided, that all demurrers shall be in writing, except in criminal cases, and in

7. 1 Rev. Code 211, §§ 101, 103.

8. Report of Revisors, 849.

9. Stephen Pl., § 139.

10. See Code, §§ 3243, 3244, 3245, 3246, 3247, 3272.

civil cases the court, on motion of any party thereto, shall, or, of its own motion, may require the grounds of demurrer relied on to be stated specifically in the demurrer; and no grounds shall be considered other than those so stated, but either party may amend his demurrer by stating additional grounds, or otherwise, at any time before the trial."<sup>11</sup>

It is to be observed that the statute requires that all demurrers in civil cases *shall be in writing*, and the grounds thereof shall or may be required to be specifically stated in the demurrer. But long before this statute was enacted it had been held that the mere statement of the grounds of the demurrer did not make it a *special* demurrer. If it were for a matter of substance it was a general demurrer although the grounds were specifically enumerated, and if for matter of form it was a special demurrer.<sup>12</sup>

"A demurrer to an entire declaration, whether general or special, raises the question whether there be, or be not, matter in the declaration sufficient to maintain the action. If there be several counts, and one is good, that is sufficient to maintain the action, and the demurrer must be overruled. If there be a single count containing several breaches, any one of which is well assigned, that is sufficient to maintain the action. If there be a single count containing a demand of several matters which in their nature are divisible, any one of which is well claimed, that is sufficient. Whether the objection be that one of several counts, or that one of several breaches, or that part of plaintiff's demand which is of a distinct and divisible nature, is bad, the demurrer should be to *that count*, or to *that breach*, or to *that part of the demand*, as the case may be, which is bad."<sup>13</sup>

It will be seen later<sup>14</sup> that certain causes of action, for exam-

11. Code, § 3271.

12. *Miller v. McLuer*, Gilmer 338; *Henderson v. Stringer*, 6 Gratt. 130; *Portsmouth R. Co. v. Oliver R. Co.*, 109 Va. 513, 64 S. E. 56.

13. *Henderson v. Stringer*, 6 Gratt. 130; *Va. N. C. Wheel Co. v. Harris*, 103 Va. 708, 49 S. E. 991; *Portsmouth R. Co. v. Oliver R. Co.*, 109 Va. 513, 64 S. E. 56; *Smith v. Kanawha County Court*, 33 W. Va. 713, 11 S. E. 1; *City of Wheeling v. Black*, 25 W. Va. 266, and numerous other cases in Va. and W. Va. cited in 4 Digest Va. and W. Va. (West Pub. Co.) 7324-7327.

14. *Post*, § 205.

ple, tort and contract, cannot be joined in the same action. Here each count of the declaration may be perfect in itself and yet the pleader is attempting to do that which is forbidden. Where this is the nature of the objection, the demurrer should be to the declaration as a whole, as the objection is no more to one count than another. The objection is to the misjoinder of causes of action, and this can only be discovered by looking at the different counts at the same time.<sup>15</sup> The proper form of demurring, therefore, to a declaration containing more than one count, or assigning more than one breach, is to demur to the declaration as a whole and to each count thereof, or to each breach assigned, for the demurrer to the declaration as a whole will reach the misjoinder, if any, of causes of action, and the demurrer to each count or to each breach will throw out those that are defective in substance. As to what the judgment should be and the effect thereof, see *post*, § 208.

### § 203. Election to demur or plead.

At common law a defendant could make but one answer of either law or fact to the plaintiff's declaration, and at subsequent stages of the pleading neither party could make but one reply to the antecedent pleading, and that might be of either law or fact, but not both. Hence it became necessary for the pleader, in every instance, to determine whether that answer should be one of law (demurrer) or of fact. The considerations which would determine the action of the pleader are set forth in Stephen on Pleading in § 143,<sup>16</sup> and they need not be here repeated, as nearly or quite all of the objections to pleadings will be cured by pleading over without demurrer, by verdict, or by the statute of jeofails.<sup>17</sup> In Virginia a defendant may *plead* as many several matters of law or fact as he deems necessary<sup>18</sup> and if he demurs and his demurrer is overruled he may still plead to is-

15. *Henderson v. Stringer*, 6 Gratt. 130; *Gary v. Abingdon Pub Co.*, 94 Va. 775, 27 S. E. 595; 1 Rob. Pr. (old) 284.

16. Andrews, 2nd edition.

17. See *post*, § 207.

18. Code, § 3264. In W. Va. there may not only be several pleas, but several replications to special pleas. Code (1906), § 3840.

sue,<sup>19</sup> so that at this stage of the pleading he is not put to any election, but this applies only to the defendant's first pleading to the plaintiff's declaration. At all subsequent stages the common-law rule prevails.<sup>20</sup> It then becomes necessary for the pleader to determine what course he will pursue. A practice has grown up in Virginia, which has been sanctioned by the Court of Appeals, of neither demurring nor replying to the pleading, but of objecting to the pleading when offered, or, if already in, of moving to strike it out, for just such causes as might have been assigned on demurrer. If the motion is refused a bill of exception is filed and the ruling of the trial court may be reviewed on a writ of error, whereas if a demurrer had been filed and overruled the pleader would have been compelled to withdraw his demurrer and ask liberty to reply, and the ruling on the demurrer could not be reviewed on a writ of error, as the record would show that the demurrer had been withdrawn.

The proceeding by motion to reject when offered, or to strike out a pleading which has already been received, thus possesses a marked advantage over a demurrer.<sup>21</sup> In practice, when a demurrer is filed there is full argument before the trial judge and he actually decides on the sufficiency of the demurrer, and if he overrules it, and the demurrant is unwilling to risk his case on the demurrer but wants a trial on the merits, he is allowed to withdraw his demurrer and reply to the antecedent pleading, and then proceeds with the trial on its merits. The record simply shows that the court intimating an opinion adverse to the demurrant, on his motion, he has liberty to withdraw his demurrer and reply to the antecedent pleading, whereupon he withdraws his demurrer and files such a replication, or rejoinder, etc. It shows nothing of the argument and actual decision of the demurrer. This practice of withdrawing the demurrer and replying in fact has become so firmly established as to be a matter

19. Code, § 3264.

20. *Ches. & O. R. Co. v. Amer. Exch. Bank*, 92 Va. 495, 23 S. E. 935.

21. *Va. F. & M. Ins. Co. v. Buck & Newsom*, 88 Va. 517, 13 S. E. 973; 1 Va. Law Reg. 827, note by Judge Burks; *Ches. & O. R. Co. v. Rison*, 99 Va. 18, 37 S. E. 320.

of right.<sup>22</sup> The record showing the withdrawal of the demurrer, the appellate court, of course, cannot review the action of the trial court in overruling it. The record imports absolute verity and cannot be disputed, hence the demurrer was not passed on, but was withdrawn, for so the record states. Even where the record does not show the withdrawal of the demurrer, but shows the demurrer and the ruling of the trial court thereon, and then a replication, it has been held that the demurrer must be deemed to have been withdrawn.<sup>23</sup>

In West Virginia by statute<sup>24</sup> a plaintiff may reply several matters of fact, but he cannot both demur and reply. If his demurrer to a plea be overruled, leave to withdraw the demurrer will be conceded as of course and an answer in point of fact then allowed. If he both demurs and replies in fact he will be deemed to have withdrawn his demurrer as he had no right both to demur and to reply.<sup>25</sup>

It will be seen later<sup>26</sup> that if a pleading states *no ground of action* or defence at all, the defect, as a general rule, is not cured by taking issue on it, but appearing, as it does, on the face of the record, advantage may be taken of it by a motion in arrest of judgment in the trial court, or on writ of error from the appellate court. This is one of the few instances where no right or advantage is lost by a failure to demur when the pleader might have safely done so.

### § 204. Who may demur.

No person not a party to the action can file a demurrer or any other pleading therein, nor can a *party* demur unless his interests are affected by the pleading demurred to. Independently of statute, therefore, if two persons be joined as defendants and the declaration sets forth a good cause of action against one but

22. *Stanton v. Kensey*, 151 Ill. 301; *Camden Clay Co. v. New Martinsville*, — W. Va. —, 68 S. E. 118.

23. *Ches. & O. R. Co. v. Bank*, 92 Va. 495, 23 S. E. 935; *Camden Clay Co. v. New Martinsville*, — W. Va. —, 68 S. E. 118.

24. W. Va. Code, 1906, § 3840.

25. *Camden Clay Co. v. New Martinsville*, — W. Va. —, 68 S. E. 118.

26. *Post*, § 207.

not against the other, the latter only should demur, and if a joint demurrer is filed by both it should be overruled. If several defendants be joined in a declaration showing several causes of action against each but no *joint* cause of action against all, the demurrer may be joint, or several.<sup>27</sup> For a misjoinder of plaintiffs there may be a joint demurrer by all the defendants.<sup>28</sup> Misjoinder of either plaintiffs or defendants, however, is not a ground of demurrer in Virginia, but the proper remedy is a motion to abate as to the parties improperly joined.<sup>29</sup> The statute provides that wherever it shall appear "by the pleadings or otherwise, that there has been a misjoinder of parties, plaintiff or defendant, the court may order the action or suit to abate as to any party improperly joined, and to proceed by or against the others as if such misjoinder had not been made, and the court may make such provision as to costs and continuances as may be just."<sup>30</sup> The word "may" in the clause "the court *may* order the action or suit to abate" means "shall."<sup>31</sup>

### § 205. Causes of demurrer.

At common law all pleadings had to be good in form as well as substance. The sufficiency in substance was determined solely by the substantive law, while sufficiency in form was determined by the rules and principles of pleading. Now objections of form, except as to dilatory pleas which are not favored, are seldom, if at all, available. It is provided by statute in Virginia that "no action shall abate for want of form, where the declaration sets forth sufficient matter of substance for the court to proceed upon the merits of the cause."<sup>32</sup> The distinction between what is mere matter of *form* and what is *substance* has been pointed out as follows: "If the *matter* pleaded be in itself insufficient without reference to the *manner* of pleading it, the defect is *substantial*; but if the only fault is in the form of al-

27. See *Langhorne v. Richmond, etc., Ry. Co.*, 91 Va. 369, 22 S. E. 159.

28. 6 Encl. Pl. & Pr. 310-313, and cases cited.

29. *Riverside Cotton Mills v. Lanier*, 102 Va. 148, 45 S. E. 875.

30. Code (1904), § 3258a; Acts 1893-'4, p. 489; Acts 1895-'6, p. 543.

31. *Lee v. Mut. Reserve Fund Ass'n*, 97 Va. 160, 33 S. E. 556.

32. Code (1904), § 3246.

leging it, the defect is but *formal*.”<sup>33</sup> Whether a pleading sets forth a good cause of action or defence is now determined solely by the substantive law.

If the pleading asserts some right protected by the substantive law, and the circumstances which give rise to that right are stated with reasonable certainty, the pleading is good, regardless of its form. If it fails in these particulars it is bad, and the proper mode of testing its sufficiency is by demurrer. The test of the sufficiency of every declaration is, does it state a case, and does it state the facts with sufficient certainty to be understood by the defendant who is to answer it, the jury who are to try the issue, and the court which is to render judgment. The question always is: Assuming the allegations of the declaration to be facts, has any right of the plaintiff, which the substantive law protects, been violated by the defendant?<sup>34</sup> The same or a similar test applies to all the subsequent pleadings. The causes of demurrer being determined, therefore, by the substantive law, no complete enumeration of them can be given, but some of the most common causes of a general demurrer to a declaration are the following:

1. That the declaration does not allege any duty owing by the defendant to the plaintiff which has been violated by the defendant. The declaration should allege such duty, or the facts from which the duty arises, and its breach, and should allege the facts with such reasonable certainty and particularity as will apprise the defendant of the nature of the demand made upon him, so that he may intelligently concert his defence. A statement of a cause in general terms, or general averments of negligence on the part of the defendant which fall short of these requirements, is not sufficient.<sup>35</sup>

2. That a declaration or count in an action of tort for the negligence of the defendant shows on its face such contribu-

33. Gould Pl., Ch. IX, § 18.

34. Lane Bros. v. Seakford, 106 Va. 93, 55 S. E. 556, and cases cited; Blackwood Coal Co. v. James, 107 Va. 656, 60 S. E. 90.

35. Hortenstein v. Va.-Car. R. Co., 102 Va. 914, 47 S. E. 996; Norfolk & W. R. Co. v. Gee, 104 Va. 806, 52 S. E. 572; Lynch. Traction Co. v. Guill, 107 Va. 86, 57 S. E. 644.

tory negligence on the part of the plaintiff as bars recovery.<sup>36</sup> In Virginia, and in nearly all of the other states, a plaintiff is not required to negative contributory negligence in his declaration, though he is in a few states.<sup>37</sup> When not so required, of course, the absence of such a negative averment is no ground of demurrer.

3. That the plaintiff has mistaken his form of action, as for instance he has sued in trespass when he should have sued in case, or in covenant when he should have sued in *assumpsit*.<sup>38</sup>

4. That there is a misjoinder of causes of action, as where some counts are in tort and others are in contract. If no amendment is made by striking out some of the counts so as to render the declaration harmonious, the defect is fatal, and the action will be dismissed, but such amendment should be allowed, if asked. In some states the amendment will not be permitted.<sup>39</sup> The rule as to misjoinder, above stated, is otherwise under code practice if the causes of action have a common origin in one transaction, or in transactions connected with the same subject of action.<sup>40</sup>

5. That there is a non-joinder of either plaintiffs or defendants in cases *ex contractu*, when apparent on the face of the declaration.<sup>41</sup>

6. The misjoinder of either plaintiffs or defendants when apparent on the face of the declaration was ground for demurrer at common law, but is no longer so in Virginia; the property remedy being a motion to abate as to the party improperly joined.<sup>42</sup>

7. The want of jurisdiction of the subject matter in the court

36. *Dunn v. Railway Co.*, 78 Va. 645.

37. 5 Encl. Pl. & Pr. 1.

38. *Jordan v. Wyatt*, 4 Gratt. 151; *Wolf v. Violet*, 78 Va. 57.

39. See *post*, § 208; *Gary v. Abingdon Pub. Co.*, 94 Va. 775, 27 S. E. 595; *Penn. R. Co. v. Smith*, 106 Va. 645, 56 S. E. 567; *Dunn v. Penn. R. Co.*, 67 N. J. Law 377, 51 Atl. 465; *Wilkins v. Standard Oil Co. (N. J.)*, 59 Atl. 14; *King and Morris (N. J.)*, 62 Atl. 1006.

40. *Phillips' Code Pl.*, § 199.

41. *Stephen Pl.*, §§ 33, 35.

42. *Code*, § 3958; *Lee v. Mut. Ins. Co.*, 97 Va. 160, 33 S. E. 556; *Riverside Cotton Mills v. Lanier*, 102 Va. 148, 45 S. E. 875.

in which the action is brought may also be raised by demurrer.<sup>43</sup> "By jurisdiction over the subject matter is meant the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers, or in authority especially conferred."<sup>44</sup> Want of jurisdiction of the *subject matter* may even be taken notice of by an appellate court *ex mero motu* for the first time.<sup>45</sup> This is not true, however, of jurisdiction over parties, for while a party can only be sued in certain designated jurisdictions, this provision is made for his benefit, and he may waive it, and will be held to have waived it unless he makes seasonable objection, and, if the court would otherwise have jurisdiction of the subject matter, it may proceed to final judgment.

8. The constitutionality of an act under which an action is brought may likewise be raised by general demurrer.<sup>46</sup> As will be seen later<sup>47</sup> the plaintiff, by instituting his action, in effect, avers the existence of a law conferring a right which he is now seeking to assert, so that the defect impliedly appears on the face of the record. In order, however, to confer jurisdiction on the Court of Appeals on the ground that a constitutional question is involved, it must appear in some way that the constitutionality of the law was called in question and decided by the trial court.<sup>48</sup>

9. In case of slander or libel it must be stated whether the words charged are counted on simply as *insults* under the statute, or as *slandorous* at common law. If it appears that the action is founded on the statute<sup>49</sup> it is therein provided that no demurrer shall preclude a jury from passing thereon, though

43. *Nelson v. Ches. & O. R. Co.*, 88 Va. 971, 14 S. E. 838; *Legum v. Blank* (Md.), 65 Atl. 1071.

44. *Cooper v. Reynolds*, 10 Wall. 308.

45. *South & W. R. Co. v. Com'th*, 104 Va. 314, 51 S. E. 824; *Hanger v. Com.*, 107 Va. 872, 60 S. E. 67.

46. *Adkins v. City of Richmond*, 98 Va. 91, 34 S. E. 967.

47. *Post*, § 206.

48. *Hulvey v. Roberts*, 106 Va. 189, 55 S. E. 585.

49. Code, § 2897.

this provision may be waived.<sup>50</sup> If it does not so appear, then the action is for slander or libel at common law, and a demurrer lies as at common law.<sup>51</sup>

10. If a sealed instrument is declared on and it is not properly described in the declaration the defendant may wait until it is offered in evidence and object to its reception on account of the variance, or he may crave oyer of it, which makes it a part of the declaration as fully as if copied into it, and then demur on account of the variance. In this way the discrepancy between the instrument as it really is and as it is described in the declaration is made to appear.<sup>52</sup>

Objection to a deed void on its face may be taken in the same manner. But if the action is founded on an unsealed instrument not made a part of the record, it cannot be looked to in order to disclose a variance, on a demurrer to the declaration.<sup>53</sup> It may be well, in this connection, to recollect that for a variance between a declaration and the writ the remedy is by craving oyer of the writ and pleading the variance in abatement.<sup>54</sup> Amendments are freely allowed in all the cases mentioned in this paragraph, and the objections are, therefore, of little practical use, except to secure an accurate record that may be pleaded in bar of another action for the same cause.

A party may plead *nul tiel* record, and if, upon inspection by the court, the record is not such as is described in the pleadings, he will have judgment; or he may crave *oyer* of the record, which makes the record a part of the pleadings in that case, and when it is spread upon the record by *oyer*, if the party admits that the record of which *oyer* is given him is a true record and relies upon the fact that it does not support the pleadings, he should not deny that there is such a record by plea, but should demur for the variance. If he wishes to deny the verity of the record of which *oyer* is given, he should then plead *nul tiel* record after *oyer*.<sup>55</sup>

50. *Brown v. Norfolk & W. R. Co.*, 100 Va. 619, 624, 42 S. E. 664.

51. *Hogan v. Wilmoth*, 16 Gratt. 80.

52. Stephen Pl. § 111, and notes.

53. *Norfolk & W. R. Co. v. Sutherland*, 105 Va. 545, 54 S. E. 465.

54. Code, § 3259.

55. *Wood v. Com.*, 4 Rand. 329.

11. Duplicity in a declaration or other pleading is a matter of form, and at common law objection on that account was made by special demurrer, but since the abolition of special demurrers (except as to pleas in abatement) it is no ground of demurrer to a declaration in Virginia and West Virginia.<sup>56</sup> In Maryland and Vermont, and probably in other States, objection to a pleading for duplicity may still be taken by demurrer,<sup>57</sup> while in New Jersey it is said that, under statutory practice, it must be taken by a motion to strike out.<sup>58</sup> It must be borne in mind, however, that in Virginia pleas in abatement (all dilatory pleas) are not favored, and that they must be good in form as well as substance, and that as to these duplicity is a defect which may be taken advantage of by demurrer.<sup>59</sup>

12. The defence of the statute of limitations ordinarily cannot be made by demurrer, but where the limitation is of the right and not merely of the remedy, the declaration must show affirmatively on its face that the action was commenced within the time prescribed by the statute or else it will be bad, and the objection may be taken by demurrer.<sup>60</sup> Attention is again called to the fact that neither the affidavit filed with a plea which is required to be verified, nor the bill of particulars filed with a declaration is any part of the declaration, and hence defects therein cannot be raised by demurrer.<sup>61</sup>

56. *So. Ry. Co. v. Blanford*, 105 Va. 373, 54 S. E. 1; *So. Ry. Co. v. Simmons*, 105 Va. 651, 55 S. E. 459; *Martin v. Monongahela R. Co.*, 48 W. Va. 542, 37 S. E. 563; *Poling v. Maddox*, 41 W. Va. 779, 24 S. E. 999. The case last cited holds that it is not only no ground of demurrer, but no ground of *objection* to any pleading. A different view, however, is taken in Virginia, where it is held, in passing on the sufficiency of a *plea*, that a *motion* to strike out or reject *can be used* to obviate objections to pleadings such as duplicity and the like which cannot now be raised by demurrer. *Ches. & O. R. Co. v. Rison*, 99 Va. 18, 37 S. E. 320.

57. *Milske v. Steiner Mantel Co.*, 103 Md. 235, 63 Atl. 471; *Lewes v. John Crane & Son*, 78 Vt. 216, 62 Atl. 60.

58. *Karnuff v. Kelch*, 69 N. J. Law 499, 55 Atl. 163.

59. *Guarantee Co. v. Bank*, 95 Va. 480, 28 S. E. 909.

60. *Lambert v. Ensign Mfg. Co.*, 42 W. Va. 813, 26 S. E. 431; *The Harrisburg*, 119 U. S. 199; *Manuel v. Norfolk & W. R. Co.*, 99 Va. 188, 37 S. E. 957; 3 Va. L. Reg. 63.

61. *Ante*, § 201.

**§ 206. Effect of demurrer.**

A demurrer questions the sufficiency in law of the pleading to which it is interposed; and this question of law is to be decided by the court.

*First.*—It is one of the fundamental principles of the common law system of pleading that every material fact not denied by the pleadings is to be taken as admitted; hence, as a demurrer does not deny any fact, *it is a rule that a demurrer admits as true all averments of material facts which are sufficiently pleaded.*<sup>62</sup> The admission is made not by the demurrer but by a failure to deny them. The effect, however, is the same. This implied admission is made only for the purposes of the demurrer, and if the demurrer is overruled and the pleader permitted to tender an issue of fact, the admission cannot be used against him, on the trial of that issue.<sup>63</sup> At common law the facts had to be sufficiently pleaded both as to *form* and *substance*, but at present the latter alone is required. It is to be observed further that the admission is only as to facts, and that a demurrer does not admit the pleader's inferences or conclusions of law such as an allegation that defendant's acts are "without right" and that the plaintiff will suffer "irreparable injury." The court determines for itself the effect of the facts alleged.<sup>64</sup> The demurrer does not admit as true what the court knows judicially is untrue or contrary to law, nor what is legally or physically impossible.<sup>65</sup>

*Second.*—"It is a rule that, on a demurrer, the court will consider the whole record, and give judgment for the party who, on

62. Stephen Pl., § 165.

63. 6 Encl. Pl. & Pr. 334, and cases cited; Martin's Civil Pro., § 239.

64. Williams v. Mathewson, 73 N. H. 242, 60 Atl. 687; Marples v. Standard Oil Co., 71 N. J. Law 352, 59 Atl. 32; Newberry Land Co. v. Newberry, 95 Va. 119, 27 S. E. 899; Coughlin v. Knights of Columbus, 79 Conn. 218, 64 Atl. 223; Lindley v. Miller, 67 Ill. 244. An allegation that bonds were issued "according to law" is the pleader's construction, inference or conclusion and is not admitted by a demurrer. See Smith v. Henry Co., 15 Iowa 385. So an allegation that a defendant "improperly stored dynamite caps" is a pleader's conclusion. Eaton v. Moore, 111 Va. 400, 69 S. E. 326.

65. Ches. & O. R. Co. v. Anderson, 93 Va. 650, 25 S. E. 947.

*the whole, appears to be entitled to it.*"<sup>66</sup> The reason of this rule is this: Every judgment is the conclusion of law from *all* the facts of the case, and the court, to ascertain these, must look through the whole pleadings. Every judgment is the conclusion of a perfect syllogism of which the law is the major (though unexpressed), and the fact the minor, premise.<sup>67</sup> The pleader must at *each stage* bring himself within this major premise, or else his pleading is bad, and it is incumbent on the judge to review the pleadings to ascertain whether or not the pleader has complied with these requirements, else he might enter an erroneous judgment. Let us illustrate: Suppose A sues B in debt on a bond, and the following pleadings ensue:

- A (Declaration) You owe me \$500 due by bond.  
 B (Plea) You released me by writing under seal.  
 A (Replication) I delivered the release to you on condition that you would get X to release me from my bond to her for a like amount.  
 B (Rejoinder) I procured the release from X and delivered it to you.  
 A (Sur-rejoinder) X was a married woman at the time she executed the release, and therefore her release is void.

B demurs, thereby admitting that X was a married woman when she executed the release, but denying the legal effect thereof.

If these pleadings took place at common law, and the court looked only to the sur-rejoinder of A and the demurrer of B, it would be compelled to give judgment against B, for the only issue presented by these two pleadings is whether a married woman could execute a valid release under seal, and the court, seeing that the release is void, must give judgment in favor of A. But if the court reviews all the pleadings, it will discover at a glance that such a judgment would be manifestly wrong, for A could not deliver in escrow a release to B. himself. The delivery is valid and the condition void, hence the release to B

66. This rule does not apply to a motion to *strike out or reject* a plea. Ches. & O. R. Co. v. Rison, 99 Va. 18, 37 S. E. 320.

67. Tucker Pl., 18, 19, 45.

was delivered unconditionally and the judgment should be in his favor.<sup>68</sup>

It is sometimes said that the court reviews the whole record and gives judgment against the party committing the first fault.<sup>69</sup> In the above illustration, A committed the first fault by averring that he delivered to B in escrow the release which he had made to him. The "whole record" means all of the pleadings from the declaration to the demurrer.

To the above rule there are some qualifications and exceptions:

1. The rule has no application to a demurrer to a plea in abatement. Such pleas are not favored, and the court will not inquire as to the sufficiency of the declaration, but if the demurrer is sustained\* will render judgment of *respondeat ouster*.<sup>70</sup>

2. Though the whole record show an apparent right in the plaintiff, the court will not adjudge in his favor if he has not put his action on that ground.<sup>71</sup>

3. If there be a demurrer to the whole declaration which contains more than one count, the demurrer should be overruled if there is any good count in it.

So if the declaration contains more than one count, and the plea is pleaded to the whole, and not to the several counts, a demurrer to the plea should be overruled if there is any good count in the declaration, as the demurrer operates as a demurrer to the declaration as a whole. If the plea be pleaded to one or more separate counts of the declaration, a demurrer to the plea operates as a demurrer to the separate count or counts, and, if defective, the demurrer should be sustained and the count or counts stricken out. The plaintiff's demurrer to the defendant's plea cannot operate as a demurrer to the declaration to any other or greater extent than the plea was pleaded to the declaration.<sup>72</sup>

4. The court in reviewing the pleadings on a demurrer will

68. Tucker Pl., 45.

69. Ches. & O. R. Co. v. Rison, 99 Va. 18, 37 S. E. 320; Doolittle v. Co. Ct., 28 W. Va. 159; Smith v. Lloyd, 16 Gratt. 295.

70. Stephen Pl., § 140; Smith v. Lloyd, 16 Gratt. 295; Birch v. King (N. J.), 59 Atl. 11.

71. Stephen Pl., § 140.

72. Smith v. Lloyd, 16 Gratt. 295.

only consider the right in matter of substance and not in respect of mere form, such as should have been the subject of special demurrer.<sup>73</sup>

5. A demurrer to special pleas filed along with the general issue will not reach back to defects in the declaration unless the declaration is so substantially defective as not to be good after verdict.<sup>74</sup>

### § 207. Effect of failure to demur—Pleading over.

All defects apparent on the face of the pleadings are waived by a failure to demur except such substantial defects as are not cured by pleading over, by verdict, or by the statute of jeofails, or which show a complete absence of a cause of action, or a want of jurisdiction over the subject matter.<sup>75</sup>

It is pointed out by Stephen that the effect of a demurrer is to admit the truth of all statements of facts well pleaded, but the converse is not true that a failure to demur admits the sufficiency in law of the facts adversely alleged, and there are many cases where a party has pleaded over without demurring and yet is allowed to avail himself of the insufficiency in the pleading of his adversary,<sup>76</sup> but the general rule is as above stated.

An illustration of a defective pleading cured by pleading over is given in the case of trespass *de bonis asportatis* where the plaintiff omits the necessary allegation of *possession* of the articles taken. If the defendant, in seeking to justify, admits that he took the goods *from the possession* of the plaintiff, he thereby cures the defect of the plaintiff's declaration.<sup>77</sup> As stated above, faults in pleading are also sometimes cured by verdict. "Where a matter is so essentially necessary to be proved, that, had it not been given in evidence, the jury could not have given such a verdict, there the want of stating that matter in express terms, provided it contains terms sufficiently general to comprehend it in fair and reasonable intendment, will be cured by a verdict; and where a general allegation must, in fair construc-

73. Stephen Pl., § 140.

74. 6 Encl. Pl. & Pr. 332; Stephen Pl., § 141, note 2, citing *Auburn & O. Co. v. Leitch*, 4 Den. 65; *Shaw v. Tobias*, 3 N. Y. 188.

75. 6 Encl. Pl. & Pr. 372.

76. Stephen Pl., § 141.

77. Stephen Pl., § 141.

tion, so far require to be restricted, that no judge and no jury could have properly treated it in an unrestricted sense, it may reasonably be presumed, after verdict, that it was so restricted at the trial."<sup>78</sup>

Faults cured by verdict are for the most part, however, covered by the statute of jeofails. The statute of jeofails cures a multitude of faults. The Virginia Statute<sup>79</sup> is as follows:

"No judgment or decree shall be stayed or reversed for the appearance of either party, being under the age of twenty-one years, by attorney, if the verdict (where there is one), or the judgment or decree, be for him and not to his prejudice; or for want of warrant of attorney; or for the want of a similiter, or any misjoining of issue; or for any informality in the entry of the judgment or decree by the clerk; or for the omission of the name of any juror; or because it may not appear that the verdict was rendered by the number of jurors required by law; or for any defect, imperfection, or omission in the pleadings, which could not be regarded on demurrer; or for any other defect, imperfection, or omission, which might have been taken advantage of on a demurrer or answer, but was not so taken advantage of."

The object and purpose of this statute was to prevent a failure or delay of justice by setting aside a verdict rendered after a full hearing on the merits because of defects that might have been used to *prevent* a judgment, but were not so used. To further this end, the statute should be liberally construed and applied, and made to embrace cases that are within its spirit though not within its letter.<sup>80</sup> On the other hand, a case may be within the very letter of a statute and yet not within its spirit.<sup>81</sup> And, in such case, the statute should not be applied, though it must be confessed that the latter power is one to be cautiously and sparingly exercised. Under the latter branch of the above proposition should be embraced the case hereinbefore mentioned<sup>82</sup> where a

78. *Jackson v. Pesked*, 1 M. & S. 234, quoted in *Stephen Pl.*, § 142; *Bailey v. Clay*, 4 Rand. 346.

79. Code, § 3449.

80. *Long v. Campbell*, 37 W. Va. 665, 17 S. E. 197, quite full.

81. *Holy Trinity Church v. United States*, 143 U. S. 457.

82. *Ante*, § 203.

party does not demur, but objects to the reception of a pleading when it is offered, or subsequently, but seasonably, moves to strike it out. Here the party is within the letter of the law and apparently subject to its penalty, but he has fully complied with its spirit, and has in fact done all that the statute was intended to accomplish, and hence should not be penalized.

It would be inexpedient to attempt to enumerate all of the cases to which the statute has been applied. Reference to some of the sources of information on this subject are given in the margin.<sup>83</sup>

It is said that where the pleading states a good case, but states it defectively, the statute applies, and the judgment should not be arrested or reversed, but the rule is otherwise if the pleading fails to state any case at all.<sup>84</sup> After verdict, the statute cures a *defective* joinder of issue, but not a total failure to join any issue at all (except the mere absence of similitur or joinder in demurrer, provided for by statute), and no judgment or verdict can be properly rendered in the case.<sup>85</sup> It has been held, however, that where the only plea a defendant was allowed by statute to file was a plea of "not guilty" and he failed to file it, but the case was frequently continued on his motion, and was finally tried by a jury who were sworn to try the "issues joined," he could not, after verdict and judgment against him, make the objection for the first time in the appellate court that no issue was ever joined. He had proceeded as if an issue had been joined, had introduced all of his evidence, and had a full and fair hearing on the merits, and the court refused to set aside the judgment. If he had pleaded, his only plea must have been "not guilty," as the statute so provided, and it appeared that he had not been in any way prejudiced, as the case was heard and decided just as if the only plea he could file had been filed, and issue had been taken thereon.<sup>86</sup>

**83.** Code (1904), notes to § 3449; Justice's Annotations 939-942; 4 Digest Va. & W. Va. (West & Co.), 7367-7387.

**84.** *O. A. & M. R. Co. v. Miles*, 76 Va. 773; *Long v. Campbell*, 37 W. Va. 665, 17 S. E. 197.

**85.** *Norfolk & W. R. Co. v. Coffey*, 104 Va. 665, 51 S. E. 729, 52 S. E. 367; notes *Rowan v. Givens*, 10 Gratt. 250, Va. Rep. Anno.; *Smith v. Townsend*, 21 W. Va. 486; Code, § 3268.

**86.** *Bartlett v. McKinney*, 28 Gratt. 750.

A like conclusion was arrived at where the proceeding was by a motion under § 3211 of the Code, for a judgment for money, and the only pleas were *non assumpsit*, and a special plea of recoupment under § 3299 of the Code. Issue was joined on the plea of *non assumpsit*, but no issue was joined on the special plea. The jury were sworn to try the "issues joined," and they found a verdict for the plaintiff. This the defendant moved to set aside, because, among other reasons, no replication had been filed to his plea. The statute (Code, § 3300) provides that every issue of fact upon such a plea "shall be upon a general replication that the plea is not true." The plaintiff was not let in to file a special replication of any kind. The defendant had a full and fair trial on the merits, made no objection to the want of a replication, offered no evidence in support of his special plea, and was in no wise prejudiced, and the court refused to reverse the judgment rendered.<sup>87</sup> In each of these cases the statute cut off all special pleadings, and the missing pleading was one to be filed as of course if any issue of fact was to be raised. The cases were heard and decided as if the only pleadings allowed by law had been filed.

Text writers and judges have frequently said that the statute cured a *misjoinder* of issue, but not a *non-joinder*. The two cases last above mentioned, which seem to have been correctly decided on principle, show that the rule has been too broadly stated, and that there are cases of non-joinder which are cured by the statute as completely as if there had been only a misjoinder. These cases seem to come within a general classification of cases where the court can see that no injury *could have resulted* from the omission.<sup>88</sup> Generally, the court cannot see this, and hence the statement of the rule as usually made. If issue is joined on an immaterial point (raised by a pleading otherwise than by confession and avoidance) and a verdict is founded thereon, the court is obliged to set it aside and award a repleader, for it cannot see what judgment ought to be entered on the merits. So, ordinarily, if no issue at all be joined, it would be impossible for the court to see that the

87. *Briggs v. Cook*, 99 Va. 273, 38 S. E. 148.

88. See *Southside R. Co. v. Daniel*, 20 Gratt. 344.

parties did not ultimately contend over an immaterial issue, and hence nothing is left for the court to do but to set aside the verdict and award a new trial. But the case is entirely different when, by some rule of law, *only one issue could have been made*. The oath of the jury shows that there was a contest, an issue, and the law declares what that issue was. In other cases of non-joinder where the jury is sworn to try the "issues joined," it is manifest that the defendant did *contest his liability*, but upon what ground is not apparent, and as it may have been upon an immaterial ground, the court is compelled to set aside the verdict and award a new trial. No such necessity exists, however, when there could have been but one issue.

The disposition of the courts in modern cases is to disregard mere technical objections which have occasioned no injury, and, where they can see from the record that no injury has resulted to a party from the omission to join issue on a pleading, they will disregard the defect and proceed to judgment on the merits of the case. Under such circumstances, they hold the party to be estopped from setting up the technical objection of the want of issue for the first time in the appellate court, and this seems consonant with right and justice.<sup>89</sup> If, however, the objection of the want of an issue is seasonably made in the trial court, the litigants should not be compelled to go to trial without an issue, and if the trial court forces a trial without an issue, the verdict and judgment resulting from such trial will be set aside on a writ of error.<sup>90</sup>

A misjoinder of causes of action, as for example tort and contract, is, as we have seen, good ground of demurrer, but if no demurrer be interposed the defect is cured by the statute.<sup>91</sup>

In an action sounding in damages, the damages should be laid in the declaration, but if not so laid but are claimed in the writ, the court, after verdict, may look to the writ

89. *Southside R. Co. v. Daniel*, 20 Gratt. 344; *Bartlett v. McKinney*, 28 Gratt. 750; *Briggs v. Cook*, 99 Va. 273, 38 S. E. 148; *Deatrick v. Ins. Co.*, 107 Va. 602, 59 S. E. 489.

90. *Colby v. Reams*, 109 Va. 308, 63 S. E. 1009.

91. *Norfolk & W. R. Co. v. Wysor*, 82 Va. 250.

(which is part of the record only for the purpose of amendment) in support of the verdict awarding damages, and will not set the verdict aside for the defect in the declaration.<sup>92</sup> If no damages were claimed in either the writ or the declaration, the verdict would probably be set aside.<sup>93</sup> If no damages are claimed in a declaration in trespass on the case, although they are claimed in the writ, the omission is a matter of substance and cannot be disregarded on a demurrer to the declaration, and such defect is neither waived nor cured by the verdict when a demurrer has been interposed.<sup>94</sup> But it has been held that if damages are claimed, and the verdict exceeds the amount claimed, the excess must amount to a sufficient sum to be within the jurisdiction of the appellate court, or else it cannot be reviewed.<sup>95</sup>

If a declaration or other pleading *fails to state any case* whatever, or if the court has no jurisdiction of the subject matter, these defects are not cured by pleading over, nor by the statute of jeofails.<sup>96</sup>

In immediate connection with the statute of jeofails another statute should be read which declares, among other things: "on a demurrer (unless it be to a plea in abatement) the court shall not regard any defect or imperfection in the declaration or pleadings, whether it has been heretofore deemed mispleading or insufficient pleading, or not, unless there be omitted something so essential to the action or defence that judgment, according to law and the very right of the case, cannot be given."<sup>97</sup>

There are still other statutes which have an important bearing on this subject, making it unnecessary to allege any matter that is not traversable, abolishing the general averments of "other wrongs" committed by a defendant in actions of

92. *Digges v. Norris*, 3 Hen. & M. 268; *McGlamery v. Jackson*, — W. Va. —, 68 S. E. 105.

93. *Georgia Home Ins. Co. v. Goode*, 95 Va. 751, 30 S. E. 366.

94. *McGlamery v. Jackson*, — W. Va. —, 68 S. E. 105.

95. *Giboney v. Cooper*, 57 W. Va. 74, 49 S. E. 939.

96. *Long v. Campbell*, 37 W. Va. 665, 17 S. E. 197; *Mason v. Bank*, 12 Leigh 84; *Boyles v. Overby*, 11 Gratt. 202.

97. Code (1904), § 3272.

trespass, and declaring that "no action shall abate for want of form, where the declaration sets forth sufficient matter of substance for the court to proceed upon the merits of the cause."<sup>98</sup>

### § 208. Judgment on demurrer.

As a defendant in Virginia and other States is allowed to both demur and plead to the plaintiff's declaration, he does not *hazard* anything by doing both. At subsequent stages of the pleadings he must elect which he will do, as he is not, in Virginia, allowed to do both. If, at the same time, a defendant should both demur and plead to a declaration the issue of law raised by the demurrer should be decided first, but an irregularity in this respect is not ground for reversal.<sup>99</sup> If a statute requires the grounds of demurrer to be stated in writing, no others besides those stated will be considered by either the trial court or the appellate court.<sup>1</sup> If the record shows that a demurrer was filed, but fails to disclose any ruling thereon, the weight of authority is to the effect that it will be deemed to have been waived and not overruled, but the Virginia cases hold that it will be deemed to have been overruled.<sup>2</sup>

If a demurrer to a plea in abatement be overruled the judgment is that the action do abate, but if it be sustained the judgment is *respondeat ouster* (that the defendant plead over, or anew), for such is the prayer of the demurrer. If, however, an issue of fact be joined, whether it be upon a plea in abatement or a plea in bar, and that be the *sole* issue in the case and be found for the plaintiff, final and peremptory judgment was formerly (and even now in some States) entered against the defendant. The reason assigned for the difference is that every man is presumed to know whether his plea be true or false, and the judgment ought to be final against him if he

98. Code (1904), §§ 3245, 3246, 3247.

99. *Jones v. Stevenson*, 5 Munf. 1.

1. *Strother v. Strother*, 106 Va. 420, 56 S. E. 170.

2. 6 Encl. Pl. & Pr. 379, and cases cited; *Miller v. Miller*, 92 Va. 196, 23 S. E. 232; *Miller v. Black Rock Co.*, 99 Va. 747, 40 S. E. 27; *Bledsoe v. Robinett*, 105 Va. 723, 54 S. E. 861; *East v. Hyde*, 112 Va. 92, 70 S. E. 508.

pleads a fact which he knows to be false and which is found to be false. But every man is not presumed to know the matter of law, which is left to the judgment of the court on demurrer.<sup>3</sup> This result would probably not follow under the present Virginia Statute declaring that the defendant "may file pleas in bar at the same time with pleas in abatement, or within a reasonable time thereafter."<sup>4</sup> The corresponding statute in West Virginia is: "The defendant may plead in abatement and in bar at the same time, but the issue on the plea in abatement shall be first tried; and if such issue be found against the defendant, he may, nevertheless, make any other defence he may have to the action."<sup>5</sup>

If there be a demurrer to a declaration as a whole, and it contains some good counts and some bad, the demurrer should be overruled and the defendant allowed to plead to the merits, for the demurrer, in effect, says that no cause of action is stated anywhere in the declaration—either as a whole, or in any count thereof.<sup>6</sup>

The proper mode of demurring in such case has already been pointed out.<sup>7</sup> If the demurrer be to the declaration and to each count thereof, and some of the counts be bad and others good, the demurrer should be sustained as to the bad counts and overruled, and the defendant put to trial, as to the good. If error be committed in overruling a demurrer to a bad count of a declaration it is ground for reversal (as the court cannot tell on which count the jury rendered their verdict), unless the court can see from the whole record, including the evidence certified, that the defendant could not have been prejudiced thereby, as that the verdict of the jury must have been based on the good count, or that no other verdict could

3. 1 Rob. Pr. (old) 338; 1 Encl. Pl. & Pr. 31, 6 Encl. Pl. & Pr. 354, and notes and cases cited.

4. Code (1904), § 3264.

5. Code W. Va. (1899), ch. 125, § 21; *Delaplaine v. Armstrong*, 21 W. Va. 211, 219.

6. *Henderson v. Stringer*, 6 Gratt. 130; *Clark v. Railroad Co.*, 34 W. Va. 200, 12 S. E. 505; Va., etc., *Wheel Co. v. Harris*, 103 Va. 709, 49 S. E. 991.

7. *Ante*, § 202.

have been found.<sup>8</sup> If it is apparent that a case was tried on amended declaration to which there was no demurrer, and it states a good case, the appellate court will not look to the ruling of the trial court on the demurrer to the original declaration.<sup>9</sup> If a demurrer to a declaration be sustained on the ground of a misjoinder of causes of action, what judgment should be rendered? If there is no amendment, nor offer to amend, the objection is fatal, and final judgment should be entered for the defendant.<sup>10</sup> But may the plaintiff amend so as to present a consistent case? If a count in tort be united with a count in contract, may the plaintiff amend by striking out one of the counts, thus leaving a perfect declaration in tort or contract? It has been held in New Jersey that he cannot. There replevin and trover were united. The court said: "An attempt was made to cure this difficulty at the trial by abandoning the count in replevin. It was too late after a demurrer for misjoinder."<sup>11</sup> The authority cited for the statement is *Chitty on Pleading*, and *Drummond v. Douglas*, 4 Term 360.

But it is doubtful if the authority supports the court. What *Chitty* says is this: "The plaintiff cannot, if the declaration be demurred to, aid the mistake by entering a *nolle prosequi* so as to prevent the operation of the demurrer, though the court will in general give the plaintiff leave to amend by striking out some of the counts on payment of costs."<sup>12</sup>

In West Virginia it is held that the objection is fatal to the declaration, if there is no amendment,<sup>13</sup> but it is also held that the defect may be cured by the plaintiff electing to proceed on a particular cause or count.<sup>14</sup>

8. 6 Encl. Pl. & Pr. 368; *Rich R. Co. v. Scott*, 88 Va. 958, 14 S. E. 763; *Newport News, etc., Co. v. Nicolopolos*, 109 Va. 165, 63 S. E. 443; *Va. Cedar Works v. Dalea*, 109 Va. 333, 64 S. E. 41; *Hood v. Bloch*, 29 W. Va. 245, 11 S. E. 910.

9. *Wash. So. Ry. v. Cheshire*, 109 Va. 741, 65 S. E. 27.

10. *Gary v. Abingdon Pub. Co.*, 94 Va. 775, 27 S. E. 595, and authorities cited.

11. *King v. Morris* (N. J. Sup. 1906), 62 Atl. 1006.

12. 1 *Chitty Pl.* (188).

13. *Malsby v. Lanark Co.*, 55 W. Va. 484, 486, 47 S. E. 358.

14. *Knotts v. McGregor*, 47 W. Va. 566, 574, 35 S. E. 899.

In Virginia, if tort and contract be united in the same declaration, and the defendant demurs thereto, the trial court should give the plaintiff leave to amend by striking out one or more counts and thus making a consistent case,<sup>15</sup> but, if upon liberty to amend, the plaintiff does amend, but still retains the inconsistency in the counts of his declaration, and does not ask for liberty to strike out, so as to render the declaration consistent as a whole, final judgment should be entered for the defendant on the demurrer, but this would not prevent a new action in proper form.<sup>16</sup> It has been further held in Virginia that if a demurrer to a declaration for misjoinder of tort and contract has been improperly overruled, the Court of Appeals, on overruling the judgment of the trial court, will remand the cause with liberty to the plaintiff to amend his declaration, where it appears that there was no intention to create a misjoinder, and that in an action of assumpsit a special count intended to be in contract was so inartificially framed as to be a count in tort.<sup>17</sup> If there has been no demurrer, however, an objection for a misjoinder of tort and contract comes too late after verdict.<sup>18</sup>

Independently of statute, it is said that: "On timely application, the court will in general give the plaintiff leave to amend by striking out some of the counts, on payment of costs."<sup>19</sup> The courts are extremely liberal in the matter of amendments in the interest of substantial justice, and no good reason is perceived why such amendment should not be made where it would not take the defendant by surprise. If it occasions such surprise a continuance should be granted, and, in either event, such order made as to costs as would be just in the particular case. If there be a demurrer to some counts of a declaration while issues of fact are pending on other counts, final judgment cannot be entered upon sustaining the demurrer while such issues of fact are pending.<sup>20</sup> The same

15. *Creel v. Brown*, 1 Rob. 265.

16. *Gary v. Abingdon Pub. Co.*, 94 Va. 775, 27 S. E. 595.

17. *Penn. R. Co. v. Smith*, 106 Va. 645, 56 S. E. 567

18. Code, § 3449; *Norfolk & W. R. Co. v. Wysor*, 82 Va. 250.

19. *Martin on Civil Procedure*, § 229, citing 1 Chitty Pl. 206.

20. *Morgantown Bank v. Foster*, 35 W. Va. 357, 13 S. E. 996.

rule applies where issues of law and fact are pending on several pleas. But if the question of law raised by demurrer goes to the whole merits of the case, final judgment may be entered thereon without trying the other issues.<sup>21</sup>

If a demurrer to a declaration or a count is sustained, the plaintiff is generally given liberty to amend, as of course, if the defect is curable by amendment. If he amends, he thereby waives any error in the ruling on the demurrer, and it is immaterial that the motion to amend recites that it is made without waiving such objection.<sup>22</sup> If the plaintiff declines to amend, final judgment is entered against him, and if this be affirmed on writ of error, no leave to amend, as a rule, is granted there.<sup>23</sup>

If the trial court overrules a demurrer to a declaration and, on writ of error, it appears that it should have sustained the demurrer, the appellate court, on reversing the judgment on demurrer, will generally remand the case to the trial court with direction to the trial court to permit the plaintiff to withdraw his joinder in the demurrer and to amend if so advised.<sup>24</sup> Where, however, a demurrer to a declaration has been overruled, and the plaintiff of his own motion has filed an amended declaration to which a demurrer was also overruled by the trial court, it will be presumed that the plaintiff has stated his case as strongly as the facts would warrant, and the appellate court, upon sustaining the defendant's demurrer to both declarations, will enter up final judgment for the defendant.<sup>25</sup>

It is often important to determine whether the judgment on demurrer is *final* so as to preclude another action for the same cause, or the same defence to another action. If the ruling on the *demurrer to a declaration* involves the merits of the cause so as to preclude a recovery on the facts stated, the

21. Huff *v.* Broyles, 26 Gratt. 283; 6 Encl. Pl. & Pr. 355.

22. Connell *v.* Ches. & O. R. Co., 93 Va. 44, 24 S. E. 467; Birckhead *v.* Ches. & O. R. Co., 95 Va. 648, 29 S. E. 678.

23. Hortenstein *v.* Va.-Car. R. Co., 102 Va. 914, 47 S. E. 996.

24. Hansbrough *v.* Stinnett, 25 Gratt. 495; N. & W. Ry. Co. *v.* Stegall, 105 Va. 538, 54 S. E. 19. It will be observed that these are cases of demurrers to a declaration and not to a plea.

25. Ches. & O. R. Co. *v.* Wills, 111 Va. 32, 68 S. E. 395.

judgment is final and bars recovery not only in that action, but in any other based on the same facts. A judgment on demurrer involving the merits is as conclusive as one rendered on the proof.<sup>26</sup> Facts may be admitted as well by the pleadings as by evidence. But if the plaintiff has simply misconceived the form of action, as if he has sued in covenant when he should have sued in assumpsit, or has omitted a material statement in his first declaration which he has supplied in the second, or has misjoined causes of action in the first declaration which he has corrected in the second, in all such cases the judgment on demurrer is not final, and the plaintiff is allowed to amend or to bring a new action as the case may be. When a demurrer to a declaration is sustained, before a judgment to that effect is finally entered, two courses are open to the plaintiff. He may either (1) ask liberty to amend, or (2) may stand on the ruling on demurrer.<sup>27</sup> If he amends, he thereby waives his objection to the ruling on demurrer. If he stands on the case stated in his declaration and the judgment of the trial court sustaining the demurrer thereto be affirmed by the appellate court, the latter court makes no order except one of affirmance, and whether he can bring another action or not is dependent upon the principles above stated.<sup>28</sup> If the judgment of the trial court is reversed the case should be remanded for trial of the issues made on the pleas, if any, but if none with liberty to the defendant to plead. As the defendant has the right to both plead and demur to the declaration, it is presumed that this liberty would be accorded him even after the decision on the demurrer if he had not previously tendered his pleas. It is not unusual in practice for a defendant to await a decision on his demurrer before tendering his pleas. When a demurrer to a plea is sustained, the defendant is usually permitted to withdraw his plea and file another plea in its stead. If he does this he waives his objection to the ruling of the court on the demurrer. If the demurrer is

26. *Norfolk & W. R. Co. v. Scruggs*, 105 Va. 166, 52 S. E. 834; *North Pac. R. Co. v. Slaght*, 205 U. S. 130, and cases cited; *Shipman Pl.*, § 179, p. 270.

27. 1 Va. Law Reg. 836, note by Judge Burks.

28. *Hortenstein v. Va.-Car. R. Co.*, 102 Va. 914, 47 S. E. 996.

overruled, the plaintiff, likewise, is permitted to withdraw his demurrer and reply to the plea.<sup>29</sup>

If there is but one plea in a cause and that is demurred to, and the demurrer is sustained, final judgment should be rendered by the trial court on the demurrer, unless leave is given to amend.<sup>30</sup>

Suppose, however, the plaintiff demurs to a plea, and the demurrer is sustained, and the defendant stands upon his plea and does not ask to put in a new plea, and judgment is entered for the plaintiff for the lack of a plea, and in this condition the case is taken to an appellate court, which decides that the plea is good, what is the result? What judgment should the appellate court enter upon the pleadings? It has been held that final judgment should be entered up for the defendant; that the appellate court cannot remand with liberty to withdraw the demurrer and reply;<sup>31</sup> that the plaintiff had the right to reply only one matter of law or fact, and, having made his election, must abide by it, and that the appellate court enters such judgment as the trial court ought to have entered, *on the pleadings as they stood*; no liberty of amendment of the pleadings being extended to the appellate court. In the case last referred to in the margin, Judge Tucker, in concluding his opinion, says: "I have struggled hard to see if we could not send the cause back, with leave to the plaintiffs to withdraw the demurrer, and take issue. But I can find no warrant for such a proceeding. Upon reversing a judgment at law, we must enter such judgment as the court below ought to have entered, and we can entertain no motion here for amendments."

This case was decided by a divided court composed of three very able judges. The majority opinion was delivered by Judge Tucker, one of the best pleaders and ablest lawyers that ever adorned the Virginia bench, and was concurred in by Judge Cabell, who was likewise a judge of great ability. In strictness the conclusion reached may be sound, and we

29. *Stanton v. Kinsey*, 151 Ill. 301, 37 N. E. 871.

30. *Chesa. & O. R. Co. v. Rison*, 99 Va. 18, 37 S. E. 320.

31. *Wilson v. Mt. Pleasant Bank*, 6 Leigh 570, 575.

may well hesitate to depart from it, and yet it is to a degree technical. The statute, then as now, required the appellate court, upon reversing a judgment at law, to enter such judgment as the trial court ought to have entered. Now upon sustaining a demurrer to a plea the trial court would enter judgment for the plaintiff, but if the defendant asked it would permit him to withdraw his plea and substitute another in its stead; so if the trial court overruled the demurrer, it would permit the plaintiff to withdraw his demurrer and object to the reception of the plea, or reply to it. Undoubtedly these powers are constantly exercised by the trial courts, and *under a liberal construction of the statute*, it may be held that it was the legislative intent to invest the appellate court (upon reversing a judgment) with the same powers over the pleadings and procedure as the trial court had. Such seems to have been the view of Judge Brockenbrough in the case above cited, and such was probably the view of the court in *Penn. R. Co. v. Smith*, *supra*, note 17. The two cases appear to be in conflict, though the latter does not refer to the former, and seems to be based on its peculiar facts rather than upon a construction of the statute. A liberal construction of the statute would seem to be in aid of justice and to be preferable to a construction that would defeat substantial rights by a mere technical construction of the language of the statute. A still more recent case, where the Court of Appeals reversed and remanded a case, but declined to authorize an amendment of the pleadings in the trial court,<sup>32</sup> leaves it doubtful what construction it will put upon the statute.

32. *Taylor v. Sutherlin-Meade Co.*, 107 Va. 787, 60 S. E. 132. This was an attachment where the court refused to allow the affidavit to be amended, and may probably be rested on different grounds from those here under consideration. The subject here considered is very fully and ably discussed by Professor C. B. Garnett in 14 Va. Law Reg. 836, maintaining the view that the appellate court has power to allow amendments to be made, and has frequently exercised it.

## CHAPTER XXVI.

### BANKRUPTCY.

§ 209. Introductory.

§ 210. Discharge in Bankruptcy.

§ 211. Plea of Discharge.

#### § 209. Introductory.

It has been hereinbefore pointed out that the only defences which may not be made under the broad general issues of *non assumpsit* and *nil debet* are bankruptcy, tender and the Act of Limitations. But little need be said on the subject of bankruptcy, so far as it relates to the subject of pleading.

#### § 210. Discharge in bankruptcy.

It is the discharge in bankruptcy, and not the adjudication, which is effective to bar the action. The fact of adjudication is a matter of suspension and not of bar to the action. If a party has been sued, but has been adjudged a bankrupt before judgment, and wishes to interpose his bankruptcy as a defence to the action, he should plead his adjudication in suspension of the action until such reasonable time as will enable him to obtain his discharge, which may then be pleaded in bar. The discharge, when applicable, operates as a release of the bankrupt personally, and of all of his after acquired property from all liability for debts which are provable against him. Debts not provable, and hence not discharged by the discharge in bankruptcy, are best set forth in § 17 of the Bankruptcy Act, as amended, which is as follows:

“A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the State, county, district, or municipality in which he resides; (2) or *liabilities* for obtaining property by false pretenses or false representations, or wilful and malicious injuries to the person or property of *another*; or *for alimony due or to become due, or for maintenance of wife*

or child, or for seduction of an unmarried female, or for criminal conversation; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity." Discharge in bankruptcy, however, is generally a personal defence, which the debtor may waive if he chooses, provided it does not affect substantial rights of innocent third persons, but if it is necessary for a purchaser of the bankrupt's land to defend his own title by defending that of his vendor, and this can only be done by setting up the discharge in bankruptcy of his vendor and his release from debts evidenced by judgments against his vendor, he will be permitted to plead such discharge in bankruptcy of his vendor.<sup>1</sup> Unless, however, the rights of third persons will be affected in some such manner as above indicated, a personal judgment may be taken against the bankrupt for his antecedent debt, if he fails to plead his discharge. So, likewise, the antecedent debt furnishes a good consideration for a new promise to pay it, and if the new promise is clearly and distinctly proved, a personal judgment may be rendered for the debt. The new promise may be made at any time after *adjudication*. It need not have been made after *discharge*. It may be conditional, provided the condition has been fulfilled.<sup>2</sup>

Whether a judgment rendered against a bankrupt on a provable debt, after the commencement of proceedings in bankruptcy, but before his discharge and when he has interposed no defence, continues to bind him and his after acquired property, or he is discharged by his discharge in bankruptcy, is the subject of much conflict of authority, but it is believed that upon reason and the weight of authority the judgment is discharged.<sup>3</sup>

1. Blair *v.* Carter, 78 Va. 621, and cases cited.

2. 16 Am. & Eng. Encl. Law (2nd Ed.) 789 ff, and cases cited.

3. Boynton *v.* Ball, 121 U. S. 457; Blair *v.* Carter, 78 Va. 621; Zumbro *v.* Stump, 38 W. Va. 325, 18 S. E. 443; 16 Am. & Eng. Encl. Law (2nd Ed.) 772, and notes; Note by Freeman, 53 Am. Dec. 296.

**§ 211. Plea of discharge.**

The proper form of a plea of discharge in bankruptcy is as follows :

The defendant says that the plaintiff ought not to have or maintain his action aforesaid against him, because he says that after the making of the supposed *writing obligatory* (or other evidence of the debt, as the case may be) in the declaration mentioned, and before the commencement of this suit, to-wit, on the — day of — he was granted a discharge by the District Court of the United States of America for the — District of — from all provable debts then existing against him, which discharge is in the words and figures following, to-wit:

(here insert the discharge in its exact language)

And the defendant further says that the supposed *writing obligatory* (or other evidence of the debt, as the case may be) in the declaration mentioned was given for a debt or claim which by the said Act of Congress was made provable against the estate of the defendant and which existed on the — day of—; and the defendant further says that the supposed *writing obligatory* was not given for, or as evidence of, any debt or claim excepted by said Act from the operation of a discharge in bankruptcy, and this the said defendant is ready to verify, wherefore he prays judgment if the plaintiff ought to have or maintain his action aforesaid against him.

The plaintiff may take issue on this plea, thereby raising the question as to whether or not any such discharge was in fact granted as set forth in the plea, or he may deny that the debt for which the action was brought is such a debt as would be discharged by the defendant's bankruptcy, or he may rely upon some fraud in procuring the discharge. In either of the two latter events, a special replication will be necessary setting forth the facts.

## CHAPTER XXVII.

### TENDER.

§ 212. Definition.

§ 213. Sufficiency of tender of money.

§ 214. Form of plea.

§ 215. Effect of valid tender.

#### § 212. Definition.

“Tender is an offer or attempt to perform, and may be either: (a) An offer to *do something* promised, in which case the offer, and its refusal by the promisee, discharge the promisor from the contract. (b) An offer to *pay something* promised, in which case the offer, and its refusal by the promisee, do not discharge the debt, but prevent the promisee from recovering more than the amount tendered, and in an action by the promisee entitle the promisor to recover the costs of his defence.”<sup>1</sup>

#### § 213. Sufficiency of tender of money.

In order to constitute a valid tender at common law it is essential that the tender should be made at the *time* and *place* stipulated in the contract, in *money*, of the *correct amount*, *unconditional*, and that the tender should be *kept good* and the *amount brought into court* with the plea. A tender either before or after the time stipulated in the contract, or at a different place, is bad. If no time is fixed it is to be made within a reasonable time, and if no place is designated it is the duty of the debtor to seek the creditor, if within the State, but he is not obliged to seek him outside the State. Usually the tender must be of current *money*<sup>2</sup>—not checks, certificates of deposit or other evidences

1. Clark on Contracts (2nd Ed.) 440.

2. Currency which may, or may not be tendered for private debts: (1) Gold coin is a full legal tender at its face value if not sweated, etc.; (2) Gold certificates are not a legal tender at all; (3) Silver dollars are a full legal tender unless otherwise stipulated expressly in the contract; (4) Silver certificates are not a legal tender; (5) United States notes (greenbacks) are a full legal tender for all pri-

of debt—but this provision may be waived and will be deemed to have been waived if refused on other grounds. It is unnecessary to tender the exact amount due if a sum sufficient is offered from which the creditor can take what is due him without the necessity for making change. Generally it is necessary that the tender should be unconditional. The creditor can not demand, as a condition, the execution of releases, or conveyances, or receipts in full, or delivery of property or the like. If the evidence of the debt is negotiable paper, the authorities are conflicting as to whether the payer has the right to demand its surrender,<sup>3</sup> without invalidating his tender, and in some cases it has been held that he may demand a receipt for the sum paid, though not a receipt in full. Furthermore, the tender must be kept good, and the amount brought into court with the plea. If at any time after the tender the debtor is not ready and willing to pay, he loses the benefit of the tender previously made, but he is not expected to carry the money on his person all the time, and if a subsequent demand is made upon him, after tender refused, he must be accorded a reasonable time within which to comply. Tender can only be made by the debtor or his agent, to the creditor or his agent. The common law requirements of a tender *ad diem* (on the very day the money was due) and of keeping the tender good and bringing the money into court so restricted its use that finally a statute was passed in England allowing the sum due to be paid into court in nearly all personal actions. Similar<sup>o</sup> statutes have been adopted in a number of the States.<sup>4</sup>

In Virginia, while the common law doctrine of tender has not been specifically repealed or abolished, it has been practically

vate debts in the United States; (6) Treasury notes of 1890 are also full legal tender unless otherwise expressly stipulated; (7) National bank notes are not a legal tender except to national banks; (8) Subsidiary silver coins are a full legal tender up to \$10.00; (9) Minor coins, such as nickels, cents, etc., are a full legal tender up to 25c.; (10) Currency certificates are not a legal tender at all. Benjamin on Sales, § 705.

3. 38 Cyc. 154.

4. 28 Am. & Eng. Encl. Law (2nd Ed.) 4 ff; 4 Min. Inst. 735, 736; 38 Cyc. 127 ff.

superseded by statute, declaring that "in any personal action, the defendant may pay into court, to the clerk, a sum of money on account of what is claimed, or by way of compensation or amends, and plead that he is not indebted to the plaintiff (or that the plaintiff has not sustained damages) to a greater amount than the said sum;"<sup>5</sup> and "The plaintiff may accept the said sum either in full satisfaction, and then have judgment for his costs, or in part satisfaction, and reply to the plea generally, and, if issue thereon be found for the defendant, judgment shall be given for the defendant, and he shall recover his costs."<sup>6</sup>

These enactments apply to all personal actions whether upon tort or contract, and if a tender, after maturity of a money demand, be made of the full amount (principal and interest to date of tender), and be arbitrarily refused, and the debtor keeps his tender good and pays the money into court and files a plea under § 3296, it is not likely that any court or jury would require more.

**§ 214. Form of plea.**

The following is the form of plea given by Prof. Minor<sup>7</sup> and states the essentials of a valid tender:

Circuit Court for A County, to-wit:

.....Rules,.....19....

D. D.

v.

C. C.

And the said defendant, by his attorney, comes and says that the said plaintiff ought not to have or maintain his action aforesaid thereof against him to recover any damages or interest by reason of the non-payment of the said sum of ..... dollars in the said declaration mentioned, because he says that the said defendant, on the day when the said sum became due and payable, to-wit, on the .... day of ....., in the year of our Lord nineteen hundred and ....., was ready and willing, and

5. Code, § 3296.

6. Code, § 3297.

7. 4 Min. Inst. 1754.

then tendered and offered to pay to the said plaintiff the sum of . . . . . dollars, to receive which of the said defendant the said plaintiff then wholly refused, and the said defendant avers that from thence hitherto he hath been and still is ready to pay to the said plaintiff the said sum of . . . . . dollars, and the said defendant now brings the same into court here, ready to be paid to the said plaintiff if he will accept the same. And this the said defendant is ready to verify. Wherefore he prays judgment if the said plaintiff ought to have or maintain his action aforesaid thereof against him as to any damages or interest by reason of the non-payment of the said sum of . . . . . dollars.

C. A. S., p. d.

The plea must show the *amount* tendered, time, place, kind of money, and continued readiness, and the defendant must bring the money into court with his plea.

#### § 215. Effect of valid tender.

If the promise was to do something other than to pay money, it relieves the promisor from the obligation of his promise. If the promise was to pay money, it relieves him from the liability for interest thereafter accruing, and from the costs of the subsequent action, but does not relieve him from liability for the debt. Whether the defendant can thereafter escape liability for the full amount tendered has been the subject of conflicting views. On the one hand, it is said that as tender is an admission of the sum tendered there can never be a verdict for a less sum.<sup>8</sup> On the other hand, it has been held that if there is a tender of an amount which is larger than the sum shown by the evidence to be really due, the court is not bound to give judgment for the larger sum tendered.<sup>9</sup> In the absence of mistake, the overwhelming weight of authority is that tender is an admission that the amount tendered is due, even though the tender was insufficient in form, or made in a

8. *Denver R. Co. v. Harp*, 6 Colo. 420; *Wm. Cameron Co. v. Campbell* (C. C. A.), 141 Fed. 42.

9. *Glos v. Goodrich*, 175 Ill. 20, 51 N. E. 643.

case where a valid tender could not be made,<sup>10</sup> and this conclusion seems to accord with reason.

It is generally held that a valid tender of the amount due upon a debt secured by a mortgage or other lien on real or personal property operates to discharge the lien and leaves the creditor with only his personal claim upon the debtor, but it is said that this rule does not apply to the lien of a judgment, and probably not to an attachment. So, also, if the debt be secured by a surety (that is, a surety is bound personally for the debt) a valid tender operates to release the surety, though the principal debtor still remains liable.<sup>11</sup> Money tendered and refused remains the property of the person making the tender and may be taken to pay his debts, but he must be ready, able and willing at all times to substitute other money and thus keep his tender good.

10. 38 Cyc. 163, 164, and cases cited.

11. 38 Cyc. 163; 28 Am. & Eng. Encl. Law (2nd Ed.), 13, 14. See also *McClain v. Balton*, 50 W. Va. 130, 131, 40 S. E. 509.

## CHAPTER XXVIII.

### LIMITATION OF ACTIONS.

§ 216. Historical.

§ 217. Nature, effect and validity of statute.

Limitation of remedy.

Limitation of right.

Adverse Possession.

Conventional limitations.

§ 218. Parties affected.

§ 219. When the statute begins to run.

(1) Demand paper.

(2) Bank deposits.

(3) Coupons.

(4) Calls on stock.

(5) Cloud on title.

(6) Covenant for general warranty.

(7) Death by wrongful act.

(8) Fraud and mistake.

(9) Malicious abuse of civil process.

(10) Voluntary conveyances.

(11) Accounts.

(12) Debt acknowledged in a will.

(13) Judgments.

(14) Nuisance.

(15) Partners.

(16) Principal and surety.

(17) Co-sureties.

(18) Principal and agent.

(19) Attorney and client.

(20) Express trustees, executors, administrators, guardians, etc.

(21) Tenant and co-tenant.

(22) Landlord and tenant.

(23) Vendor and purchaser.

(24) Assignor and assignee.

(25) Persons under disability.

§ 220. What limitation is applicable.

(1) Tort or contract.

(2) Cases on contract.

(3) Debt assumed by grantee in a deed.

(4) Coupons.

(5) Debt secured by mortgage, deed of trust, or pledge.

- (6) Lien for purchase money.
- (7) To recover damages for suing out an injunction.
- (8) Principal and surety.
- (9) Death by wrongful act.
- (10) Proceedings in federal courts.
- (11) Unmatured debts.
- (12) Foreign contracts.
- (13) Foreign judgments.

§ 221. What stops or suspends the running of the statute.

- (1) Commencement of action.
- (2) Amendment of pleadings.
- (3) Removal from state.
- (4) Infancy.
- (5) Death.
- (6) Inability to serve process.

In equity.

§ 222. How defence of statute is made.

At law.

- (1) By demurrer.
- (2) By special plea.
- (3) Shown under the general issue.
- (4) By instructions.

In equity.

In code states.

Matters of avoidance.

§ 223. Who may plead the statute.

Fiduciaries.

Strangers.

§ 224. New promise or acknowledgment.

Effect of new promise.

Nature of promise or acknowledgment.

Undelivered writing.

Provisions in wills.

By whom promise should be made.

- (1) By party.
- (2) By partners after dissolution.
- (3) By personal representative.

To whom promise should be made.

When new promise should be made.

§ 225. Waiver and Estoppel.

§ 226. Burden of proof.

§ 227. Appeal and error.

§ 216. Historical.

At common law there was no limitation of actions except the presumption of payment arising from the lapse of time, and

even after a statute was passed in England there was conflict among the judges as to whether the statute was one of presumption, or one of repose. Lord Mansfield held that the statute, in case of money demands, was a mere presumption of satisfaction, and consequently allowed almost anything to be proved that showed that the debt had not been paid to defeat the plea of the statute. While Chief Justice Best held that it was a statute of repose, and this led to the adoption of what is known as Lord Tenterden's Act in 1829 (9 Geo. IV, Chap. XIV) adopting in effect the view of Chief Justice Best. The latter view is the one held in Virginia, and in practically all of the States.<sup>1</sup> Being statutes of repose they are liberally construed.<sup>2</sup>

### § 217. Nature, effect and validity of statute.

"A limitation fixed by statute is arbitrary and peremptory, admitting of no excuse or delay beyond the period fixed, unless such excuse be recognized by the statute itself."<sup>3</sup> The legislature has full power to make any exception it chooses, or to refuse to make any at all, and, whether or not an exception exists, for instance in favor of infants, insane persons or others, is to be determined from the statute itself. If the statute makes exceptions, they exist; if not, they do not exist, as there is no limitation of actions at common law.<sup>4</sup>

Statutes of limitation may be of several different kinds. The statute may (1) simply interpose a barrier between a claimant and the remedy for the enforcement of his right, and such is generally the statute applicable to personal actions *ex contractu* and *ex delicto*, or it may (2) limit the *right* of recovery as distinguished from the *remedy*, or it may (3) constitute a muniment of title to property, real or personal. In addition to this there may be conventional limitations. The first class may be

1. *Templeman v. Pugh*, 102 Va. 441, 46 S. E. 474; 19 Am. & Eng. Encl. Law (2nd Ed.) 146.

2. *Bell v. Morrison*, 1 Pet. 351.

3. *Peoria F. & M. Ins. Co. v. Hall*, 12 Mich. 202.

4. *Vance v. Vance*, 108 U. S. 514; *Terry v. Anderson*, 95 U. S. 634; *Leonard v. Henderson*, 23 Gratt. 331, 338; *Bickle v. Chrisman*, 76 Va. 678; *Jones v. Lemon*, 26 W. Va. 629.

designated as a limitation of remedy, the second as a limitation of the right, and the third as title by adverse possession.

*Limitation of remedy.* This is the limitation generally referred to in speaking of the statute of limitations. A limitation may be prescribed to the enforcement of a right to which there was no limitation at the time the right accrued, or an existing limitation may be reduced, provided always a reasonable time is allowed to elapse before the expiration of the time prescribed. So also the limitation may be extended, or, in some jurisdictions, taken away altogether.<sup>5</sup> It has been held by the Supreme Court of the United States that no person has a vested right in the statute of limitations as a defence to his promise to pay money, that the right to defeat payment of a just debt by the statute is not a vested right, hence if the statute were repealed after the bar had attached, in those cases (that is where the bar did not confer title in the adversary), the right might be enforced.<sup>6</sup> The same doctrine is held in West Virginia, Texas, Florida, New York, Pennsylvania and one or two other states but the weight of authority is against it.<sup>7</sup> In Virginia this doctrine is distinctly repudiated by statute enacted for that very purpose.<sup>8</sup>

*Limitation of right.* If a statute confers a right for the first time (i. e., a right that did not exist at common law) and at the same time fixes the period within which the right may be enforced, then the limitation is of the right, and not merely of the remedy. Here time is of the essence of the right and a condition of its existence and duration (and not a mere limitation of the remedy) and it should be alleged and proved that the action is brought within the period of existence of the right. The right is lost if not asserted within the statutory period.<sup>9</sup>

5. Terry *v.* Anderson, 95 U. S. 628; Vance *v.* Vance, 108 U. S. 514.

6. Campbell *v.* Holt, 115 U. S. 620.

7. McEldowney *v.* Wyatt, 44 W. Va. 711, 30 S. E. 239; 19 Am. & Eng. Encl. Law (2nd Ed.) 171, 172.

8. Code, § 2936; Kesterson *v.* Hill, 101 Va. 739, 45 S. E. 288; Burks' Address, p. 25.

9. Lambert *v.* Ensign Man. Co., 42 W. Va. 813, 26 S. E. 451; The Harrisburg, 119 U. S. 199; McCartney *v.* Tyrer, 94 Va. 203; Manuel *v.* N. & W. R. Co., 99 Va. 188, 37 S. E. 957; Savings Bank *v.* Powhatan Clay Co., 102 Va. 274, 46 S. E. 294; 3 Va. Law Reg. 63.

*Adverse possession.* Statutes in the states generally fix a time beyond which no action can be brought to recover either real or personal property in the adverse possession of another. The object of these statutes is to quiet titles to property, and to require claimants out of possession to assert their claims within such reasonable time as the statutes prescribe. The effect of the statutes is not merely to bar the remedy of the claimant to the property, but to take away from him altogether the right to the property, and vest it in the defendant in possession, thereby giving the latter the superior title. It is one of the most valuable muniments of title, and is absolutely essential to the repose of society. Title thus obtained is superior to any paper title, and no repeal of the statute can operate to divest the adverse claimant of the title thus acquired. The right and title thus acquired is a vested right which the legislature has no power to disturb.<sup>10</sup>

*Conventional limitations.* Parties may agree upon a less time within which an action may be brought than that prescribed by law, unless prohibited by statute, as it may be,<sup>11</sup> and the agreement will be enforced.<sup>12</sup> An agreement that a claim for loss or damage to goods shipped by rail shall be made in writing within thirty days is valid. It is not really a limitation of the time to sue.<sup>13</sup> Agreements to extend the time for the statute to run, or to waive it altogether, are treated hereinafter in § 225.

### § 218. Parties affected.

Generally the statute operates upon every person, natural and artificial, but there is one notable exception, and that is the public government.

*State.* As a rule, statutes of limitation do not apply to the State unless expressly mentioned, and it is said that the same is true of county governments and municipalities when

10. *Campbell v. Holt*, 115 U. S. 620; *Leffingwell v. Warren*, 2 Black (U. S.) 599; *Sharon v. Tucker*, 144 U. S. 544; 19 Am. & Eng. Enc. Law (2nd Ed.) 172; Code, § 2915, and cases cited.

11. *Smith v. Ins. Co.*, 112 Va. —, 70 S. E. 482.

12. *Cochran v. London Corp.*, 93 Va. 553, 25 S. E. 537.

13. *Liquid C. Co. v. N. & W. R. Co.*, 107 Va. 323, 58 S. E. 569; *Atlantic Coast Line v. Bryan*, 109 Va. 525, 65 S. E. 30; *St. Louis & Santa Fé R. Co. v. Wallace* (Ark.), 119 S. W. 254.

asserting rights of a purely public and governmental nature, as they are then mere arms of the State, but this is not true when they are engaged in trade or commercial matters, such as issuing bonds, collecting debts and the like.<sup>14</sup>

In Virginia it is provided by § 2937 of the Code that no statute of limitations which shall not in express terms apply to the commonwealth shall be deemed a bar to any proceeding by or on behalf of the same. In West Virginia it is provided by Code, § 1137, that "every act of limitation, unless otherwise expressly provided, shall apply to the State." It has been held, however, that, notwithstanding the latter statute, the public easements in the public highways of the State are not subject to the statute of limitations.<sup>15</sup>

Hospitals for the insane are in Virginia State institutions and the statute of limitations does not run against debts due to them.<sup>16</sup> If the State or one of its agencies sues in the courts of another State, however, they stand on the footing of an individual, and the ordinary statute of limitation applies.<sup>17</sup>

### § 219. When the statute begins to run.

The statute begins to run when a party has a right to sue, that is, when there has been a breach of duty, or a violation of a contract, giving rise to a cause of action.<sup>18</sup> In the following cases the relations of the parties to each other, or the subject matter, is such as to require special mention.

(1) *Demand paper*. For the purpose of the statute of limitations all demand paper is, as to the persons primarily liable thereon, due as of its date, and the act of limitations

14. 19 Am. & Eng. Encl. Law (2nd Ed.) 191; *Reusens v. Lawson*, 91 Va. 226, 21 S. E. 347; *Johnson v. Black*, 103 Va. 477, 49 S. E. 633; *Bellenot v. Richmond*, 108 Va. 314, 61 S. E. 785.

15. *Ralston v. Weston*, 46 W. Va. 544, 33 S. E. 326, overruling several prior cases.

16. *Eastern State Hospital v. Graves*, 105 Va. 151, 52 S. E. 837.

17. *Western Lunatic Asylum v. Miller*, 29 W. Va. 326, 1 S. E. 740.

18. *Cookus v. Peyton*, 1 Gratt. 431; *Walker v. Tyler*, 94 Va. 534, 27 S. E. 434; *Handy v. Smith*, 30 W. Va. 195, 3 S. E. 604; *Cann v. Cann*, 40 W. Va. 138, 20 S. E. 910.

begins to run from that date. The action itself is a demand.<sup>19</sup> Under § 7 of the Negotiable Instruments Act, the following instruments are payable on demand: "(1) Where it is expressed to be payable on demand or at sight, or on presentation, or (2) when no time of payment is expressed." A bond or note which fixes no date of payment or is expressed to be payable on demand is due and payable as soon as it is executed and delivered. Where paper is payable so many days after demand it means that number of days after actual demand, which may or may not be on the day of the date of the paper. If payable at sight, it would seem that, *independently of statute*, the paper must be shown for payment, and that the act begins to run from the latter date.<sup>20</sup> The same rule, of course, would apply to paper payable after sight, that is, that time must expire after the paper is shown for payment.

To hold an *endorser* bound on a note payable on demand, there must be an actual demand, non-payment, and notice thereof, and until then the statute does not begin to run.<sup>21</sup>

"If a demand be necessary before action, the statute does not begin to run until the date of the demand, but demand must be made within a reasonable time, which is the time fixed by the statute of limitations, if not made before. Where no demand is shown it will be presumed to have been made within that period, and the statute will then run."<sup>22</sup>

Courts are not uniform in their holdings as to when interest should run on paper payable on demand. Some hold that the interest begins only with actual demand. Probably a majority, including Virginia,<sup>23</sup> hold that interest begins with the date of the paper.

(2) *Bank deposits*. Whether the deposit be special (on certificate) or general (subject to check), in either case

19. *Laidley v. Smith*, 32 W. Va. 387, 9 S. E. 209; *Newman v. Kettell*, (Mass.), 13 Pick. 418; *Omohundro v. Omohundro*, 21 Gratt. 626; 19 Am. & Eng. Encl. Law (2nd Ed.) 197.

20. Dan. Neg. Instruments, § 1215; 19 Am. & Eng. Encl. Law (2nd Ed.) 198.

21. *Parker v. Stroude*, 98 N. Y. 379.

22. *Thompson v. Whittaker*, 41 W. Va. 574, 23 S. E. 797.

23. *Omohundro v. Omohundro*, 21 Gratt. 626.

demand is necessary, and the statute does not begin to run except from the date of the demand and refusal.<sup>24</sup>

(3) *Coupons*. Upon coupons, whether attached to or detached from bonds, the statute begins to run from the maturity of the coupon.<sup>25</sup>

(4) *Calls on stock*. As between a corporation and its stockholders, and as between creditors of the corporation and stockholders, where calls have been made by the company, and also by the court, the authorities are in conflict as to whether the statute begins to run from the maturity of the call by the company, or from a call by the court. In Virginia the statute begins to run from the maturity of the call by the company.<sup>26</sup> If no calls have been made by the company, but one has been made by the court, the statute begins to run from the maturity of the call made by the court.<sup>27</sup> Upon a stock subscription made by parol in Virginia the limitation is three years from the date of the maturity of the call on the stock.<sup>28</sup>

(5) *Cloud on title*. This is a continuing wrong, and ordinarily the statute does not begin to run against it so long as it exists.

(6) *Covenant for general warranty*. Generally there is no breach of this covenant until eviction, or what is regarded as its equivalent, and until then the statute does not begin to run.

(7) *Death by wrongful act*. The action for death by wrongful act is purely statutory, and most of the acts are modeled after Lord Campbell's Act. Where this is true it is said that the action is not the continuation, survival, or revival, of the decedent's cause of action, but is a new and independent cause of action, in which the measure of damages is not the same as

24. *Thompson v. Bank*, 82 N. Y. 1; *Gutch v. Fosdick*, 48 N. J. Eq. 353, 22 Atl. 590, 27 Am. St. Rep. 473.

25. *Clark v. Iowa City*, 20 Wall. 586; *Amy v. Dubuque*, 98 U. S. 470.

26. See discussion and cases cited in *Gold v. Paynter*, 101 Va. 714, 44 S. E. 290.

27. *Vanderwerken v. Glenn*, 85 Va. 9, 6 S. E. 806.

28. *Bank v. Otterview Land Co.*, 96 Va. 352, 31 S. E. 511.

in an action brought by a decedent,<sup>29</sup> and the time within which the action is to be brought is regulated by statute. In Virginia it is one year from the death of the decedent, and not from the date of the injury.<sup>30</sup> If the decedent survives the injury more than a year and a day, there is no conclusive presumption that he did not die from the injury, and it may still be shown that the injury was the proximate cause of his death, and the statute will begin to run from his death.<sup>31</sup> It seems that the statutory action in favor of a personal representative may still be brought, notwithstanding decedent's right of action was barred at the time of his death.<sup>32</sup>

Under the Federal Employers' Liability Act applicable to employees of railroad companies while engaging in interstate commerce, the limitation to an action for the death of an employee is two years from the day the cause of action accrued.

It has been held under the Virginia statute that but one action can be maintained to recover damages for an injury resulting in death as there is but one cause of action in such case. An action brought by an injured employee who subsequently dies may be revived in the name of his personal representative after his death, or a new action may be brought by the personal representative.<sup>33</sup>

(8) *Fraud and mistake.* Whether at law the statute begins to run from the commission of the fraud, or from its discovery, or from the time when by the exercise of ordinary diligence it should have been discovered is a question upon which the authorities are in conflict.<sup>34</sup> At common law there was no act of limitations outside of the presumption of payment and prescription, and hence in any common-law State if there is any limitation on any demand whatever it must be found in the stat-

29. *Anderson v. Hygeia Hotel Co.*, 92 Va. 687, 24 S. E. 269.

30. Code, § 2903.

31. *Louisville, etc., R. R. Co. v. Clark*, 152 U. S. 230.

32. 8 Am. & Eng. Encl. Law (2nd Ed.) 877, and cases cited; 70 Am. St. Rep. 669.

33. *Brammer v. N. & W. R. Co.*, 107 Va. 206, 57 S. E. 593.

34. 19 Am. & Eng. Encl. Law (2nd Ed.) 242, 247; *Rowe v. Bentley*, 29 Gratt. 756, 760; *Callis v. Waddey*, 2 Munf. 511; *Rice v. White*, 4 Leigh 474; 1 Rob. Pr. (old) 87, 110; Code, § 2933.

ute. If not found there, it does not exist. In Virginia it is provided that "every personal action, for which no limitation is otherwise prescribed, shall be brought within five years next after the right to bring the same shall have accrued, if it be for a matter of such nature that in case a party die it can be brought by or against his representative; and, if it be for a matter not of such nature, shall be brought within one year next after the right to bring the same shall have accrued."<sup>35</sup> This section seems broad enough to cover actions for fraud. The main question of difficulty is whether the statute begins to run from the commission of the fraud, or from its discovery. It has been held in Virginia that no lapse of time and no delay in bringing a suit, however long, will defeat the remedy in case of fraud or mutual mistake, provided the injured party during such interval was ignorant of the fraud or mistake, without fault on his part, and that the duty to commence proceedings can only arise upon discovery of the fraud or mistake.<sup>36</sup> But the case in which this language is used was one of mistake and not of intentional fraud, and the suit was in equity and not at law. At law the statute probably runs from the commission of the fraud. In West Virginia it is said that where a cause of action arises out of a fraud, the statute of limitations runs from its perpetration, and that to deduct the period during which a party is ignorant of the fraud, his ignorance must arise out of some positive act on the part of the defendant. Mere silence is not sufficient, but there must be some act designed to conceal the existence of liability and operate in some way upon the plaintiff to prevent or delay suit for it, otherwise it will not come within the saving clause of the statute directed against obstructing the prosecution of a right "by any other indirect ways or means."<sup>37</sup> This rule, however, does not apply to fraudulent transfers of property.<sup>38</sup> It is said that the tendency of modern decisions and also of modern statutes is to place actions at law on the same footing with suits in equity,

35. Code, § 2927.

36. *Craufurd v. Smith*, 93 Va. 623, 23 S. E. 235.

37. *Thompson v. Whittaker Iron Co.*, 41 W. Va. 754, 23 S. E. 795; Code, W. Va., 1906, § 3511.

38. *Thompson v. Whittaker Iron Co.*, *supra*; *Bumgardner v. Harris*, 92 Va. 188, 23 S. E. 229.

where the defendant fraudulently conceals the cause of action, and to start the statute only from the time the fraud was, or ought to have been, discovered.<sup>39</sup> Equity certainly does not apply the statute in case of fraud or mistake except from the time that the fraud or mistake was, or should have been discovered.<sup>40</sup> Mere ignorance, however, on the part of the opposite party will not prevent the running of the statute.<sup>41</sup> Money paid under a mistake of law with knowledge of the facts cannot, according to the weight of authority, be recovered back in the absence of any fraud or misconduct on the part of the payee.<sup>42</sup>

(9) *Malicious abuse of civil process.* Time runs from the termination of the suit.<sup>43</sup>

(10) *Voluntary conveyances.* Generally the statute runs from the time of discovery of the right to avoid the conveyance, though in some states it is from the time the conveyance is made.<sup>44</sup> In Virginia it is provided that the suit shall be brought within five years after the right to avoid the conveyance has accrued. The debt need not be due.<sup>45</sup> Formerly it was necessary for the creditor to first establish his debt at law, but now he may proceed at once in Virginia, whether his debt is due or not, to set aside the conveyance and to subject the property conveyed and he is given a lien from the time of the institution of his suit.<sup>46</sup> So in Virginia it would seem that the act begins to run from the time of the conveyance, or at least from the time of the recordation of the conveyance and not from its discovery, unless the failure to discover the existence of the conveyance resulted from the fraud of the grantee.<sup>47</sup> The limitation

39. 19 Am. & Eng. Encl. Law (2nd Ed.) 245, note 2; *Bailey v. Glover*, 21 Wall. 342; *Traer v. Clews*, 115 U. S. 528.

40. *Craufurd v. Smith*, 93 Va. 623, 23 S. E. 235; *Hull v. Watts*, 95 Va. 10, 27 S. E. 829; *Rowe v. Bentley*, 29 Gratt. 756, 760, and cases cited.

41. *Vashon v. Barrett*, 99 Va. 344, 38 S. E. 200.

42. Note, 55 Am. St. Rep. 517, and cases cited.

43. Note, 93 Am. St. Rep. 471, and cases cited.

44. 14 Am. & Eng. Encl. Law (2nd Ed.) 353.

45. Code, § 2929.

46. Code, § 2460.

47. *Bickle v. Chrisman*, 76 Va. 678; *Vashon v. Barrett*, 99 Va. 344, 7 Va. Law Reg. 36, and note, 38 S. E. 200; 1 Va. Law Reg. 597.

for setting aside a voluntary conveyance prescribed by the Virginia Code, § 2929, has no application to a suit to set aside a conveyance for actual fraud. As to the latter there is no limitation, though the right may be lost by the laches of the creditor.<sup>48</sup>

A suit to set aside a voluntary conveyance is always in equity. Notwithstanding the fact that the Virginia statute gives a lien from the filing of the bill, if the suit be brought in the Federal court, or in the State court and afterward removed into the Federal court, the Federal courts refuse to recognize any such lien, and hold that there is no such federal equity jurisdiction, and that the plaintiff, before filing a bill to avoid the conveyance, must first establish his debt at law by obtaining a judgment. Federal courts have their own rules of procedure in equity, operating uniformly throughout the United States, and are not bound by State statutes in such matters.<sup>49</sup>

(11) *Accounts.* The act begins to run from the time the account is due, and that depends upon the terms, express or implied, upon which the articles are sold. It is provided by statute in Virginia that "upon any oral contract, express or implied, for articles charged in a store account, although such articles be sold on a written order," the action shall be brought within two years next after the right to bring the same shall have first accrued.<sup>50</sup> If the well-known custom of the merchant is to sell on credit, until the end of the week, month, half year, or year, accounts will fall due at these periods and the statute begins to run from that date. The Code of 1887 changed the phraseology of this statute so as to insert the words "express or implied." Before this insertion, it had been held that the statute applied only to implied promises to pay the account, and hence if there was an express promise to pay it, the limitation was five years and not two, and this was the view of Professor Minor,<sup>51</sup> but

48. *Bumgardner v. Harris*, 92 Va. 188, 23 S. E. 229; 1 Va. Law Reg. 590; *Kinney v. Craig*, 103 Va. 158, 165, 48 S. E. 864.

49. *Scott v. Neeley*, 140 U. S. 106; *Hollins v. Briarfield*, 150 U. S. 371; *Cates v. Allen*, 149 U. S. 451.

50. Code, § 2920.

51. 4 Min. Inst. 612, 613.

the construction would be different under the present statute. Under the former statute, it was also held that the time could be extended by an account rendered.<sup>52</sup> But since that time it has been held that an account stated which is not supported by a writing signed by the debtor, or his agent, will not prevent the running of the statute of limitations against previously existing items of indebtedness included therein.<sup>53</sup> As to mutual accounts between parties, growing out of the same transaction, or where there is more than one transaction, and the parties have agreed to run accounts with each other for a stated period, the statute begins to run from the termination of the transaction or period, as the case may be. The action in such case is for the balance due, and not for the items of the account.<sup>54</sup>

(12) *Debt acknowledged in a will.* If there is no other evidence of a debt but the will, or if the will is relied upon as a new promise or acknowledgment, the statute begins to run from the death of the testator, provided the will fixes no time of payment.<sup>55</sup>

(13) *Judgments.* The duration of the life of a judgment is fixed by statute in each State. In Virginia the lien of a judgment on land continues as long as you may issue a *fi. fa.* on the judgment or revive the judgment by a *scire facias*. Upon a judgment a writ of *feri facias* may be issued within a year, and thereafter other writs of *feri facias* may be issued at any time within ten years from the return day of a writ upon which there has been no return by an officer, or within twenty years from the return day of a writ upon which there has been such a return. So that it may be kept alive perpetually. If no execution issues within the year the judgment may be revived by *scire facias* at any time within ten years from its date.<sup>56</sup> It is pro-

52. Radford *v.* Fowlkes, 85 Va. 820, 851-852, 8 S. E. 817.

53. Magarity *v.* Shipman, 93 Va. 64, 24 S. E. 466; Stiles *v.* Laurel Fork Oil Co., 47 W. Va. 838, 35 S. E. 986. As to what constitutes an account stated, see 62 Am. Dec. 81-96.

54. Green *v.* Disbrow, 75 N. Y. 1, 35 Am. Rep. 496.

55. Perkins *v.* Siegfried, 97 Va. 444, 34 S. E. 64.

56. *Post*, "Executions," and cases cited.

vided, however, by the section of the Code just cited that where the *scire facias* or action is against the personal representative of a decedent, it shall be brought within five years from his qualification, thus cutting down the life of a judgment against a judgment debtor who dies to five years from the qualification of his personal representative, unless within that time the judgment be revived by *scire facias* or an action be brought thereon.<sup>57</sup> No suit in equity can be maintained to enforce a judgment barred at law.<sup>58</sup>

It has been held in Virginia that if an execution is made out and signed by the clerk ready for delivery to the officer and marked "To lie," it is a sufficient issuance within the meaning of § 3677 of the Code, although it has not been placed in the hands of the officer to be levied.<sup>59</sup>

(14) *Nuisance*. Where the injury created by a nuisance is recurrent, each recurrence of the nuisance creates a new cause of action upon which the statute begins to run from that time; but if the nuisance be permanent in its nature, and all the damages which will flow therefrom can be recovered in a single action, the statute begins to run from its original creation.<sup>60</sup>

(15) *Partners*. Until the affairs of a partnership are settled and all outstanding engagements made good, the partnership is regarded in legal contemplation as continuing,<sup>61</sup> and the limitation to a suit by one partner against another for the settlement of the partnership affairs does not begin to run until the "cessation of the dealings in which they are interested together." The words quoted refer to the time when the affairs of a partnership are wound up, and not to the cessation of active operations, but the parties may have a partial settlement of partnership affairs before that time, or may bring a suit for such settlement.<sup>62</sup> Not until all the assets are collected and debts paid,

57. *Spencer v. Flanary*, 104 Va. 395, 51 S. E. 849.

58. Code, § 3573.

59. *Davis v. Roller*, 106 Va. 46, 55 S. E. 4.

60. *Va. Hot Springs Co. v. McCray*, 106 Va. 461, 56 S. E. 216; *Gulf Ry. v. Moseley (C. C. A.)*, 161 Fed. 72.

61. *Smith v. Zumbro*, 41 W. Va. 623, 24 S. E. 653.

62. *Foster v. Rison*, 17 Gratt. 321.

or at least until it be demonstrated that no further assets can be collected or debts paid, does the statute begin to run.<sup>63</sup> The trouble is more serious where the statute does not fix the time at which the statute is to begin to run.<sup>64</sup>

(16) *Principal and surety.* Time begins to run from payment by the surety of the debt or any part of it, and the obligation is an open account liability, although the original undertaking was by bond.<sup>65</sup> If the surety has paid the debt before maturity, then his right of action against the principal does not begin to run until the maturity of the original debt.<sup>66</sup>

(17) *Co-sureties.* The surety has no right to call upon a co-surety until he has paid more than his proportion of the debt. "It may be that one of the two sureties pays half of the debt; five years expire, and then the principal pays the other half. The right of action of the surety against his co-surety does not exist until the principal has paid the last half, for until that is paid the surety had not paid more than his proportion, and could not recover from the co-surety. Consequently, in this case, the statute of limitations does not begin to run until the principal has paid his half of the debt. The endorser of a note who pays it in whole or in part has his right of action against the principal, and that right of action accrues at the time of pay-

63. *Sandy v. Randall*, 20 W. Va. 245; *Smith v. Brown*, 44 W. Va. 342, 30 S. E. 160.

64. Note, 40 Am. St. Rep. 574-576.

65. *Tate v. Winfree*, 99 Va. 255, 37 S. E. 956.

66. Attention is called to the Virginia statute giving a surety the right to require a creditor to sue, or else release the surety. If a right of action has accrued, the surety may give notice to the creditor or his personal representative in writing forthwith to institute suit thereon, and if he fails to prosecute the suit with due diligence to judgment, he forfeits his right to go against the surety. The notice, however, must show a clear, unequivocal, and distinct demand upon or command to the creditor "forthwith to institute suit upon the paper." A notice to take such action as is necessary to get the endorser's name off a note, or to sue one of the parties to a note, is not a sufficient compliance with the statute. Code, §§ 2890, 2891; *Edmonson v. Potts*, 111 Va. 79, 68 S. E. 254. Provision is also made by statute in Virginia to enable a surety on an official bond to be relieved from further liability. Code, § 2887, and cases cited thereto.

ment. If he has paid the whole note he may sue upon it as endorser, or he may maintain an action for money paid. In case the note itself is barred by the statute at the time his action was brought, five [three] years having elapsed since he paid the money, it seems that he may recover for money paid for the use, etc., though if he sued on the note his action would be barred. A contrary rule is said to prevail in some of the States, but is not sustained by English authorities, nor does it prevail in Virginia."<sup>67</sup>

(18) *Principal and agent*. In case of a general or continuing agency, as distinguished from a special or isolated agency, the statute of limitation runs between the parties to it from its close.<sup>68</sup> As to whether the relation is one of trust or not, see *Hasher v. Hasher*, 96 Va. 584, 32 S. E. 41; *Wilson v. Miller*, 104 Va. 466, 51 S. E. 837.

(19) *Attorney and client*. Attorneys at law are within the general statute limiting the time within which actions for breach

67. 1 Barton L. Pr. (2nd Ed.) 106, 107.

68. "Where there is an isolated or special agency, one for a particular act or acts, one to collect a specific debt or debts, the statute begins from the act or collection in each particular case; but where the agency has currency, is continuous, is general, involving many acts, or a course of business involving many transactions, the statute begins from the termination of the agency. The contract of agency is a lump, covering several years, covering many items, and the parties reserve them for settlement some day ahead. You cannot start the statute at date of each collection or each item of liability, innumerable items in an account which both sides treated as open, and there is a necessity to fix some day. 1 Rob. Pr. 488; 1 Wood 347, 349 n. 2; Angell, Lim., § 181, n. 2; *Hopkins v. Hopkins*, 4 Strobb. (S. C.) Eq 267; *Estes v. Stokes*, 2 Rich (S. C.) 320. The Virginia case of *Riverview Land Co. v. Dance*, 98 Va. 329, 35 S. E. 720, holds that in continuous agencies the statute begins at their termination; but that if the law gives a right to either to demand payment before, it runs from demand and refusal. No doubt there can be a demand for adjustment giving cause of action at once; but, as a general rule, in the absence of special circumstances, changing it, as there may be, the statute starts at the close of the agency. The books show that the statute applies between principal and agent. It's wise policy to have an end of liability and give peace of mind, happiness of life and to prevent litigation, should be liberally applied, as well to this relation as others." *Rowan v. Chenoweth*, 49 W. Va. 287, 38 S. E. 544.

of contract must be brought. They do not occupy such a relation of trust towards their clients as would debar them from pleading the statute of limitations.<sup>69</sup> The statute begins to run from the time the cause of action accrued, and not merely from the time the damage was suffered, unless the defendant used fraud to conceal the wrong done until a right of action had become barred.<sup>70</sup> For funds collected by him, the statute begins to run from the time that the attorney should have paid the money to his client. It is said that it is the duty of the attorney when he has collected money for his client, to give him notice and to pay it over promptly when called for or demanded, but if the client has notice of it, it is unnecessary to go through the idle ceremony of giving him notice, but that sometimes the attorney is unable to give notice to his client, as, for example, where he is out of the country, or his whereabouts unknown, or he has no means of communicating with him. In such cases, he would be excused from giving the notice.<sup>71</sup> But if the whereabouts of the client is known, it is the duty of the attorney to give him notice of collections and to pay over the money, and the general duty of the creditor to seek his debtor and pay him applies to attorneys as well as to other debtors. There is conflict of authority, however, on the subject of the necessity for a demand of payment by the client. Of course if the client does not know of the fact of collection, and is not negligent in this respect, no demand is necessary, especially if the attorney converts the money to his own use.<sup>72</sup> If the client knows of the collection of funds and makes no demand for payment, the statute will probably run from the date of the acquisition of that knowledge.<sup>73</sup> This subject is regulated to some extent in Virginia by the statute cited in the margin.<sup>74</sup> Under this

69. *Kinney v. McClure*, 1 Rand. 284.

70. 3 Am. & Eng. Encl. Law (2nd Ed.) 399.

71. *Pidgeon v. Williams*, 21 Gratt. 251, 259.

72. 1 Bart. Law Pr. 109.

73. *Hasher v. Hasher*, 96 Va. 584, 32 S. E. 41, a case of attorney in fact and principal.

74. Section 3200 of the Code is as follows: "Every attorney at law shall be liable to his client for any damage sustained by him by the neglect of his duty as such attorney. If any attorney receive money for his client and fail to pay the same on demand, it may be re-

statute it would seem that a demand upon the attorney and refusal on his part is essential to subject the attorney to the penalty therein prescribed. If the attorney has acted in good faith, it is presumed that the statute of limitations will begin to run from the time of collection, or within a reasonable time thereafter.

(20) *Express trustees, executors, administrators, guardians, etc.* Ordinarily the right of action on their bonds accrues at, and hence the statute begins to run from, the time that the plaintiff has the right to demand settlement, or payment, or delivery of estate. In the absence of statute there is no limitation to the right to sue them personally, and not on their official bonds.<sup>75</sup>

(21) *Tenant and co-tenant.* The right of a tenant to enforce against the share of his co-tenant the equitable lien arising from the payment by the tenant of more than his share of the purchase money, does not arise until suit for partition is brought, and the statute of limitations has no application to such suits.<sup>76</sup> Possession of one co-tenant is the possession of both, and the statute does not begin to run as between them until ouster or its equivalent.<sup>77</sup> It must not be supposed, however, that the tenant could not sue his co-tenant personally for contribution.

covered from him by warrant, or by suit, or motion, according to the amount; and damages in lieu of interest, not exceeding fifteen *per centum per annum* until paid, may be awarded against him."

"If any fiduciary mentioned before in this chapter, or any agent or attorney at law, shall, by his negligence or improper conduct, lose any debt or other money, he shall be charged with the principal of what is so lost, and interest thereon, in like manner as if he had received such principal." Section 2676.

75. *Redford v. Clarke*, 100 Va. 115, 40 S. E. 630, 7 Va. Law Reg. 851; Code, § 2921.

It is provided by statute in Virginia that if the fiduciary has settled an account under the provisions of ch. 121 of the Code, a suit to surcharge or falsify the same or to hold *such fiduciary* or his sureties liable for any balance stated in such account to be in his hands shall be brought within ten years after the account has been confirmed. Code, § 2921.

76. *Grove v. Grove*, 100 Va. 556, 42 S. E. 312; *Ballou v. Ballou*, 94 Va. 350, 26 S. E. 840.

77. *Fry v. Payne*, 82 Va. 759, 1 S. E. 197.

(22) *Landlord and tenant.* A tenant cannot set up a claim adverse to his landlord without full notice to the landlord of the tenant's disclaimer to hold under him, or his assertion of an adverse title, but such notice need not be so conclusive as to preclude all doubt.<sup>78</sup> The statute begins to run from the time of such notice, or knowledge.

(23) *Vendor and purchaser.* The statute will not commence to run in favor of a vendee against the vendor who has retained title until the vendee has dissevered the privity of title between them by the assertion of an adverse right, and the open and continuous disclaimer of the title of his vendor, and until such disclaimer has been clearly brought home to the knowledge of the vendor.<sup>79</sup>

(24) *Assignor and assignee.* "The right of action by an assignee against his assignor accrues when the assignee is defeated in his suit against the debtor. If he prevails in his suit, the statute will begin to run from the time that he has done all that the law requires him to do in order to bind his assignor; that is, to obtain judgment, issue execution, and have a return of *nulla bona.*"<sup>80</sup>

(25) *Persons under disability.* While statutes of limitation, as previously stated, generally contain a saving clause in favor of infants, married women and other persons laboring under disabilities, it is entirely competent for the legislature to omit such saving clause, and, when omitted, statutes of limitation apply to such persons as though no disability existed.<sup>81</sup> In Virginia the statute of limitations makes no exception in favor of married women in respect to matters relating to, or affecting, their separate estates<sup>82</sup> nor as to the right to make entry on or to bring an action to recover land. In statutes making savings in favor of persons under disability, the saving is confined to

78. *Reusens v. Lawson*, 91 Va. 226, 21 S. E. 347.

79. *Chapman v. Chapman*, 91 Va. 397, 21 S. E. 813.

80. 1 *Barton's L. Pr.* (2nd Ed.) 107, 108; *Scates v. Wilson*, 9 Leigh 473.

81. *Vance v. Vance*, 108 U. S. 514; *Schauble v. Schultz* (C. C. A.), 137 Fed. 389; *Jones v. Lemon*, 26 W. Va. 629; *Leonard v. Henderson*, 23 Gratt. 331.

82. Code, §§ 2917, 2931.

disabilities existing at the time the right of action accrues. No other disability is available than the one which then existed, and no disability subsequently arising can be "tacked" on to the one so existing, for instance if a female infant marries after the right accrues, the disability of coverture cannot be "tacked" to that of infancy, but if both exist when the right accrues the statute is suspended until the last one is removed. Here there is no "tacking."<sup>83</sup>

The period of disability of a married woman saved to her as to her common law lands by § 2931 of the Virginia Code is not allowed where action is brought by a husband and wife during the coverture, and the husband is living at the time of trial. But if the husband be dead, and the action survives to the wife, the period of her coverture is deducted, provided the whole time elapsing from the time the right of action accrued until action brought does not exceed twenty years.<sup>84</sup>

### § 220. What limitation is applicable.<sup>85</sup>

(1) *Tort or contract.* Whether the limitation to be applied in a particular case is a tort or contract limitation, where either may be brought, is determined by the object of the action, and not simply by its form. If the injury sought to be redressed is *merely personal*, whether resulting from breach of contract or from tort, the action dies with the person and the tort limitation applies.<sup>86</sup>

The following distinction, between actions for tort or contract is made by the English Court of Appeals: "The distinction is this: If the cause of complaint be for an act of omis-

83. *Parsons v. McCracken*, 9 Leigh 495; *Blackwell v. Bragg*, 78 Va. 529; *Jones v. Lemon*, 26 W. Va. 629.

84. *McMurray v. Dixon*, 105 Va. 605, 54 S. E. 481. See *post*, note 21 to § 221.

85. In Virginia the limitation on contracts under seal is ten years, on contracts in writing not under seal five years, on oral contracts three years, on store accounts two years, on personal torts one year. For all other actions for which no limitation is prescribed the limitation is five years if the action would survive to the personal representative, and if not, one year. Code, §§ 2920, 2927.

86. *Grubb v. Sult*, 32 Gratt. 203; *Birmingham v. C. & O.*, 98 Va. 548, 37 S. E. 17.

sion or non-feasance which, without proof of a contract to do what was left undone, would not give rise to any cause of action (because no duty apart from contract to do what is complained of exists) then the action is founded upon contract, and not upon tort. If, on the other hand, the relation of the plaintiff and the defendants be such that a duty arises from that relationship, irrespective of contract, to take due care, and the defendants are negligent, then the action is one of tort."<sup>87</sup>

(2) *Cases on contract.* Where the plaintiff has two causes of action upon contract open to him and elects one, and adapts his pleading and proof thereto, he will be bound by his election, and cannot thereafter adopt the other. The act of limitation applicable will be the one appropriate to the cause of action selected.<sup>88</sup>

(3) *Debt assumed by grantee in a deed.* The assumption by the grantee in a deed, who does not sign it, of the payment of bonds given by his grantor for purchase money, is a simple contract debt, and is barred in Virginia in three years from the time of assumption.<sup>89</sup>

(4) *Coupons.* Coupons are mere interest certificates, and when annexed to bonds partake of the nature of the bonds. They are intended to be parts and parcels of the principal undertaking, and are annexed for convenience of the collection of the interest. When annexed to bonds they may be said to be little bonds, and the limitation on the coupon is the same as that applicable to the principal obligation. They mature, however, and the statute begins to run on them from the times they are payable, and not from the time when the original undertaking is payable.<sup>90</sup>

87. *Kelly v. Met. R. Co.* (1895), 1 Q. B. 944; *Atl., etc., R. Co. v. Laird*, 164 U. S. 393.

88. *Noell v. Noell*, 93 Va. 433, 25 S. E. 242. If an accommodation endorser pays a note he may sue either on the note, or on the implied contract of indemnity.

89. *Taylor v. Forbes*, 101 Va. 658, 44 S. E. 333; *Harris v. Shields*, 112 Va. —, 69 S. E. 933; *W. Va. R. Co. v. McIntire*, 44 W. Va. 210, 28 S. E. 696.

90. *Clark v. Iowa City*, 20 Wall. 583; *Amy v. Dubuque*, 98 U. S. 470.

(5) *Debt secured by mortgage, deed of trust, or pledge.* A debt secured by mortgage, deed of trust, or other lien may be barred so that no action can be brought thereon, but the lien still remains and may be enforced.<sup>91</sup> Whether or not giving security for a prior existing debt is a renewal of the debt, is said to be a question upon which the authorities are greatly at variance.<sup>92</sup> Where a creditor holds a pledge or collateral security for his debt he may enforce the debt against the security, although it is barred.<sup>93</sup>

(6) *Lien for purchase money.* In the absence of statute, no time bars the right to enforce a lien reserved for purchase money. Presumption of payment from lapse of time and laches will alone rebut the claim.<sup>94</sup> In Virginia it is provided by Code, § 2935, that even a lien reserved for the purchase price of property shall not be enforced after twenty years from the time the right to enforce the same shall have first accrued. If, however, the title is retained as a security for the purchase price no limitation is fixed for the time of its enforcement. The fact, however, that a limitation was fixed upon all other liens to secure the purchase price after the lapse of twenty years would greatly strengthen the common law presumption of payment after that lapse of time, and this presumption would be well nigh as effective as an absolute bar. The limitation placed upon deeds of trust and mortgages by § 2935 above mentioned has no application to such instruments made by corporations.

(7) *To recover damages for suing out an injunction.* An action for maliciously and without probable cause suing out an injunction whereby the operation of a mill was suspended is barred in one year, as it is for a mere personal tort.<sup>95</sup>

91. *Hanna v. Wilson*, 3 Gratt. 243; *Bowie v. Poor Society*, 75 Va. 300; *Tunstall v. Withers*, 86 Va. 892, 11 S. E. 565; *Criss v. Criss*, 28 W. Va. 388; 1 Va. Law Reg. 854, and cases cited.

92. 19 Am. & Eng. Encl. Law (2nd Ed.) 303; *Wolf v. Violet*, 78 Va. 57. See also an excellent discussion in 8 Va. L. Reg. 401; *Shepherd v. Thompson*, 122 U. S. 231; *post*, § 224.

93. *Roots v. Salt Co.*, 27 W. Va. 483.

94. *Evans v. Johnson*, 39 W. Va. 299, 19 S. E. 623.

95. *Mumpower v. City of Bristol*, 94 Va. 737, 27 S. E. 581, 3 Va. L. Reg. 439, and note.

(8) *Principal and surety.* The liability of a principal to indemnify the surety is a simple contract debt, although the original debt may be under seal.<sup>96</sup>

(9) *Death by wrongful act.* "The limitation prescribed by the law of the State where the injury occurred governs the time within which the action must be brought, regardless of where the action is tried, if the limitation is contained in the act creating the right of action. But where the statute giving the right of action in such State provides no limitation, the limitation prescribed by the law of the forum will govern."<sup>97</sup>

(10) *Proceedings in federal courts.* State statutes of limitation are as a rule binding on Federal courts.<sup>98</sup>

(11) *Unmatured debts.* If a debt is payable at a future day, and an act of limitation is enacted for the first time, or an existing act is changed, the act in force when the debt *becomes due*, and not the one (if any) existing when the debt was contracted, prevails in the absence of any saving clause in the statute.<sup>99</sup> The Virginia statute<sup>1</sup> contains no such saving clause as to causes of action which had not matured at the time the Code took effect, May 1, 1888.

A promise to pay a debt after a certain specified debt is paid matures when the specified debt should have been paid by the debtor if of ability to pay. To postpone payment when able to pay is a fraud on the other creditor.<sup>2</sup>

(12) *Foreign contracts.* Upon a contract made in one State and sought to be enforced in another, the laws of the latter (*lex fori*) generally prevail, but the rule is otherwise where a

96. *Tate v. Winfree*, 99 Va. 255, 37 S. E. 956.

97. 8 Am. & Eng. Encl. Law (2nd Ed.) 886, and cases cited; *Gregory v. Ry.* (D. C.), 157 Fed. 113; *Dowell v. Cox*, 108 Va. 460, 62 S. E. 388.

98. *Bauserman v. Blunt*, 147 U. S. 647, 652; *Leffingwell v. Warren*, 2 Black. 599.

99. 19 Am. & Eng. Encl. Law (2nd Ed.) 168, 176; *Smith v. Ins. Co.*, 112 Va. —, 70 S. E. 482.

1. Code, § 2938.

2. *Solenberger v. Strickler*, 110 Va. 273, 65 S. E. 566.

statute creates a new liability which did not exist at common law, and prescribes the period of limitation.<sup>3</sup>

(13) *Foreign judgments.* It is expressly provided by statute in Virginia that "every action upon a judgment or decree rendered in any other State or country shall be barred, if by the laws of such State or country such action would there be barred, and the judgment or decree be incapable of being otherwise enforced there; and whether so barred or not no action against the person who shall have resided in this State during the ten years next preceding such action shall be brought upon any such judgment or decree, rendered more than ten years before the commencement of such action."<sup>4</sup>

### § 221. What stops or suspends the running of the statute.

When the statute begins to run, nothing will stop or suspend it except what is expressly so provided by the statute. Neither marriage, death, insanity, removal from the State, nor any other cause will suspend its operation unless expressly so provided.<sup>5</sup> Such statutes usually, however, except from their operation infants, insane persons and married women during the period of their disability and for a reasonable time thereafter, and also exclude from the computation the time during which any party may, by absconding, concealing himself, or by any other indirect ways or means, obstruct the prosecution of a legal right.<sup>6</sup> As these are common exceptions, it will be necessary to consider them somewhat more in detail, also to consider the effect of the amendment of pleadings.

(1) *Commencement of action.* The commencement of an action of course stops the running of the statute, and is generally the only thing that will stop it. Other causes may *suspend* it for a time, but the commencement of an action *stops* it. The language of the statutes usually is that every action of a designated kind shall be brought within a specified number

3. *Urton v. Hunter*, 2 W. Va. 83; *Brunswick Terminal Co. v. National Bank*, 99 Fed. 635, 5 Va. Law Reg. 787.

4. Code, § 2928.

5. *Vance v. Vance*, 108 U. S. 574; *Ins. Co. v. Hall*, 12 Mich. 202.

6. Code, § 2933.

of years from the time the right accrues, or that no action shall be brought except within a given time after the right accrues. Hence, if the action be brought within the time specified, it of necessity stops the statute from running. What constitutes the commencement of an action so as to stop the running of the statute is a question about which there is serious conflict of authority. In Virginia it is provided that process to commence a suit shall be a summons and that it shall be "issued" on the order of the plaintiff, his attorney or agent.<sup>7</sup> On the one hand it is claimed that when the plaintiff has made his memorandum and the clerk has filled out the writ for the purpose of delivery, this is all that can be required of him. On the other hand, it is insisted that to "issue" is to put forth, to send out, to deliver by authority, and hence that the writ or summons must not only be filled out, but delivered, or at least put in the course of delivery to some one who may legally serve it. The latter view would, on principle, seem to be preferable.<sup>8</sup> The references in the margin will show the authorities for the different views.<sup>9</sup> In *Davis v. Roller*, 106 Va. 46, 55 S. E. 4, a writ of *feri facias* was simply filled out by the clerk and never sent out, but marked "to lie" and this was held a sufficient "issuance" under the statute authorizing the issuance of other executions thereafter. The endorsement "to lie" would seem to indicate that there never was any *bona fide* intention that the writ should be put in the hands of an officer to be executed. In *Homestead Ins. Co. v. Ison*, 110 Va. 18, it is more properly said that the legal definition of "issuance" is "to send out officially, to deliver for use, to put into circulation." If the latter view of issuance be adopted, then the conclusion of the author of the article in 12 Va. Law Reg. 675 is the correct view.

Where the record shows that suit or action was brought

7. Code, § 2233.

8. See *Davis v. Roller*, 106 Va. 46, 55 S. E. 4, construing the word "issue" as applied to executions. See also *Lawrence v. Winifred Coal Co.*, 48 W. Va. 143, 35 S. E. 925, and cases cited.

9. 8 Va. Law Reg. 624, and cases cited; 12 Va. Law Reg. 675, and cases cited; note, 15 Am. Dec. 341; Compare *Davis v. Roller*, *supra*, and *Homestead Ins. Co. v. Ison*, 110 Va. 18, 65 S. E. 463.

within the time prescribed by the statute of limitations, the court will take judicial notice of the date of the writ in order to ascertain the time of the institution of the suit. The date of the writ is usually conceded to be *prima facie* evidence of the time of issuance.<sup>10</sup> If the proceeding is by motion to recover a judgment for money under § 3211 of the Code of Virginia, the action cannot be deemed commenced within the meaning of the attachment law until the notice has been executed and returned to the clerk's office.<sup>11</sup> By parity of reasoning, the act of limitations would not cease to run until the same time.

If a plaintiff suffers a non-suit and his cause is afterwards reinstated on the docket there is in legal contemplation no break in the continuity of his action, and the date of the institution of the original action is the proper test. It is otherwise if the action is not reinstated.<sup>12</sup>

If an action brought in due time be dismissed for failure of the plaintiff to file his declaration in the time prescribed by law and a second action be brought for the same cause, the time during which the first action is pending is not deducted in computing the period of limitation. The dismissal for such cause is in the nature of a voluntary non-suit.<sup>13</sup>

10. *Sands v. Stagg*, 105 Va. 444, 52 S. E. 633.

11. *Furst Bros. v. Banks*, 101 Va. 208, 42 S. E. 360.

12. *Manuel v. N. & W. R. Co.*, 99 Va. 188, 37 S. E. 957. See also *Wickham v. Green*, 111 Va. 199, 68 S. E. 259.

13. *Lawrence v. Winifred Coal Co.*, 48 W. Va. 139, 35 S. E. 925; *Wickham v. Green*, 111 Va. 199, 68 S. E. 259.

Section 2934 of the Code of Virginia is as follows: "If an action commenced within due time in the name of or against one or more plaintiffs or defendants abate as to one of them by the return of no inhabitant or by his or her death or marriage, or if in an action commenced within due time judgment for the plaintiff shall be arrested or reversed upon a ground which does not preclude a new action for the same cause, or if there be occasion to bring a new suit by reason of the loss or destruction of any of the papers or records in a former suit which was in due time, or if in any pending case or in any action or suit hereafter commenced within due time in any of the courts of this commonwealth, the plaintiffs proceed or have proceeded in the wrong forum or bring the wrong form of action or against the wrong defendant, and judgment is rendered against

(2) *Amendment of Pleadings.* If the amendment sets up no new cause of action or claim, and makes no new demands, but simply varies and expands the original cause of action, the amendment relates back to the commencement of the action and stops the running of the statute as of that date; but an amendment which introduces a new or different cause of action, or makes a new or different demand, does not relate back and the statute continues to run till date of amendment.<sup>14</sup> If the amendment simply consists in claiming larger damages than were claimed in the original declaration, the statute stops running at the commencement of the action, and not at the time of making the amendment.<sup>15</sup>

Generally, where *new parties* are introduced by the amendment, the statute continues to run up to the time of the amendment, so far as it affects the rights of such new parties.<sup>16</sup> See particularly Code, § 2934, as to suspension in certain cases.<sup>17</sup>

(3) *Removal from State.* In *Ficklin v. Carrington*, 32 Gratt. 219, it was held that removal from the State after creating a debt was of itself an obstruction which would stop the running of the statute. This holding is apparently overruled in *Brown v. Butler*, 87 Va. 621, 13 S. E. 71, citing *Wilson v.*

the plaintiff solely upon such ground, in every such case, notwithstanding the expiration of the time within which a new action or suit must otherwise have been brought the same may be brought within one year after such abatement or arrest or reversal of judgment or loss or destruction or judgment against the plaintiff, but not after, provided, however, that the time that any such action or suit first brought shall be pending in any appellate court shall not be included in the computation of said year."

14. *Whalen v. Gordon*, 95 Fed. 305, and cases cited; 16 C. C. A. 508, and note; 5 Va. Law Reg. 411, and cases cited; note, 50 Am. St. Rep. 737; *New River Min. Co. v. Painter*, 100 Va. 507, 8 Va. Law Reg. 430, and note; note, 51 Am. St. Rep. 430; *Stout v. Vance*, 1 Rob. (Va.) 169; *Morrison v. Householder*, 79 Va. 627; *Lusk v. Kimball*, 4 Va. Law Reg. 731; *Lamb v. Cecil*, 28 W. Va. 653; *Kuhn v. Brownfield*, 34 W. Va. 352, 12 S. E. 519.

15. *Bentley v. Standard F. Ins. Co.*, 40 W. Va. 729, 23 S. E. 584.

16. I Encl. of Pl. and Pr. 623, and cases cited; *Richmond v. Sitterding*, 101 Va. 354, 43 S. E. 562.

17. *Griffin v. Woolford*, 100 Va. 473, 41 S. E. 749.

Koontz, 7 Cranch 202, but is reaffirmed in *Cheatham v. Aistrop*, 97 Va. 457, 34 S. E. 57.

In *Embry v. Jemison*, 131 U. S. 336, it was held that § 2933 of the Code, relating to removal from the State, does not apply when the defendant, though once a resident of the State, removed therefrom before any right of action accrued against him, and before the transaction occurred out of which the plaintiff's cause of action arose. The same doctrine is held in *Griffin v. Woolford*, *supra*. In *Abell v. Penn*, 18 W. Va. 400, it was held that, where a contract was made out of the State to be performed in the State, with the plaintiff, a citizen and resident of the State, by a defendant who had been a resident of the State, but is then temporarily absent from it, the time during which the defendant remains out of the State is not to be computed as any part of the time within which the creditor is required by the statute of limitations to prosecute his action on the contract.

The continued non-residence of the maker of a note who was never a resident of this State did not prevent the running of the statute as it existed prior to the amendment of 1897-98.<sup>18</sup> Under Code, § 2933, as amended by acts of 1897-98, p. 441, "continuing to reside without the State" is made an obstruction, and such time is not counted in computing the time within which an action is to be brought.

If a non-resident, owning effects in this State, makes a simple contract, to be performed in this State, and then dies outside of this State, before the accrual of a right of action on such contract, the action must be brought within the statutory period, notwithstanding the amendment above mentioned, as the debtor, having died before the plaintiff's cause of action accrued, did not, and could not, obstruct its prosecution.<sup>19</sup>

(4) *Infancy*. It has been pointed out that the statute need not make any saving in favor of infants or other persons under disability, but they usually do.<sup>20</sup> A common provision is that if any person to whom the right accrues under the act shall,

18. *Griffin v. Woolford*, *supra*; *Door v. Rohr*, 82 Va. 359, 3 Am. St. Rep. 106.

19. *Templeman v. Pugh*, 102 Va. 441, 46 S. E. 474.

20. *Ante*, § 212.

at the time the same accrues, be an infant, married woman, or insane, the same may be brought within a like number of years after he has become of full age, unmarried, or sane, that is allowed to a person having no such impediment to bring the same after the right accrues, except that it shall in no case be brought after a given number of years from the time when the right accrues.<sup>21</sup> In Virginia, the exception in favor of married women does not apply in cases relating to or affecting their separate estates.<sup>22</sup>

(5) *Death.* The running of the statute is not affected by the death of either the creditor or the debtor, in the absence of a statute so providing.<sup>23</sup> In Virginia it is provided that "the period of one year from the death of any party shall be excluded from the computation of time within which, by operation of any statute or rule of law, it may be necessary to commence any proceeding to preserve or prevent the loss of any right or remedy."<sup>24</sup> It is further provided that "the right of action against the estate of any person hereafter dying, on any such award or contract which shall have accrued at the time of his death, or the right to prove any such claim against his estate in any suit or proceeding shall not in any case continue longer than five years from the qualification of the personal representative, or if the right of action shall not have accrued at the time of the decedent's death, it shall not continue longer than five years after the same shall have so accrued."<sup>25</sup>

It is further provided:

"If a person die before the time at which any right mentioned in this chapter would have accrued to him if he had continued

21. Code, § 2931. In Virginia, not exceeding twenty years.

22. Code, §§ 2917, 2931.

23. *Rowan v. Chenoweth*, 49 W. Va. 287, 38 S. E. 544.

24. Code, § 2919. This section also provides that there "shall be excluded from the computation the time within which, by the terms or operation of any statute or rule of law, it may be necessary to commence any action or other proceeding, or to do any other act to preserve or prevent the loss of any civil right or remedy, or to avoid any fine, penalty, or forfeiture," the period between the seventeenth day of April, 1861 and the first day of January, 1869, commonly known as the *Stay Law*.

25. Code, § 2920.

alive, and there be an interval of more than five years between the death of such person and the qualification of his personal representative, such personal representative shall, for the purposes of this chapter, be deemed to have qualified on the last day of the said five years."<sup>26</sup>

The foregoing section seems to indicate that, if a party died before a right in his favor accrued, the statute would not begin to run until after the qualification of his personal representative, actually or constructively, and this is the view taken of the prior statute of limitations in Virginia.<sup>27</sup>

It will be observed that § 2920 is applicable only to awards and contracts. It is provided by § 3577 that if a judgment debtor dies, the lien of the judgment will be lost, unless the judgment is revived against his personal representative or action be brought thereon within five years from the qualification of his personal representative.<sup>28</sup>

6) *Inability to serve process.* In some jurisdictions it is held that the mere inability to serve process upon a defendant, caused by his intentional elusion of it, is no excuse for not commencing an action within the prescribed period.<sup>29</sup> In the case first cited in the margin there was no obstruction to the institution of the action, but the parties, seeing that, because the chief officers of the town resigned, they could get no service of process, did not bring their action. The court said that this was a very different case from suspending the running of the act during the existence of a fraud of which the plaintiff did not know, for then the plaintiff could not know that he had a cause of action, while here he knew it, but failed to sue because he thought he could not get service of process. Whether this case would be followed elsewhere depends largely on the phraseology of the particular statute. It would probably not be followed in Virginia, in view of the language of the Code, § 2933.

26. Code, § 2932.

27. *Hansfort v. Elliott*, 9 Leigh 79; *Bowles v. Elmore*, 7 Gratt. 393.

28. Code, § 2920; *Spencer v. Flanary*, 104 Va. 395, 51 S. E. 849.

29. *Amy v. Watertown*, No. 2, 130 U. S. 320. In Wisconsin the statute does not stop running until service of process or an attempt to serve followed by service or publication within sixty days. *Knowlton v. Watertown*, 130 U. S. 327.

IN EQUITY.—A creditor's bill, filed by a creditor, suing on behalf of himself and others, or an order for an account of debts or liens, as the case may be, stops the running of the statute as to all creditors who ultimately come in and prove their claims, but not as to others.<sup>30</sup>

### § 222. How defence of statute is made.

*At law.* The defence of the statute of limitations may be raised (1) by demurrer, where it is of the right and not of the remedy; (2) by special plea—this is ordinarily necessary; (3) under the general issue, where it is a basis of title, as in ejectment and detinue; (4) by instructions, where there has been no opportunity to plead it, as in case of replication to a plea under Virginia Code, § 3299.

(1) *By demurrer.* It has already been pointed out<sup>31</sup> that where a statute confers a right for the first time and at the same time fixes a period within which the right may be enforced, then the limitation is of the right and not merely of the remedy. Where the limitation is of this nature, it must be alleged in the pleadings and proved on trial that the right existed at the time of the institution of the action, and a failure to allege in the declaration when the right accrued will be good ground of demurrer as it does not show the present existence of a right conferred by the statute.<sup>32</sup>

(2) *By special plea.* This is generally the proper and only method. The others are exceptions. If this were not true, the plaintiff would be compelled to set out his whole case in his declaration, including not only the grounds of his action, but also excuses for not sooner bringing it, or else he would be cut off from relying upon a new promise in writing, coverture, infancy, insanity and many other answers to the plea. It is especially necessary in those jurisdictions which, like Virginia, allow the plaintiff either to bring his action on the old promise and reply to the new, or else to bring it on the new.<sup>33</sup> *The*

30. Callaway v. Saunders, 99 Va. 350, 38 S. E. 132.

31. Ante, § 217.

32. Manuel v. N. & W. R. Co., 99 Va. 188, 37 S. E. 957.

33. Code, § 2922.

*form of the plea* is as follows: And the said defendant, by his attorney, comes and says that the supposed cause of action in the declaration mentioned did not accrue to the said plaintiff at any time within — years next before the commencement of this action in manner and form as the said plaintiff hath above complained against him, and this the said defendant is ready to verify.

.....

p. d.

As a general rule, subject to exceptions to be pointed out in the next section, the defence is purely personal to the debtor, and if not made by him in the proper manner is deemed to have been waived.<sup>34</sup>

(3) *Shown under the general issue.* In ejectment and detinue the statute of limitations need not be pleaded by the defendant, but adverse possession in him may be shown under the general issue, because such adverse possession does not only bar the remedy of the plaintiff but takes the right from him and vests it in the defendant, thereby giving him superior title.<sup>35</sup> The reasons for allowing the statute to be relied upon in this manner and the difference between the use of the statute as a muniment of title and as a mere bar or obstacle to the enforcement of a personal assumpsit are well set forth by Robertson, C. J. in *Smart v. Baugh* (Ky.), 3 J. J. Marshall 364, which was an action of detinue to recover a slave. He says: "The plea is *non detinet* in the present tense, and under this plea anything which will show a better right in the defendant than in the plaintiff may be admitted as competent evidence. The plea puts in issue the plaintiff's right. Five years uninterrupted adverse possession of a slave not only bars the remedy of the claimant out of possession, but vests the absolute legal right in the possessor. Therefore, proof of such possession may show that the claimant had no right to the slave and cannot recover. Consequently, it would seem to result from the reason of the case that the adverse possession may be

34. *Smith v. Hutchinson*, 78 Va. 683; *Riddle v. McGinnis*, 22 W. Va. 253; *Smith v. Brown*, 44 W. Va. 342, 30 S. E. 160.

35. *Leffingwell v. Warren*, 2 Black (U. S.) 599; *Sharon v. Tucker*, 144 U. S. 544.

proved under the general issue. \* \* \* The same reason does not apply to assumpsit, because the statute of limitations does not destroy the right *in foro conscientiae* to the benefit of assumpsit, but only bars the remedy if the defendant chooses to rely on the bar. *Time does not pay the debt, but time may vest right of property.*" Furthermore, the learned judge says: "This is perfectly true in detinue for a slave because in such a case the lapse of time has divested the plaintiff of his right of property and vested it in the defendant. \* \* \*. But it is not so in debt, because the statute of limitations does not destroy nor pay the debt.

"A debt barred by time is a sufficient consideration for a new assumpsit. The statute of limitations only disqualifies the plaintiff to recover a debt by suit if the defendant rely on time in his plea. It is a personal privilege accorded by law for reasons of public expediency and the privilege can only be asserted by a plea."<sup>36</sup>

(4) *By instructions.* When a defendant has had no opportunity to plead the statute, as where under § 2717 of the Virginia Code in unlawful detainer the only plea allowed is not guilty, and under the Virginia Code, § 3299, where the only replication is a general replication (see § 3300), the statute of limitations cannot be replied, but may be relied on in evidence.

So, likewise, set-offs may be formally pleaded, or notice may be given of set-offs and a list filed. If formally pleaded, and the statute of limitations is relied on in answer to the plea, it must be specially replied, else it will be deemed to have been waived, but if only a list be filed there is no pleading to reply to, and the plaintiff may rely on the statute as a bar to such set-offs without pleading it. This is done by simply asking the court to instruct the jury that if they believe that more than a given time (the statutory period) had elapsed between the time that the set-off became due and the filing thereof, then on that question they must find for the plaintiff. The defendant in such case cannot claim that he is taken by surprise by using the defence of the statute of limitations in this manner, as the plaintiff has had no other opportunity of giving

36. *Campbell v. Holt*, 115 U. S. 624.

him notice of his intention to rely upon the statute, and a correct instruction upon a point which the evidence tends to prove can never work a surprise at law.<sup>37</sup>

*In equity.* In Virginia, following precedent, it is said that the defence of the statute of limitations cannot be raised by a demurrer where the limitation is of the remedy only, but must be raised by a plea, answer, exceptions to report, or in some other manner,<sup>38</sup> but the rule is otherwise in West Virginia and most of the States.<sup>39</sup> Where, however, the limitation is of the essence of the right, and not merely of the remedy, it must affirmatively appear from the bill that the suit was brought within the time limited by the statute, else the bill will be bad on demurrer. Here time is of the essence of the right and hence the defence may be made by demurrer.<sup>40</sup>

*In Code States.* In Code States the defence of the statute of limitations is generally allowed to be raised by demurrer. It is said that the right to demur is well established by authority of precedent, but it is criticised as indefensible upon principle. It is said: "The doctrine of the right under consideration is this, then, that before the demurrer is filed, the complainant states sufficient facts; but, upon the filing of the demurrer, questioning only the sufficiency of these facts, they at once become insufficient. The error of this doctrine is that it either makes the mere lapse of time vitiate the right asserted, which is beyond the purpose and office of the statute, or it makes the demurrer operate as a defence, which is beyond the office of the demurrer. If it be said that a cause of action, on its face subject to a bar of the statute, is good if the statute is not asserted because the statute is waived by not asserting it, then we have the anomaly of a waiver validating that which is defective in substance."<sup>41</sup>

37. *Sexton v. Aultman*, 92 Va. 20, 22 S. E. 838.

38. *Hubble v. Poff*, 98 Va. 646, 37 S. E. 277.

39. *Jackson v. Hull*, 21 W. Va. 601; *Thompson v. Whittaker*, 41 W. Va. 574, 23 S. E. 795; *Newberger v. Wells*, 51 W. Va. 624, 42 S. E. 625; 13 Encl. Pl. and Pr. 201.

40. *Savings Bank v. Powhatan Clay Co.*, 102 Va. 274, 46 S. E. 294.

41. *Phillips on Code Pleading*, §§ 295, 336, 337.

*Matters of avoidance.* Matter in avoidance of the statute of limitations, or forming an exception thereto, should, as a rule, be specially pleaded, or the pleadings (bill or declaration) be amended. It cannot be relied on under a general replication.<sup>42</sup>

### § 223. Who may plead the statute.

Generally the statute is a personal defence and can be relied on by the party only. But in equity when the court is administering the estate of a decedent one creditor may set up the statute against the claims of another,<sup>43</sup> and in sales to wind up an insolvent partnership, where the partners are non-residents and do not appear, and the contest is wholly between creditors of the firm, one creditor of the firm may set up the statute against another;<sup>44</sup> and in Virginia it has been held that in suits to enforce liens against a *living* defendant one creditor may set up the statute against the claims of another.<sup>45</sup> In the case of *McCartney v. Tyrer*, cited in the margin, the debtor was dead, while in *Callaway v. Saunders*, likewise cited in the margin, he was living, and yet the latter case is based solely on the former. The West Virginia court, with better reason it would seem, refuses to allow one creditor to set up the act against another where the debtor is alive and does not plead the act.<sup>46</sup> In the course of the opinion in the case last cited, the following quotation is made from the opinion of the court in *Lee v. Feemster*, 21 W. Va. 108: "In *Woodyard v. Polesley*, 14 W. Va. 211, we held that 'After a man is dead, and his estate is distributed among his creditors in a court of equity, a creditor might rely on the statute of limitations to defeat the claim of another creditor.' But this is put upon the principle that it is then impossible for the debtor to plead the statute of limitations; his voice is hushed; the law made it the duty of his personal representative to plead the statute of limitations, and if the personal representative did not do it the

42. 2 Abbott's Trial Brief on Pl. 1090, and cases cited; *Lewis v. Bacon*, 3 Hen. & Munf. 89; *Switzer v. Noffsinger*, 82 Va. 518.

43. *McCartney v. Tyrer*, 94 Va. 198, 26 S. E. 419.

44. *Conrad v. Bank*, 21 W. Va. 396, 410, 411.

45. *Callaway v. Saunders*, 99 Va. 300, 38 S. E. 182.

46. *Welton v. Boggs*, 45 W. Va. 620, 624, 32 S. E. 232.

creditors might do so as against each other. With a living man it is altogether different. The law does not compel him to plead the statute of limitations. It is a personal privilege that he can avail himself of or not, as he pleases."

The plea of the statute by one surety which is not purely personal to him inures to the benefit of all.<sup>47</sup>

*Fiduciaries.* It is the duty of a fiduciary to set up the statute as a defence to claims asserted against the person he represents which are barred by the statute of limitations and his failure to do so will generally render him liable for the resulting loss. It is provided by statute in Virginia<sup>48</sup> that if any personal representative, guardian, curator or committee shall pay any debt the recovery of which could be prevented by reason of illegality of consideration, *lapse of time*, or otherwise, knowing the facts by which the same could be so prevented, no credit shall be allowed him therefor."

*Privies in estate.* Privies in estate, such as devisees, vendees, and mortgagees of property have a right to rely upon the statute of limitations in favor of those under whom they claim in order to protect their property.<sup>49</sup>

*Strangers.* Generally a mere stranger to a claim can neither interpose the statute of limitations himself nor compel his debtor to do so. Hence if there be several creditors of a common debtor, one of such creditors cannot interpose the statute as a bar to the claim of the other nor compel the debtor to do so when all are living, though the debtor be insolvent.<sup>50</sup>

#### § 224. New promise or acknowledgment.

Statutes of limitation generally provide for the removal of the bar of the statute on promises to pay money by a new promise in writing of the debtor, or an acknowledgment from which a promise to pay will be implied. The Virginia statute

47. *Ashby v. Bell*, 80 Va. 811.

48. Code, § 2676.

49. *McLaugherty v. Croft*, 43 W. Va. 270, 27 S. E. 246; *Blair v. Carter*, 78 Va. 621.

50. *Welton v. Boggs*, 45 W. Va. 620, 32 S. E. 232. But see *McCartney v. Tyrer*, and *Callaway v. Saunders*, *ante*, notes 43, 45.

is given in the margin.<sup>51</sup> The antecedent debt as a general rule, furnishes all the consideration necessary for the new promise.

*Effect of new promise.* The effect of the new promise or acknowledgment is not to stop the running of the statute on the old promise, but to fix a new period from which the statute will begin to run on the old promise, and, unless the new promise amounts to a novation of the debt, the limitation on the new promise will be the same as on the old in the absence of language in the statute showing a different intent.<sup>52</sup>

Furthermore, a new promise to pay a debt secured by a mortgage or other lien will keep alive the lien, but whether the giving of a security for a debt will revive the personal liability of the debtor is the subject of much conflict.<sup>53</sup> A part payment of the principal or payment of interest does not, at least in Virginia, remove the bar of the statute.<sup>54</sup>

If the new promise is limited to a part of the debt or a new security is given to pay the debt, or so much thereof as the

**51. § 2922. Limitation of Action When There Is a New Promise in Writing. How Plaintiff to Sue in Such Case.**—If any person against whom the right shall have so accrued on an award, or any such contract, shall, by writing signed by him or his agent, promise payment of money on such award or contract, the person to whom the right shall have so accrued may maintain an action for the money so promised, within such number of years after such promise, as it might be maintained under § 2920, if such promise were the original cause of action. The plaintiff may sue on such promise or on the original cause of action, except that where the promise is of such a nature as to merge the original cause of action, then the action shall be only on the promise. If the action be on the original cause of action, in answer to a plea under § 2920, the plaintiff shall be allowed without pleading it, to show such promise in evidence, to repel the bar of the plea, provided he shall have given the defendant reasonable notice, before the trial, of his intention to rely on such promise. An acknowledgment in writing, as aforesaid, from which a promise of payment may be implied, shall be deemed to be such promise in the meaning of this section."

**52.** *Copeland v. Collins*, 122 N. C. 619, 30 S. E. 315; *Tole's Appeal*, 54 Conn. 521, 9 Atl. 402.

**53.** 19 Am. & Eng. Enci. Law (2nd Ed.) 289, 303, and notes; *Wolf v. Violet*, 78 Va. 57; 8 Va. L. Reg. 401.

**54.** *Gover v. Chamberlain*, 83 Va. 286, 5 S. E. 174.

security will pay, it has been held that this does not revive the whole debt in the first instance nor any part of it except so far as the security goes in the second,<sup>55</sup> but on this point the authorities are conflicting.<sup>56</sup>

*Nature of promise or acknowledgment.* It must in most States be in writing and signed by the debtor or his agent, and must be an unconditional promise to pay money, or else the condition must have been fulfilled.<sup>57</sup> The following requirements have been laid down for an acknowledgment to take a case out of the statute: the acknowledgment must be (1) consistent with a promise to pay, (2) must be such that a promise to pay will naturally be implied, (3) must be unconditional or the condition must have been fulfilled, (4) must be unqualified and unequivocal—hopes, excuses, etc., are not sufficient; (5) must be definite as to the sum and the debt intended, (6) may be before or after the bar has fallen,<sup>58</sup> (7) must have necessary formalities—writing; (8) must be (a) to the creditor or his agent, (b) duly communicated, (c) by the debtor or his agent.<sup>58</sup> With some qualifications and differences, nearly the same requirements are stated in a monographic note, in 102 Am. St. Rep. 751. The amount must be definite. It has been held that the new promise must not be uncertain, but must acknowledge a fixed sum or balance which admits of ready and certain ascertainment. If the balance has not been agreed, the promise is insufficient. Hence a promise to pay “the agreed balance on your judgment” is not sufficient when the amount of such balance does not appear.<sup>59</sup> An acknowledgment must admit both a liability and a willingness to pay.<sup>60</sup> Of course, if the promise is conditional, the condition must be complied with before the promise becomes operative. It is said that an acknowledgment that the debt is unpaid, accompanied by an expression of a willing-

55. *Shepherd v. Thompson*, 122 U. S. 231.

56. 19 Am. & Eng. Encl. Law (2nd Ed.) 803; 8 Va. Law Reg. 401.

57. *Stansburg v. State*, 20 W. Va. 23; *Bell v. Crawford*, 8 Gratt. 110; *Aylett v. Robinson*, 9 Leigh 45.

58. 19 Am. & Eng. Encl. Law (2nd Ed.) 291 ff.

59. *Quarrier v. Quarrier*, 31 W. Va. 310, 15 S. E. 154.

60. *Bell v. Morrison*, 1 Pet. 351; *Sutton v. Burruss*, 9 Leigh 381; *Gover v. Chamberlain*, 83 Va. 286, 5 S. E. 174.

ness to pay, but an inability, is insufficient to take a case out of the statute.<sup>61</sup> But there are many cases *contra*. Where the debtor said, "I cannot pay it now, as I have two members of my family now to support," it was held sufficient to take the case out of the statute. So also, "I am sorry to inform you that the prospect at present is not very pleasing, as it is utterly out of my power to pay anything." These and other expressions have been held sufficient, but it is very generally held that a promise "to settle" is not sufficient.<sup>62</sup>

A promise to pay an unascertained balance, or to settle and pay the balance found due, will not stop the running of the statute.<sup>63</sup> But where there is a promise to pay, not specifying any amount, but the amount can be made certain, extrinsic evidence may be received to ascertain the amount due. It is sufficient if the true amount is capable of being made certain.<sup>64</sup>

Under the Virginia statute, and under the statutes generally, the promise must be to pay money or a debt. The statute has no application to torts. Hence where detinue was brought for a breast-pin, to a plea of the statute of limitations, the replication was filed that within five years before suit was brought the defendant had acknowledged the breast-pin to be the property of the plaintiff, the replication was held bad as the statute did not apply to such a case, or provide such a method for divesting the defendant of his title acquired by adverse possession. This was not a promise to pay money, but an acknowledgment of title of the complainant.<sup>65</sup>

*Undelivered writing.* An action cannot be maintained on an undelivered writing or a due bill found in the supposed debtor's papers after his death. Such writing so found is not a sufficient acknowledgment to prevent the bar of the statute.<sup>66</sup>

61. 19 Am. & Eng. Encl. Law (2nd Ed.) 300, and cases cited.

62. Monographic note, 102 Am. St. Rep. 770, *et seq.* See also *Shepherd v. Thompson*, 122 U. S. 231; 8 Va. Law Reg. 401.

63. *Liskey v. Paul*, 100 Va. 764, 42 S. E. 875; *Aylett v. Robinson*, 9 Leigh 45; *Sutton v. Burruss*, 9 Leigh 381. See on this subject *post*, § 225.

64. *Cole v. Martin*, 99 Va. 223, 37 S. E. 907.

65. *Morris v. Lyons*, 84 Va. 331, 4 S. E. 734.

66. *Cann v. Cann*, 40 W. Va. 138, 20 S. E. 910; 102 Am. St. Rep. 758.

*Provisions in wills.* It is expressly provided by statute, both in Virginia and West Virginia, that no provision in the will of any testator devising his real estate or any part thereof subject to the payment of his debts, or charging the same therewith, shall prevent the statute from operating on such debts unless the contrary intent plainly appears.<sup>67</sup>

*By Whom Promise Should Be Made.*

(1) *By party.* A new promise should be made by the debtor or his authorized agent, and not by his personal representative or heir.<sup>68</sup> An insolvent debtor may give a new promise to pay a debt barred by the statute and may secure the debt by a specific lien. In the absence of fraud, other creditors cannot object if the case does not come within some provision of the bankrupt law.<sup>69</sup>

(2) *By partners after dissolution.* Whether a new promise or acknowledgment by one partner *after dissolution* will take a case out of the statute of limitations as to the other partners is much controverted. In England it is provided by statute that it shall not (9 Geo. IV., chap. 14). In the United States there is great conflict. Many courts say it will not take it out, viewing it virtually as a new contract. In Virginia, one partner cannot, by his *sole* act, bind his copartner against his consent, so as to impose a new liability, or to revive one barred by the statute of limitations. Nor can his declarations or admissions be received as the *only* evidence of the existence of a debt against the partnership.<sup>70</sup>

The new promise, when made, must be to pay a debt; a promise "to settle" with the claimant is not sufficient.<sup>71</sup>

67. Va. Code, § 2924; W. Va. Code, § 3503; *Dunn v. Remmick*, 33 W. Va. 476, 10 S. E. 810; *Johnston v. Wilson*, 29 Gratt. 821.

68. *Seig v. Accord*, 21 Gratt. 365; *Smith v. Pattie*, 81 Va. 654; *Switzer v. Noffsinger*, 82 Va. 518.

69. *Robinson v. Bass*, 100 Va. 190, 40 S. E. 660.

70. *Bell v. Morrison*, 1 Pet. 367; *Woodson v. Wood*, 84 Va. 478; *Shelton v. Cocke*, 3 Munf. 191; *Davis v. Poland*, 92 Va. 225; *Roots v. Salt Co.*, 27 W. Va. 483. See note collecting cases 1 Gr. Ev. (16th Ed.) 307.

71. *Bell v. Crawford*, 8 Gratt. 110; *Bell v. Morrison*, 1 Pet. 361.

(3) *By personal representative.* A personal representative, cannot, under the statutes of Virginia and West Virginia, make a new promise which will remove the bar of the statute against the debt of his decedent.<sup>72</sup> In *Bishop v. Harrison*, 2 Leigh 532, it was held that an executor might promise to pay a debt of his testator not already barred and that it was no *devastavit* for him to do so, that the estate would be bound by the promise and the administrator d. b. n. might be sued therefor. After that, what is now § 2923 of the Code of Virginia was enacted, declaring that no acknowledgment or promise by any personal representative of a decedent should charge the estate of such decedent in any case where, but for such acknowledgment or promise, the decedent's estate could have been protected under the statute of limitations. After the passage of this statute the case of *Bishop v. Harrison* was cited with approval in *Braxton v. Harrison*, 11 Gratt. 57, in *Smith v. Pattie*, 81 Va. 665 and *Switzer v. Noffsinger*, 82 Va. 524, 525, but the question decided in *Bishop v. Harrison*, was not involved in any of the cases citing it. The question of the effect, however, of § 2923 or its equivalent in West Virginia did come under review in *Findley v. Cunningham*, *supra*, where it was held that the promise of the representative did not bind the estate of the decedent. The court, however, stood three to two. The majority opinion seems to be right. The language of § 2923 seems to prevent the personal representative from making any promise or acknowledgment that will remove the bar or prevent the operation of the statute from affecting the debt, and such seems to have been the intention of the revisors of 1849.<sup>73</sup>

*To whom promise should be made.* Under the English rule, such a promise to a *third person* is sufficient, but the weight of American authority seems to be that it must be to the creditor or his agent, or at least for his benefit; and, in one case in Virginia, an acknowledgment made in a deposition by which the deponent was seeking credit for a payment as against a

72. *Stiles v. Laurel Coal Co.*, 47 W. Va. 838, 35 S. E. 936; *Findley v. Cunningham*, 53 W. Va. 1, 44 S. E. 472; *Van Winkle v. Blackford*, 33 W. Va. 573, 11 S. E. 26; *Smith v. Pattie*, 81 Va. 654.

73. See Report of Revisors, Chap. 149, § 8, p. 744.

deceased partner, the acknowledgment was held to be sufficient as a new promise to pay that debt.<sup>74</sup>

*When new promise should be made.* If made before action brought, it is immaterial whether it was made before or after the bar had fallen.<sup>75</sup> It would seem to be too late after the institution of action.<sup>76</sup>

### § 225. Waiver and estoppel.

In a monographic note in 95 Am. St. Rep. 411, it is said: "Notwithstanding some conflict in the authorities, the great weight of legal adjudication and the universal trend of modern cases firmly establish the rule that an agreement or promise, whether oral or written, by the debtor not to plead the statute of limitations, made before the expiration of the statutory period, and relied upon by the creditor, until after the statutory period has expired, operates as an estoppel *in pais* as against the debtor, and precludes him from interposing the defence of the statute to defeat the action." In a qualified sense this is true. When the creditor has relied upon the assurance of the debtor that he would not plead the statute of limitations to such an extent that to permit the interposition of the defence would be unconscientious, inequitable, and unjust, and would operate a fraud upon the creditor, then the courts generally hold that the debtor will be estopped to set up the defence, and so where by fraudulent representations the debtor has misled the creditor and caused him to delay instituting his action, and in some cases where the debtor has fraudulently concealed from the creditor the existence of a cause of action against him, the courts generally hold that the debtor will be estopped to make the defence of the statute. One of the most common cases arising is that where a defendant induces the plaintiff not to sue by assurances that he will settle his liability without suit, and lulls the plaintiff into inaction until after the claim is barred. The case of *Ches. & Nashville R. Co. v. Speak-*

74. Note, 102 Am. St. Rep. 754, 756 ff; *Diuguid v. Schoolfield*, 32 Gratt. 803, 809, 810; 1 Va. Law Reg. 782.

75. *Shepherd v. Thompson*, 122 U. S. 231.

76. 19 Am. & Eng. Encl. Law (2nd Ed.) 318, 319.

man<sup>77</sup> is simply typical of this class of cases. There the railroad company induced an employee to refrain from suing for injuries by promising to retain him on its pay-roll, pay him for his injuries and give him a life job, which promise it fulfilled until after the period of limitation had expired, and it then discharged him and refused to pay for the injuries received. In an action against the company, the latter set up the defence of the statute of limitations, but it was held that the company was estopped to plead the statute. When the estoppel is of this nature, it may be by words or conduct, and if by words, they may be oral or written. It is the common case of estoppel by conduct. The defendant having induced the plaintiff to change his position for the worse by the representation that he would not plead the statute, is not thereafter allowed to set up the statute against the plaintiff's claim. As to the duration of this estoppel, there is some conflict of authority, quite a number of the cases holding that the statute runs against the agreement not to plead as well as against the original cause of action, and that the effect of the agreement is simply to fix a new period from which the statute will begin to run, and this would seem to be a very reasonable conclusion, where there is nothing in the language of the agreement to indicate a different intention.

If the promise not to plead the statute of limitations is not made until after the bar has fallen, then it is held by a number of courts and it would seem upon good reason, that the promise is without consideration and therefore not binding. In such case a creditor has not altered his position to his detriment in consequence of the promise, and if the promise was not enforced he is in no worse condition than he was before it was made.

If the promise not to plead the statute is made contemporaneously with the original agreement and is part and parcel thereof, there is no uniformity in the holdings of the courts as to what is the result. Some courts hold flatly that such an agreement is contrary to public policy and void and in contravention of the statute which requires a new promise or an

77. 114 Ky. 628, 71 S. W. 633, 63 L. R. A. 193.

acknowledgment to take a case out of the statute of limitations to be in writing. Of course the courts entertaining this view hold that such a promise contained in the original undertaking is simply nugatory, and if made subsequent to the original undertaking, under such circumstances as do not amount to a fraud on the debtor, it is either of no effect at all, or else has only the effect of starting a new period from which the statute is to be computed. On the other hand, a number of courts of the highest respectability and noted for their learning, hold that an agreement by the debtor, made at any time before the debt is barred, not to plead the statute of limitations is not contrary to public policy, is based upon a valuable consideration and estops the debtor from setting it up. While statutes of limitation, they say, are essentially statutes of repose, they were enacted for the benefit and repose of individuals. The enactments were dictated by public policy, but the beneficiaries are not the public as such, but individuals. The right to rely upon the statute is a privilege personal to the individual and hence he may waive it if he chooses. The privilege being personal, generally no one can plead the statute for him, nor compel him to plead it. He, however, may waive it if he chooses, and one of the commonest ways of waiving it is by a failure to plead it. If he may waive it by a failure to plead, there is no good reason why he may not waive it by an agreement to that effect. If the waiver is by agreement, then, like all other contracts, it must be supported by a valuable consideration. If made at any time before the bar has fallen, the act of the creditor in refraining from suing furnishes all the consideration necessary to support the agreement. The duration of the waiver is to be determined by the language of the agreement. There is no reason why the parties may not make the waiver perpetual if they choose. The policy which dictated the statutes being for the benefit of individuals and not for the public as such, such an agreement cannot be said to contravene any rule of public policy. The agreement affects the individual only and not the public. Hence there is no reason why parties may not agree not to plead the statute at any time. Statutes enacted to secure general objects of policy or morals cannot be modified by the agreement of parties, but where no principle of public policy

is violated, the protection of a statute enacted for the benefit of parties may at any time be waived by the parties, and the waiver, when made, is continuous, unless by its terms it is limited to a specified time. Covenants not to sue, or not to sue for a limited time, or except on given conditions, are upheld everywhere, and it is not perceived why a like covenant on the part of the defendant or an agreement supported by a valuable consideration, either to lengthen the running of the statute, or to suspend it, or to waive it altogether, may not be validly entered into. The waiver or estoppel is not a new promise nor an acknowledgment of a debt from which a new promise may be implied, but simply an abandonment or postponement of the right to set up the statute as a defence, and hence the plaintiff must establish his demand after the waiver as well as before. The authorities on the foregoing propositions, as hereinbefore pointed out, are not altogether in harmony, and the cases are too numerous to be cited in this connection, but a fair collection of them may be found in the references given in the margin.<sup>78</sup>

Whether the right to waive the statute of limitations is or is not contrary to public policy has not been settled in Virginia. Here, as elsewhere, it has been held that a "promise to settle" is not sufficient to take the case out of the statute and in effect does not amount to a waiver.<sup>79</sup> In *Aylett v. Robinson*, 9 Leigh 45, the debtor, when applied to to settle his account, replied, "I am too unwell to do business now, but when I am better, I will *settle* your account." This was held not to amount to a promise to pay, nor an acknowledgment of a debt. The judges delivered seriatim opinions. Judge Tucker, in the course of his opinion, in which, however, the other judges did not concur, uses this language: "But it is said, the promise ought to be

78. Monographic note, 95 Am. St. Rep. 411; mon. note, 63 L. R. A. 193; 19 Am. & Eng. Encl. Law (2nd Ed.) 123ff; *Bridges v. Stephens*, 132 Mo. 524, 34 S. W. 555; *Holman v. Omaha, etc., Co.*, 117 Iowa 268; 90 N. W. 833, 94 Am. St. Rep. 293; *Schroeder v. Young*, 161 U. S. 334, 344; *Burton v. Stevens*, 24 Vt. 131, 58 Am. Dec. 153; *State Trust Co. v. Sheldon*, 68 Vt. 259, 35 Atl. 177; *Cecil v. Henderson*, 121 N. C. 244, 28 S. E. 481.

79. *Bell v. Morrison*, 1 Peters 351; *Bell v. Crawford*, 8 Gratt. 110.

sufficient to give a new cause of action. And so it is. The balance not being ascertained, indeed, nor the precise amount known which may be due, the plaintiff has only title to nominal damages, unless he proves the amount of his account, and to entitle him to recover at all, he must show that there is some balance at least in his favor. Suppose the defendant had expressly said, 'As soon as I am well I will go into a settlement, and whatever balance appears against me, I will pay you.' Can it be doubted, that after five years from the original contract, an action would lie against him or his executor, in which the balance might be proved and recovered? I imagine not. And if so, the promise in this case gave a right of action, for a promise to *settle*, amounts, at the least, to an engagement to pay the balance when ascertained. I cannot make this matter plainer by argument."

In *Sutton v. Burruss*, 9 Leigh 381, the defendant acknowledged the items of the plaintiff's account to be just, but said he had some offsets, and subsequently promised the plaintiff that he would settle all their differences and accounts fairly, and would not avail himself of the act of limitations, and this was held not sufficient to warrant a verdict for the plaintiff on the plea of the statute of limitations. In the course of his opinion in this case, however, Judge Parker said: "The promise by the defendant that he would not, after a fair settlement, take advantage of the act of limitations, could only avail the plaintiff (after showing that such a settlement has been made *inter partes*) as a justification to the jury in implying a promise to pay the balance, without proof of an express promise. No consideration arises upon such a promise, until the debt is established." From this it might be inferred that if the debt were established the defendant would be bound by his agreement, but none of the judges dealt with the agreement as a *waiver*. Each treated it in the light of an acknowledgment or new promise, and held it insufficient as such.

In *Holladay v. Littlepage*, 2 Munf. 316, the debtor was about to sail to Europe for an extended visit (which in fact lasted sixteen years) and it was agreed between him and his creditor that no action should be brought on the debt until his return.

The agreement was upheld as valid, and the running of the statute was suspended during that period.

In *Bowles v. Elmore*, 7 Gratt. 385, the maker of a note became the surety of the payee on a bail bond in an action of detinue brought against him. The payee, in order to indemnify the maker against loss by reason of becoming his bail, delivered to him the note. The liability of the bail continued fifteen years. Action was then brought on the note by the payee against the maker and he relied on the statute of limitations, but the court held that the statute did not run from the time of the delivery of the note to the maker until his liability as bail ceased, and consequently upon the facts of that case, the statute of limitations did not apply. There was a valuable consideration for the suspension and the decision was clearly right. It was in effect an agreement that the statute should not run during the period that the liability as bail continued, so that in this case, as in the case of *Holladay v. Littlepage*, *supra*, the running of the statute was suspended by the agreement, express or implied, of the parties. If parties may make a valid agreement for the suspension of the statute for any length of time they choose, it would seem that they might abrogate it altogether. But in *Liskey v. Paul*, 100 Va. 764, 42 S. E. 875, it was held that a promise to settle and pay the balance found due on the settlement will not stop the running of the statute of limitations during the time such settlement is delayed. It was said that it was at most only a promise to pay an unascertained balance, which is not sufficient. The promise in this case to settle and to pay the balance found due would seem to be in effect a promise to waive or not to plead the statute of limitations against any balance that might be found due, but the reasoning of the court, and the quotation made from *Sutton v. Burruss*, *supra*, leads inevitably to the conclusion that the Virginia court regards an agreement to waive the statute of limitations as contrary to public policy and therefore void. The substance of the replication filed in this case is given in the opinion of the court, and is in effect an estoppel to plead the statute, though it is not pleaded as an estoppel, but as an obstruction to the prosecution of the plaintiff's claim. The court said it was not an obstruction within

the meaning of the statute and hence was bad as a replication. As the facts were not formally relied upon as an estoppel, and as estoppels are required to be very precise, it is *possible* that the court might have taken a different view if the facts had been relied as estoppel. But the reasoning of the opinion can leave little room for doubt that the court regards an agreement not to plead the statute of limitations as in contravention of public policy, and therefore bad. It is believed, however, that if the promise not to plead the statute is such as would operate a fraud upon the plaintiff to allow it to be pleaded, the Virginia court will hold, with the majority of other courts, that the defendant is estopped to set it up.

Aside, however, from estoppel on account of fraud, or promises "to settle," or "to settle and pay an unascertained balance," which may not be intended to operate as a waiver of the statute, there seems to be no reason of public policy or of other kind why a debtor may not in a writing evidencing a debt stipulate that the statute shall never run against it. There is no statute forbidding it, and no reason of public policy which renders the stipulation void. Equally true, if the agreement is supported by a valuable consideration, there is no reason why a debtor may not at *any time*, after the debt has been contracted, agree that he will not plead the statute. Such an agreement should be very clearly and distinctly proved, and the intention of the debtor to waive the statute should be very clearly manifested, but when it has been so proved and manifested, and the agreement is supported by a valuable consideration, there is no reason why it should not be enforced. It is not in contravention of good morals, it is no more burden upon the courts than a refusal to plead the statute would be, and there is no reason of public policy which forbids a debtor to waive a statute enacted for his benefit when to be available he must *positively* claim it. The statute of limitations is not self-operative. It is a privilege extended to those who choose to avail themselves of its benefit. It is not forced upon the debtor. It is a shield erected, behind which the debtor may step, if he chooses to seek protection from his creditor, but behind which no one as a rule, can compel him to step, and no honest man, admitting a just liability, will step. Such a statute can hardly be said to render void

all agreements not to plead it. The right to plead it would seem, therefore, to be a *personal privilege* which the debtor may waive if he chooses, and which he may waive as well before action brought as after. He may waive it for a limited time, or for all time. The duration of the waiver will be determined by the facts of the particular case. Where no question of fraud or injustice is involved, probably by the analogy to the statute requiring a new promise or acknowledgment to be in writing, and for like reasons, the waiver should be in writing, but the right to make the waiver seems not to be denied by any statute, nor forbidden by any rule of public policy. As hereinbefore pointed out, however, there is much conflict of authority on this subject.

### § 226. Burden of proof.

In Virginia the burden of proof is on the party pleading the statute, but elsewhere the authorities are conflicting.<sup>80</sup>

### § 227. Appeal and error.

It is held in some States that the statute of limitations must be pleaded in bar of an appeal or writ of error,<sup>81</sup> but in Virginia the practice is to move to dismiss the appeal or writ of error because not granted within the time prescribed by law.<sup>82</sup> In fact the court is without jurisdiction to grant an appeal or writ of error after the expiration of the statutory period, and if one is inadvertently granted, the court, upon discovery of the fact, will dismiss it *ex mero motu*.

80. *Goodell v. Gibbons*, 91 Va. 608, 1 Va. Law Reg. 340, and note, 22 S. E. 504; *Coles v. Martin*, 99 Va. 223, 37 S. E. 907; *Green v. Dodge* (Vt.), 64 Atl. 499; 13 Am. & Eng. Encl. Law (2nd Ed.) 771.

81. 13 Encl. Pl. and Pr. 187.

82. *Bull v. Evans*, 96 Va. 1, 30 S. E. 468.

## CHAPTER XXIX.

### PAYMENT.

§ 228. What constitutes payment.

Voluntary payments.

§ 229. Application of payments.

§ 230. Plea of payment.

Form of the Plea.

Code states.

Payment and set-off distinguished.

§ 228. **What constitutes payment.**

Payment in a general sense is the discharge of a pecuniary obligation of a debtor by the delivery of money, or anything that is accepted as such, to the creditor or his agent. It generally means the discharge of a pecuniary obligation. It involves two elements, the tender of the amount due by the debtor and its acceptance by the creditor. Payment can only be made by a party who, or whose property, is in some way liable for the debt, or by the agent of such party, and it must be made to the creditor or his agent. If there is more than one payee, payment to any one will discharge the entire debt, unless otherwise stipulated. One cannot make himself the creditor of another by voluntarily paying that other's debt without request from him, but the same result is often practically accomplished indirectly. The manner in which this is done is clearly pointed out by the learned Judge Green, of West Virginia, as follows:<sup>1</sup>

"1. A stranger who pays the debt of another without his request or authority cannot sustain a suit against the debtor unless he has ratified the act of the stranger by promising to repay him, or in some other manner.

"2. If such payment by a stranger is neither authorized nor ratified by the debtor, it will not be held to be a discharge of the debt.

"3. If such payment by a stranger is neither authorized nor ratified by the debtor, the stranger may sue the debtor at law in

1. *Neely v. Jones*, 16 W. Va. 625.

the name of the creditor for his own use; but the debtor may by pleading or relying on the payment of the stranger ratify it, and such ratification being the equivalent of a previous request, the debt will be thereby discharged, and the debtor will be liable to be then sued by the stranger for money paid for him at his request.

“4. A stranger who pays a debt without the request or authority of the debtor, when the payment is not afterwards ratified, may, if he chooses, bring a suit in equity stating this fact, and praying that if the payment be not ratified by the debtor, the debt may be enforced in his favor as the equitable owner thereof, or, if the payment be not ratified by the debtor, that the court will decree to the stranger the repayment of the amount so advanced by him for the use of the debtor; and the court will give the one relief or the other prayed for.

“5. The stranger, when he pays the amount of the debt to the creditor, may, without the consent of the debtor, take an assignment of the debt and enforce it against the debtor; and if, when he pays the amount, it is agreed between the creditor and him that the creditor will assign him the debt, though no actual assignment be made, the stranger will be regarded as the equitable assignee of the debt, and the transaction will be considered equivalent to the purchase of the debt.

“6. If a sheriff who has had, or who has, an execution in his hands, pays the debt to the creditor, whether he takes an assignment of the judgment or not, he will have the same rights and remedies against the debtor that a mere stranger would have. But *quære*: Does not public policy forbid that such sheriff should have the same rights and remedies as against subsequent judgment creditors who have acquired liens on the debtor's lands, or against a purchaser of such lands for valuable consideration without notice that the sheriff set up such a claim?”

If the payment made by a stranger is ratified by the debtor, then of course the debt is *paid*, and all securities therefor are released. The original debt is gone, but the ratification makes the payment one by request, and the stranger may sue in assumpsit as for money paid on request, but he gets no benefit of the securities (judgment or otherwise) held by the original cred-

itor. If the payment is not ratified, but repudiated, the stranger, under the conditions stated in paragraph (5) above mentioned, takes the place of the original creditor and gets the securities held by him for the original debt.<sup>2</sup> As between a *stranger* and a *debtor*, a payment by the stranger which is neither authorized nor ratified by the debtor does not discharge the debt,<sup>3</sup> but as between the original *creditor* (who has received payment and satisfaction of his debt from a stranger) and the *debtor*, in an action by the former against the latter, while there is much conflict of authority, it would seem that the debtor can plead that the debt has been satisfied, and thereby ratify the payment. In other words, the creditor having received payment from any source cannot call on the debtor to repay the debt.<sup>4</sup>

“A third person who is under no obligation to pay the debt of another cannot, without his request, officiously pay that other’s debt and recover of the debtor the amount so paid, where the debtor whose debt is paid does not ratify the payment; and the better doctrine seems to be that though the debtor takes advantage of the payment of his debt by a third person who is under no obligation to pay it and who does so without the debtor’s request, express or implied, such third person acquires no right against the debtor for reimbursement,”<sup>5</sup> but this difficulty is generally avoided in the method hereinbefore pointed out.

Part payment of a money demand, though accepted in full, was not good at common law, unless there was a release under seal, or the evidence of the debt was surrendered for cancellation, which was said to be equivalent to a seal. In the case of such part payment it was said that there was no consideration for the promise not to collect the residue of the debt. So, also, at common law, the creditor could not compound or compromise with a joint contractor or co-obligor and release him from liability on his contract without releasing the other joint contractors or co-obligors. In Virginia, by statute, a part payment of a money demand, when accepted by the creditor in satisfaction,

2. Neely v. Jones, *supra*.

3. Neely v. Jones, *supra*.

4. Crumlish v. Central Land Co., 38 W. Va. 390, 396, ff, 18 S. E. 456.

5. 22 Am. & Eng. Encl. Law (2d Ed.) 537.

is good without any new consideration,<sup>6</sup> and a creditor is allowed to compound or compromise with any joint contractor or co-obligor and release him from all liability on his contract or obligation, without impairing the contract or obligation as to the other contractors or co-obligors,<sup>7</sup> but when the compromise is made, the contract or obligation is to be credited with the full share of the party released, except where the compromise is with a surety or co-surety, and, in that case, as between the creditor and the principal, the credit is only for the sum actually paid by the compounding debtor.<sup>8</sup>

Payment in counterfeit money is no payment, but if made, the payee must use due diligence to ascertain the character of the money, and when found to be counterfeit give notice thereof to the payer, or else he will be concluded by the payment.<sup>9</sup> A payment to an assignor before notice of the assignment is a good payment, and may be pleaded in bar; and so likewise a payment to a creditor before notice of an execution against him is good, but it is not good if made after notice of such execution.<sup>10</sup>

A check or draft is generally a conditional payment only, but if the money is lost by failure to present in due time the loss falls on the creditor. Of course, a check or anything else may, by agreement of the parties, be accepted as payment.<sup>11</sup>

Bills, notes, or bonds of the debtor are generally conditional payments, or collateral, only. They are not payments unless so agreed, and may be returned, and an action may be brought on the original cause of action.<sup>12</sup> If it is agreed between the parties that the note of a third person may be taken for a debt, and such note is so given and received, it will be a payment of the debt.<sup>13</sup> The note of a debtor does not operate as a payment of an antecedent debt, unless so intended by the parties. In the

6. Code, § 2858.

7. Code, § 2856.

8. Code, § 2857.

9. *Pindall v. Northwestern Bank*, 7 Leigh 607; 22 Am. & Eng. Encl. Law (2d Ed.) 550.

10. Code, § 3601.

11. *Blair v. Wilson*, 28 Gratt. 165.

12. *Benj. on Sales*, 699 to 701.

13. *Dryden v. Steven*, 19 W. Va. 1.

absence of such intention, express or implied, the note is treated as a conditional payment merely. If the antecedent debt has passed into judgment, the same rule applies. The new note is considered simply as a conditional satisfaction of the judgment and upon the dishonor of the former the latter revives and may be enforced at law or in equity. If the note, however, is accepted in satisfaction of the judgment, it is presumed, in the absence of evidence to the contrary, that it was accepted in satisfaction of the debt represented by the judgment. It is not essential that any particular form of words be used such as "full satisfaction" or "absolute payment," but any language will be sufficient which, under the circumstances, plainly indicates the satisfaction of the debt.<sup>14</sup> Whilst the mere taking of a negotiable security, payable at a future day, does not, unless so agreed, operate as a payment of an antecedent debt, it does operate to suspend the right of action on the original demand until the maturity of the bill or note. It is a conditional satisfaction as to the principal, and as to the surety it is absolute unless it plainly appears that the parties intended otherwise.<sup>15</sup> But if the note be that of a third person, the taking of such new note and the surrender of the old will be treated *prima facie* as a discharge of the old note and the release of the maker from personal liability, and if the old note was secured by a lien on land, the payment of which such third person has assumed, the lien on the land will not be released although the original debtor be discharged.<sup>16</sup>

It is said that a sale for cash cannot be settled by a set-off against the vendor;<sup>17</sup> but on this point there is conflict of authority. Payment by mail or in any other indirect way, unless authorized expressly or impliedly, is at the risk of the payer.

*Voluntary Payments.*—The mere fact that at the time of payment a protest is entered and notice given of intention to sue to recover the money back is unavailing. In order to render the

14. *Morris v. Harveys*, 75 Va. 726.

15. *Callaway v. Price*, 32 Gratt. 1.

16. *Hess v. Still*, 23 W. Va. 90. See, as to what constitutes a novation of a debt, *Beantz v. Basnett*, 12 W. Va. 772.

17. *Benj. on Sales*, 702.

payment compulsory so as to allow a suit to recover it back, the compulsion must have been illegal, unjust or oppressive, and usually the payment must have been made to emancipate the personal property of the payor from a duress illegally imposed upon it by the party to whom the money is paid, or to prevent a seizure by a party armed with apparent authority to seize the property.<sup>17a</sup> Payments are generally presumed to have been voluntary.<sup>18</sup> If there is in fact, illegal compulsion formal protest is unnecessary.

### § 229. Application of payments.

When a debtor makes a payment he may direct its application as he sees fit. If he fails to exercise the right the creditor may then make the application, and if neither makes the application, it becomes the duty of the court to so apply the payment as a sound discretion under the circumstances may dictate, and in the exercise of this discretion the interests of the debtor and creditor are alone to be considered. Even sureties have no advantage in this particular. Where the creditor had two claims against the debtor, the one secured and the other not, and a payment has been made which neither the debtor nor the creditor has applied, and the court is called upon in the exercise of its discretion to make the application, and there is no other fact or circumstance upon which the court can lay hold to guide and direct its discretion, the payment will be appropriated to that debt which is least secured,<sup>19</sup> that is, in the interest of the creditor. It is said that this is no hardship on the debtor as he owes both debts, and ought to pay both. Many courts, however, follow the rule of the civil law and apply the payments in accordance with the presumed intention of the debtor; that is, in the way most beneficial to him. Others following, it is said, a strict

17a. *Va. Brewing Co. v. Com.*, 113 Va. 145, 73 S. E. 454.

18. 22 Am. & Eng. Encl. Law (2nd Ed.) 613; *Phoebus v. Manhattan Club*, 105 Va. 144, 52 S. E. 839.

19. *Pope v. Transparent Ice Co.*, 91 Va. 79, 20 S. E. 940; *Sipe v. Taylor*, 106 Va. 213, 55 S. E. 542. In *Magarity v. Shipman*, 82 Va. 784, 1 S. E. 109, the secured debt was undisputed, the oldest in point of time, and carried a higher rate of interest than the unsecured debt, and the payment was therefore credited by the trial court to the secured debt, and this application was affirmed on appeal.

construction of the common law, apply the payments as above indicated in favor of the creditor.<sup>20</sup>

Where there is but a single debt, upon which partial payments have been made, in those jurisdictions which do not allow interest upon interest, the interest should be computed on the principal debt up to the date when the partial payment or payments equal or exceed the interest due. The payment or payments should then be deducted from the aggregate of the principal and interest, and thereafter interest calculated only on the remaining principal. Where the payment does not amount to as much as the interest, then accrued interest on the first principal should be calculated up to the time when the aggregate of the partial payments equal or exceed the amount of interest due when the payment is made, which, with the prior payments, equals or exceeds the accrued interest, and such aggregate of payments should then be deducted from the sum of the original principal and accrued interest, and the balance found due will constitute the new principal upon which interest is to be calculated. The principal can never at any time be larger than what it was after payments were deducted from principal and accrued interest to a given date. Where there have been partial payments and the parties undertake to settle the amount due the creditor, it is error to calculate the interest on the principal up to the time of settlement and interest on the different payments up to that time and subtract one from the other.<sup>21</sup>

If payments are made on a running or continuous account, and no application has been made by either the debtor or the creditor, the law applies the payment to the oldest items of the account.<sup>22</sup>

### § 230 Plea of payment.

Payment is a special plea, not amounting to the general issue,

20. 2 Am. & Enc. Encl. Law (2nd Ed.) 454-5 and cases cited.

21. 16 Am. & Eng. Encl. Law (2nd Ed.) 1036, and cases cited; *Fulz v. Davis*, 26 Gratt. 903; *Peyson v. Myers*, 138 N. Y. 599, 32 N. E. 699; *Story v. Irvington*, 13 Pet. 359.

22. *Smith v. Loyd*, 11 Leigh 512; *Chapman v. Comth.*, 25 Gratt. 721; *Rowan v. Chenoneth*, 55 W. Va. 325, 47 S. E. 80; *Peale v. Grossman* (W. Va.), 73 S. E. 46.

and hence, as a rule, may be specially pleaded. In the absence of statute, payment in full, whether before, at, or after maturity, if made before action brought, may be shown under the general issues of *nil debet* and *non assumpsit*.<sup>23</sup> If the payment be made after action brought, it must be specially pleaded, as all pleadings speak as of the date of the writ.<sup>24</sup> If the payment be not in full, but be a special or partial payment, made before action brought, it may be shown under the general issues of *nil debet* and *non assumpsit*. In Virginia payments and set-offs are for many purposes put on practically the same footing and it is provided that "in a suit for any debt the defendant *may*, at the trial, prove and have allowed against any such debt any payment or set-off which is so described in his plea, or in an account filed therewith as to give the plaintiff notice of its nature, but not otherwise."<sup>25</sup> A like provision is contained in the Code of West Virginia.<sup>26</sup> The statute makes no exception as to the time at which the payment is made, or the amount thereof. It seems to contemplate a special plea, or an account, in all cases; the object being to give notice of the defence.<sup>27</sup> It has been strongly urged that payment *at maturity* may be shown under *nil debet* and *non assumpsit*,<sup>28</sup> but in view of the language of the statute above quoted, and of the construction put upon it in *Richmond City Railroad Co. v. Johnson*, *supra*, it would be unwise to omit the filing of a proper account along with such general issues in any case. Courts are not strict in requiring a defendant to give the proper designation to a counter-claim. Where the items of an account filed with a plea of payment, or with a plea under which payment may be proved, as *nil debet*, are so described as to give the plaintiff notice of their character, the defendant may show either payments or set-offs. If the nature of the item be distinctly stated, the statute is complied with, though the item be wrongly denominated.<sup>29</sup>

23. Ante, §§ 73, 93.

24. *Nichols v. Campbell*, 10 Gratt. 160.

25. Code, § 3298; *Allen v. Hart*, 18 Gratt. 722, 734.

26. Code, W. Va., § 3890.

27. *Richmond City Railroad Co. v. Johnson*, 90 Va. 775, 20 S. E. 148.

28. 5 Va. Law Reg. 410; *Green v. Douglas Land Co.*, 12 W. Va. 508;

16 Encl. Pl. & Pr. 179.

29. *Langhorne v. McGhee*, 103 Va. 281, 49 S. E. 44.

In West Virginia it seems to be held that payment in full before action brought may be shown under the general issues of *nil debet* and *non assumpsit* without any account of payments, but if specific or partial payments are relied on, they must be specified in an account of payments.<sup>30</sup>

Upon a plea of part payment and no answer as to the residue, the plaintiff should take judgment by *nil dicit* as to the part not answered, as prescribed by the statute,<sup>31</sup> else his whole case will be discontinued, that is, dismissed.

Upon an issue made upon a plea of payment, if that be the only issue, the defendant has the right to open and conclude.<sup>32</sup>

At common law, when a bond was conditioned for the payment of money on a certain day, it could not be discharged by payment after that day. Payment after the day set for payment would be pleaded as accord and satisfaction and not as payment, but this has been changed by statute in Virginia, enacting that, "In an action of debt the defendant may plead payment of the debt (or of so much as may be due by the condition) before action brought."<sup>33</sup>

*Form of the Plea.*—It was held in an early case in Virginia that the plea of payment should conclude to the country, and not with a verification,<sup>34</sup> but in a later case it is held that a verification is a proper conclusion of the plea, and such is its form at present. The ground of the former holding was that the plea of payment was a denial of the allegation of non-payment in the declaration which the plaintiff was required to make, and West Virginia still adheres to that form of plea.<sup>35</sup> Notwithstanding, however, the form of the conclusion of the plea in West Virginia, the burden of proof of the payment is on the defendant in that state as well as in Virginia.<sup>36</sup>

30. *Shanklin v. Crisamore*, 4 W. Va. 134; *Simmons v. Trumbo*, 9 W. Va. 358; *Lawson v. Zinn*, 48 W. Va. 312, 315, 37 S. E. 612.

31. Code, § 3302.

32. 16 Encl. Pl. & Pr. 170.

33. Code, § 3295.

34. *Henderson v. Southall*, 4 Call 371.

35. *Douglass v. Central Land Co.*, 12 W. Va. 502; *Bank v. Kimberlands*, 16 W. Va. 555; *Kinsley v. County Court*, 31 W. Va. 464, 7 S. E. 445.

36. *Douglas v. Central Land Co.*, *supra*.

*Code States.*—Whether payment must be specially pleaded or may be shown under a general denial in the Code States is a subject upon which the authorities are in conflict. In many cases it is presented under the general denial, while in others it is said it must be specially pleaded.<sup>37</sup>

*Payment and Set-off Distinguished.*—A distinction is made between a payment and a set-off. A payment is by consent of parties, express or implied, appropriated to the discharge of the debt in whole or in part. When sued for the debt the defendant must establish his payment, if any, for if judgment is allowed to go for the full amount of the debt it is conclusive as to the amount due to the plaintiff, and all payments made prior to the date of the judgment will be excluded. If, however, the defendant has a set-off, he may either assert it in the action brought on the debt due by him, or he may bring an independent action therefor. The judgment for the debt due by the defendant does not preclude him from bringing a separate action for his set-off.<sup>38</sup>

37. Phillips, § 363.

38. Kennedy *v.* Davidson, 46 W. Va. 433, 33 S. E. 291.

## CHAPTER XXX.

### SET-OFFS.\*

- § 231. Definition.
- § 232. Actions in which available.
- § 233. Subject of set-off.
  - Liquidated demands.
  - Availability of set-offs.
- § 234. Acquisition of set-offs.
  - Set-off as between a bank and general depositor.
- § 235. Application of set-offs.
- § 236. Pleading set-off.
  - Manner of pleading.

#### § 231. Definition.

Set-off is a counter demand of a liquidated sum growing out of a transaction extrinsic to the plaintiff's demand, for which an action on contract might be maintained by the defendant against the plaintiff and which is now exhibited by the defendant

\*The following sections of the Virginia Code bear upon the subject of this chapter:

Section 3298: "In a suit for any debt, the defendant may at the trial prove, and have allowed against such debt, any payment or set-off which is so described in his plea, or in an account filed therewith, as to give the plaintiff notice of its nature, but not otherwise. Although the claim of the plaintiff be jointly against several persons, and the set-off is of a debt not to all but only to a part of them, this section shall extend to such set-off, if it appear that the persons, against whom such claim is, stand in the relation of principal and surety, and the person entitled to the set-off is the principal."

Section 3302: "If the defendant file a plea or account of set-off, which covers or applies to part of the plaintiff's demand, judgment may be forthwith rendered for the part not controverted, and the costs accrued until the filing of the plea or account, and the case shall be proceeded with for the residue, as if the part for which judgment was rendered had not been included therein. And if, in addition to such plea or account, the defendant plead some other plea, going to the whole or residue of the demand, the case shall not be continued as to the part not controverted by the plea or

against the plaintiff for the purpose of counter-balancing in whole or in part the plaintiff's demand, and, where it exceeds the plaintiff's demand, of recovering a judgment in his own favor for the excess. Set-offs, as such, were unknown to the com-

account of set-offs, unless good cause be shown for such continuance."

Section 3303: "A defendant who files a plea or account under this chapter, shall be deemed to have brought an action, at the time of filing such plea or account, against the plaintiff, and, if he be assignee or transferee, also against the person with whom the contract sued on was originally made and under whom the plaintiff claims, according to their respective interests, for the matters mentioned in such plea or account, and the plaintiff shall not, after the plea or account is filed, dismiss his case, without the defendant's consent, but the defendant's claim shall be open to the same ground of defence to which it would have been open in any action brought by him thereon."

Section 3304. OTHER PROCEEDINGS: "Other proceedings shall be as follows: *First, If plaintiff is the person, or, etc., with whom the contract was made, how set-off applied and judgment given.*

"If the plaintiff be a person with whom the contract sued on was originally made, or the personal representative of such person, on the trial of the case, the jury shall ascertain the amount to which the defendant is entitled, and apply it as a set-off against the plaintiff's demand, and, if the said amount be more than the plaintiff is entitled to, shall ascertain the excess, and fix the time from which interest is to be computed on the same, or any part thereof. Judgment, in such case, shall be for the defendant against the plaintiff for said excess, with such interest from the said time till payment.

*Second, If he is assignee of such person, and defendant's claim exceeds plaintiff's demand, defendant may waive for the excess.*

"If the plaintiff claims as assignee or transferee under a person with whom the contract sued on was originally made, and the defendant's claim exceeds the plaintiff's demand, the defendant, in his plea or in a writing filed with his account, may waive the benefit of his claim as to any excess beyond the plaintiff's claim, whereupon, the further proceedings shall be upon the plaintiff's claim and the defendant's counter claim as a defence thereto; or, instead of such waiver.

*Third, He may have person under whom plaintiff claims made a party, and obtain judgment against him for such excess.*

"Such defendant may, by rule issued by the court, or, on his application, issued by the clerk of the court in vacation, or by reasonable notice in writing, such rule or notice substantially stating the

mon law. They were mere cross demands, and required a separate and independent action. So far as the right to assert them at law exists, it is entirely by virtue of statute.<sup>1</sup> At common law if A and B mutually owe each other \$1000, the demands cannot be set off against each other, but the rule is otherwise by statute.<sup>2</sup>

### § 232. Actions in which available.

The language of the Virginia Act<sup>3</sup> is that "in a suit for any debt" the defendant may prove and have allowed the set-off described in that section, and such is the language of a large number, if not of the majority, of the statutes on the subject. As will be seen later, a set-off must be a debt, or at least in the nature of a debt, and that against which it is to be set off must likewise be a debt. It must be a debt against a debt. It is immaterial what the form of the action may be, whether Debt, Covenant, Assumpsit, or Motion, if the thing proceeded for is a debt, then set-off may be allowed against it. The action must, as a rule, be upon some demand which might itself be used as a set-off. Set-offs cannot be used in purely tort actions. In some cases arising out of tort, the plaintiff has a right to waive the tort and sue in contract. If he sues in tort, no set-offs can be allowed against it. If he waives the tort and sues upon the implied contract, the authorities are in conflict as to whether or not set-offs can be set up against the plaintiff's demand.<sup>4</sup> It would seem in Virginia that the set-off would be available.<sup>5</sup>

defendant's claim, make the person, under whom the plaintiff claims as aforesaid, a party to the suit; and, on the trial of the case, the jury shall ascertain and apply, as provided in the first sub-division of this section, the amount and interest to which the defendant is entitled; and, for any excess beyond the plaintiff's demand for which such person under whom the plaintiff claims as aforesaid is liable, with such interest as the jury allows, judgment shall be rendered for the defendant against such person."

1. 34 Cyc. 625; 25 Am. & Eng. Encl. Law (2nd Ed.) 488.

2. Code, § 3298.

3. Code, § 3298, *supra*.

4. 25 Am. & Eng. Encl. Law (2nd Ed.) 508.

5. Tidewater Quarry Co. v. Scott, 105 Va. 160, 52 S. E. 835.

### § 233. Subject of set-off.

It is generally held under statutes similar to the Virginia statute that that which is the subject of set-off must be a liquidated demand, a debt against a debt.<sup>6</sup> It seems to be well settled that unliquidated demands cannot be used as set-offs, but that the demand must be liquidated.

*Liquidated Demands.* It is said that "the cases defining what is a liquidated demand within the meaning of statutes of set-off are very confusing and unsatisfactory and vary according to the disposition of the various courts to extend or restrict the right of set-off and the wording of the statute."<sup>7</sup> An examination of the cases in the various states on this subject fully confirms the foregoing statement. It has been held in Virginia that property unlawfully converted to the use of another may be treated as a sale, and the price or value thereof may be set off against a liquidated demand.<sup>8</sup> There are several other states that take a similar view. They generally lay down the rule that unliquidated damages to be assessed upon pecuniary demands, as for goods sold and delivered, work done, and demands in all cases where debt or *indebitatus assumpsit* would lie, may be set off;<sup>9</sup> but the rule stated in these general terms would cover many cases where the demand was far from liquidated. The cases taking this view hold that if the damages do not lie in mere opinion, but can be readily ascertained by calculation or computation they may be set off against a liquidated demand; that the statute is intended to lessen litigation, and hence is to be liberally construed to further that end. This is undoubtedly true, and where the articles, the value of which is sought to be set off, are staple and their value readily ascertainable, it would seem a set-off might be allowed; but where the articles are not of this character, and the evidence of witnesses as to their value is conflicting, and the value is to be determined by the jury from the weight

6. *Bunting v. Cochran*, 99 Va. 558, 39 S. E. 229; *Tidewater Quarry Co. v. Scott*, 105 Va. 160, 52 S. E. 835; *Case v. Sweeney*, 47 W. Va. 638, 35 S. E. 853.

7. 34 Cyc. 693.

8. *Tidewater Quarry Co. v. Scott*, *supra*.

9. 34 Cyc. 694, and cases cited.

of the evidence, their value should not be allowed as set-off. If such values so ascertained may be allowed as a set-off then no certain standard can be fixed to ascertain what is and what is not a liquidated demand. On the other hand, there is a line of cases holding that damages resulting from breach of contract are unliquidated when there is no criterion provided by the parties, or by the law, for their ascertainment, and that, in order for a claim to be admissible as a set-off, the amount of it must be ascertained either by the contract of the parties, or by the law, or by a mere mathematical calculation on the contract under which the claim arises.<sup>10</sup> The Alabama doctrine seems to comport with the language of statutes similar to the Virginia statute. It is said, "not only debts, but liquidated and unliquidated demands not sounding in damages merely are the subject of set-off. A demand of this nature is defined to be one which, when the facts upon which it is based are established, the law is capable of measuring accurately by a pecuniary standard. If, however, the law does not fix the measure of damages, but they are committed to the judgment of the jury and depend upon the circumstances of the particular case, the demand sounds in damages merely, and is not available as a set-off."<sup>11</sup> It would seem, on principle, that a demand must appear from the contract to be certain or capable of being rendered certain by calculation upon data furnished by the contract, or by the law, or the articles, the value of which are sought to be set up, must have a fixed market value, else the demand is not liquidated and cannot be brought forward as a set-off. If the value of articles is not ascertainable by any fixed standard, but lies in the opinion of a jury upon weighing conflicting testimony, it is not admissible as a set-off. Of course, no matter how unliquidated a demand may be, if parties agree upon its value, then it has become liquidated and may be used as a set-off.

*Availability of Set-Offs.* In order that the defendant may avail himself of his set-offs, it is said that the following circum-

10. 25 Am. & Eng. Encl. Law (2nd Ed.) 509, and cases cited, including *McCord v. Williams*, 2 Ala. 71; *Hall v. Glidden*, 39 Me. 445; 34 Cyc. 694, and cases cited.

11. 25 Am. & Eng. Encl. Law (2nd Ed.) 511, 512.

stances must concur: (1) As just pointed out, the demands of the plaintiff and of the defendant each must be in the nature of a debt, and such that an action at law may be maintained thereon, but, if of this nature, the claim may be either legal or equitable.<sup>12</sup> (2) The demands must be due between the same parties, and in the same right. A debt due from a partner cannot be set up against a partnership demand, nor *vice versa*, nor can a debt due to one as executor, administrator, or trustee, be set up against one in his own right, nor *vice versa*.<sup>13</sup> Where principal and surety, however, are sued in the same action, the Virginia statute<sup>14</sup> permits the principal to set off against the plaintiff any claim which he may have against him, but the same privilege is not extended to the surety of a solvent principal. The surety may not, while the principal is solvent, set off a demand of his against the plaintiff.<sup>15</sup> Where a contract has been made by an agent of an undisclosed principal and a defendant has dealt with such agent, supposing him to be the sole principal, if the action be brought in the name of the principal, the defendant has the right to be put in the same position to all intents and purposes as if the agent were the principal, and to set off claims against such agent acquired before knowledge of the fact that he was agent.<sup>16</sup> (3) A set-off must be pleaded, or at least a list filed and notice thereof given to the adverse party. (4) Debts on both sides must be due and owing at least at the time of the filing of the set-off. No action could be maintained by the plaintiff unless his claim was due at the time of action brought, and as the defendant is deemed, under the terms of the Virginia statute, to have brought an action at the time of the filing of his plea or list,<sup>17</sup> of course his set-off must be due and payable at the time he pleads or files his list. Such, undoubtedly, is the rule at law, but in equity, in cases of insol-

12. 4 Min. Inst. 787; *Wartman v. Yost*, 22 Gratt. 605.

13. 4 Min. Inst. 788, 789.

14. Code, § 3298.

15. *Stimmel v. Benthal*, 108 Va. 141, 60 S. E. 765; *Edmondson v. Thomasson*, 112 Va. 326, 71 S. E. 536.

16. *Leterman v. Charlottesville Co.*, 110 Va. 769, 67 S. E. 281; 25 Am. & Eng. Encl. Law (2nd Ed.) 538, 539.

17. Code, § 3303.

vency or when irreparable injury would be otherwise done a defendant, a debt not due may be set off against an existing demand on the ground of a right of equitable retainer.<sup>18</sup>

### § 234. Acquisition of set-offs.

As a general rule, under the Virginia statute, the defendant may, after he is sued and up to the time of filing his plea or list, indeed up to the time of trial, acquire set-offs against the plaintiff, but if they are acquired after action is brought the plaintiff will be entitled to a judgment for his cost even though the defendant should recover a judgment against the plaintiff for the excess of his set-off over the plaintiff's demand.<sup>19</sup> If the payee or other owner of a non-negotiable instrument assigns it to another, the debtor may acquire offsets against the assignor up to the time that he has notice of the assignment, but not afterwards. If, however, the paper be negotiable, though transferred after maturity, set-offs acquired after transfer, even without knowledge of the transfer will not avail against the holder, as the holder takes the legal title discharged of such equities.<sup>20</sup> Indeed it has been held that a *bona fide* purchaser for value of an overdue negotiable instrument holds it subject only to such equities as attached to the instrument itself at the time of the transfer, not subject to offsets acquired before or after, of which he had no notice.<sup>21</sup>

The law fixes the order in which debts of a decedent shall be paid out of his estate, and if he dies insolvent this order cannot be disturbed, as it would affect the rights of other creditors. Upon this principle, if a creditor becomes bankrupt, or has made a general assignment as an insolvent, one of his debtors cannot

18. 1 Va. Law Reg. 780; *Ford v. Thornton*, 3 Leigh 695; *Wayland v. Tucker*, 4 Gratt. 267; *Williamson v. Gayle*, 7 Gratt. 152; *Childress v. Jordan*, 107 Va. 275, 58 S. E. 563; *Feazle v. Dillard*, 5 Leigh 30; Va. Rep. Ann., and notes.

19. Code, §§ 3303, 3304; *Allen v. Hart*, 18 Gratt. 722, 729.

20. *Davis v. Miller*, 14 Gratt. 1; *Davis v. Noll*, 38 W. Va. 66, 17 S. E. 791. It is not believed that this question is affected by § 58 of Nego. Ins. Act.

21. *Davis v. Noll*, 38 W. Va. 66, 17 S. E. 791.

set off claims bought up by him for the purpose *after he had notice of the assignment*, as by registration of the deed of assignment, or after adjudication in bankruptcy.<sup>22</sup>

*Set-Off as between a Bank and General Depositor.*—The relation existing between a bank and its depositor is simply that of debtor and creditor, and hence the bank may acquire setoffs against the deposits of its creditor, and may deduct them from his account. By § 87 of the Negotiable Instruments Act it is expressly provided that “where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon.” But even if not payable at the bank which is the holder thereof, but at some other bank, the holder, upon dishonor by non-payment, may, if the primary debtor is one of its customers, charge the debt to his account. This right results simply from the relation of the parties as debtor and creditor.<sup>23</sup>

### § 235. Application of set-offs.

Where there is a set-off to several bonds or other evidences of debt which have been assigned to different persons, the set-off should be applied to the bonds or other evidences of debt in the inverse order of assignment. This is upon principles of natural justice.<sup>24</sup> Whether the plaintiff can acquire counter set-offs in whole or in part against the defendant's set-offs has not been adjudged in Virginia, but, upon principle, there is no reason why he may not acquire them, and such has been the practice, at least in some of the trial courts, and the right seems to have been recognized in one case without question.<sup>25</sup> Section 3304 of the Code seems to be liberal in the matter of adjusting accounts between the parties and to be in furtherance of ad-

22. *Bennett v. Finney*, 27 Gratt. 365; *Edmondson v. Thomasson*, 112 Va. 326, 71 S. E. 536; *State v. Brobston*, 94 Ga. 95, 21 S. E. 146, 47 Am. St. Rep. 138, and notes.

23. *Scammon v. Kimball*, 92 U. S. 362; 3 Am. & Eng. Encl. Law (2nd Ed.) 835; *Durkee v. National Bank*, 102 Fed. 845; *Ford v. Thornton*, 3 Leigh 695; *Owsley v. Bank*, 23 Ky. Law 1726, 66 S. W. 33.

24. *Armentrout v. Gibbons*, 30 Gratt. 632.

25. *Sexton v. Aultman*, 92 Va. 20, 21, 22 S. E. 838.

justing all liquidated demands between them. If the plaintiff sues as assignee of another party, and the defendant's set-offs against the assignor exceed the plaintiff's demand, he may waive the excess and simply rely upon his set-off to repel the plaintiff's action, or the statute provides that he may, by rule issued by the court or by the clerk in vacation, or by reasonable notice in writing stating the defendant's claim, make the person under whom the plaintiff claims a party to the suit, and if upon the trial it shall be ascertained that there is an excess in favor of the defendant beyond the plaintiff's demand, for which such person under whom the plaintiff claims as aforesaid is liable, the defendant may have judgment against such person for such excess.<sup>26</sup>

### § 236. Pleading set-off.

The statute *permits* but does not require the defendant's set-off to be pleaded or relied on in the plaintiff's action. The defendant *may* is the language of the statute.<sup>27</sup> It is a cross demand growing out of an independent transaction for which he may maintain an independent action, but in order to prevent a multiplicity of suits he is allowed to set up this claim in an action by the plaintiff against him. If he does rely on a set-off in the original cause of action, he "shall be deemed to have brought an action at the time of filing such plea or account against the plaintiff,"<sup>28</sup> and of course should have the burden of proving the same. If he has *several items* of set-off, he may assert part of them in the plaintiff's action and omit the others, but he cannot claim part of an *entire demand* in one action to defeat the plaintiff's claim, and reserve the residue for cross action against the plaintiff. He is deemed to have brought an action on his set-off. He could not divide an entire demand and bring separate actions for the different parcels, neither can he assert a part of such entire demand as a set-off, and reserve the residue.<sup>29</sup>

26. Code, § 3304.

27. Code, § 3298.

28. Code, § 3303.

29. *Huff v. Broyles*, 26 Gratt. 285. See, also, *Phillips v. Portsmouth*, 112 Va. 164, 70 S. E. 502.

*Manner of Pleading.* Set-offs may be specially pleaded by a formal plea of set-offs, or a list may be filed with some plea. A mere list, however, without any plea, does not conform to the requirement of the statute. The statute says a defendant may have allowed any set-off "which is so described in his plea or in an account filed therewith," as to give the plaintiff notice of its nature.<sup>30</sup> Undoubtedly the statute contemplates a plea of some kind. It is said by Prof. Minor that the defence may be either "by plea or by notice merely, which is usually endorsed on the bond, note or account evidencing or containing the particulars of the cross demand stating that the same will be relied on at the trial as a set-off. This notice is usually and prudently accompanied by a plea of *general issue, nil debet* or *non assumpsit*, but that does not appear to be necessary."<sup>31</sup> It is believed that this statement of Prof. Minor accords with the practice, but it does not seem to accord with the language of the statute and consequently is not a safe course to pursue. It has been held recently, however, in Virginia, that the "defendant may either *plead* the set-off, or *give notice of it by filing an account of set-off*" but the holding is *obiter* as to the right of the defendant to rely on the *list alone*, as the question arose in a case where the defendant had pleaded *nil debet* and filed an account with his plea, so that whether the account would of itself have been sufficient without the plea was not involved in the case.<sup>32</sup> The defendant should either file a special plea of set-offs, or some other applicable plea, and along with the latter file his list of set-offs. Usually he should give notice of the filing of such set-offs. The general issues of *nil debet* and *non assumpsit* would be appropriate pleas with which to file an account of set-offs where the action is on a simple contract. If, however, the action is on a sealed instrument the appropriate plea would be *payment*. If the defendant simply files a list of the set-offs and the plaintiff wishes to rely upon the fact that some or all of them are barred by the act of limitations, this defence would be reached by an instruction from the court as there is no plea to which the plaintiff can

30. Code, § 3298.

31. 4 Min. Ins. 790.

32. *Sexton v. Aultman*, 92 Va. 20, 21, 22 S. E. 838.

reply.<sup>33</sup> If, however, the defendant files a formal *plea* of set-off and the plaintiff wishes to rely on the statute of limitations, he must do so by special replication of the act.

It has been recently held that a defendant in a proceeding by motion under § 3211, of Va. Code, may, under a plea of *non assumpsit*, rely upon set-offs though no list is filed. This, however is placed on the informality of the proceeding by notice, strengthened by the fact that the plaintiff had notice of the set-off at an early stage of the proceeding. But the court said that even if there had been no notice, the remedy of the plaintiff was by motion for a statement of the grounds of defence under Section 3249 of the Code.<sup>34</sup> This last statement was not necessary to the decision of the case, and certainly is not applicable to a regular action at law, even conceding its correctness as to motions.

33. *Sexton v. Aultman*, 92 Va. 30, 22 S. E. 838.

34. *Whitley v. Booker Brick Co.*, 113 Va. —, 74 S. E. 160.

## CHAPTER XXXI.

### RECOUPMENT.

§ 237. Definition.

§ 238. Common law recoupment.

§ 239. Virginia statute of recoupment.

Reinvestment of title to real estate.

Rejection of plea under statute.

Action for purchase price of personal property.

Notice of recoupment.

Essentials of a valid plea.

Relief in equity.

Recoupment and set-offs contrasted.

§ 240. Who may rely upon the statute.

#### § 237. Definition.

The difference between recoupment and set-off has been illustrated by scales or balances. Ordinarily, the balances will stand even between man and man, but if a plaintiff puts his claim into the balances against the defendant this destroys the equilibrium which had previously existed, and the plaintiff's side of the balances will be pulled down in his favor. In order to restore the equilibrium the defendant may do either of two things. He may either take out part or all of what the plaintiff has put into his side, or he may put something into the other side of the balances. When he takes something from the plaintiff's side this is recoupment, a reduction or diminution of what the plaintiff claims against him; but if, instead of taking something out of the plaintiff's side, he puts some outside, independent, matter of his own into his own side of the scales, he may thereby restore the equilibrium; or, if he puts in sufficient, he may have the scales dip on his side, showing that the balance is in his favor. When the defendant does this, it is set-off. The illustration is very good as far as it goes, but in so far as it relates to recoupment, it is inexact in one particular. In order to constitute recoupment, what is taken from the plaintiff's side of the scales must be in consequence of some delinquency or deficiency on his part. Recoupment arises out of mutual

and reciprocal duties, and when one of the parties (e. g., the plaintiff) has failed to fully discharge the duty devolved upon him, this failure or delinquency on his part may be given in evidence to reduce or cut down what he would otherwise have been entitled to recover. Hence payment is not recoupment, as it does not represent any delinquency or deficiency on the part of the plaintiff. Recoupment, therefore, is the right of the defendant to cut down or diminish the claim of the plaintiff in consequence of his failure to comply with some provision of the contract sought to be enforced, or because he has violated some duty imposed upon him by law in the making or performance of that contract.<sup>1</sup> The delinquency or deficiency which will justify the reduction of the plaintiffs claim must arise out of the same transaction, and not out of a different transaction. In most cases it arises out of some fraud or misrepresentation on the part of the plaintiff in the procurement of the contract, but it is by no means confined to that. Very frequently it is a mere extension of the doctrine of failure of consideration.<sup>2</sup>

### § 238. Common law recoupment.

Recoupment is of common law origin, but its use was very much more restricted than it is under modern practice. At common law, the want or failure of consideration, fraud in the procurement of contract, and the like, could be proved under *non assumpsit* or *nil debet* in an action on an unsealed instrument, but the defendant could not recover the excess, if any, of the plaintiff. On sealed instruments the defendant could not show failure of consideration, fraud in the procurement, or a breach of warranty of title, or soundness, of personal property. Indeed, no matter of recoupment could be shown against a sealed instrument. The seal was deemed of such solemnity as to forbid this. Hence for all matters of recoupment against sealed instruments the defendant was driven to a separate action against the plaintiff.<sup>3</sup>

1. 25 Am. & Eng. Encl. Law (2d Ed.) 546.

2. Note 40 Am. Dec. 323, and cases cited; 25 Am. & Eng. Encl. Law (2d Ed.) 550, 551.

3. 4 Min. Inst. 792; 7 Va. Law Reg. 332.

**§ 239. Virginia statute of recoupment.<sup>4</sup>**

The original statute of recoupment in Virginia was enacted in 1831, and the statute of recoupment is frequently referred to as the Act of 1831. It is also sometimes referred to as the statute of equitable defenses, and the plea is frequently spoken of as a plea in the nature of a plea of set-off, but the act, as will appear from reading it, is really a statute of recoupment and bears but little resemblance to a set-off. The purpose of the act was to enlarge the rights of defence in that class of cases, and

**4. Section 3299 of the Code is as follows:**

"In any action on a contract, the defendant may file a plea, alleging any such failure in the consideration of the contract, or fraud in its procurement, or any such breach of any warranty to him of the title or the soundness of personal property, for the price or value whereof he entered into the contract, or any other matter as would entitle him either to recover damages at law from the plaintiff, or the person under whom the plaintiff claims, or to relief in equity, in whole or in part, against the obligation of the contract; or, if the contract be by deed, alleging any such matter arising under the contract, existing before its execution, or any such mistake therein, or in the execution thereof, or any such other matter as would entitle him to such relief in equity; and in either case alleging the amount to which he is entitled by reason of the matters contained in the plea. Every such plea shall be verified by affidavit."

**Section 3300 of the Code is as follows:**

"If a defendant, entitled to such plea as is mentioned in the preceding section, shall not tender it, or though he tender it, if it be rejected for not being offered in due time, he shall not be precluded from such relief in equity as he would have been entitled to if the preceding section had not been enacted. If, when an issue in fact is joined thereon, such issue be found against the defendant, he shall be barred of relief in equity upon the matters alleged in the plea, unless upon such ground as would entitle a party to relief against a judgment in other cases. Every such issue in fact shall be upon a general replication that the plea is not true; and the plaintiff may give in evidence, on such issue, any matter which could be given in evidence under a special replication if such replication were allowed."

**Section 3301 of the Code is as follows:**

"Nothing in this chapter shall impair or affect the obligation of any bond or other deed deemed voluntary in law upon any party thereto, or his representatives."

Sections 3302, 3304 are given in the notes to Chapter XXX, ante.

to enable parties to settle in one action all matters of defence between them growing out of the same transaction, whether such matters were of tort or contract,<sup>5</sup> or as stated in another case: "The plain purpose of said statute is to give the same measure of relief under it by a plea that could be obtained by the defendant in an independent action brought at law for the same cause, or in equity for relief growing out of the same transaction, and thus to prevent a cause of action from being divided into two; so that to give effect to this plain purpose it is essential that it should include contracts under seal as well as contracts by parol."<sup>6</sup> It will be observed that the statute enumerates specifically certain matters which may be set up thereunder and also "any other matter as would entitle him either to recover damages at law from the plaintiff \* \* \* or to relief in equity, in whole or in part, against the obligation of the contract." It has been held very properly that the words "or any other matter" means matters of like kind as the preceding particular enumeration, and hence the defence under the statute is limited to other matters growing out of the contract in suit.<sup>7</sup>

The Virginia statute applies only to "any action on a contract," hence if the plaintiff's action is not "on a contract" the defendant cannot set up statutory recoupment as a defence. The statute is purely *cumulative*, and does not purport to be compulsory. The language of the statute is "the defendant *may* file a plea." The first paragraph of the section applies to all contracts, sealed and unsealed, while the second paragraph applies to sealed contracts only. So far as unsealed contracts are concerned, the provisions of that section, disconnected from the right to recover the excess provided by § 3304, would seem to have been useless, and to have conferred no right which did not exist before. At common law any of the defences enumerated in that section could have been set up under the general issues of *nil debet* and *non assumpsit*, but there could have been no

5. Newport News Co. v. Bickford, 105 Va. 182, 52 S. E. 1011.

6. Fisher v. Burdette, 21 W. Va. 626, 630.

7. Amer. Manganese Co. v. Va. Manganese Co., 91 Va. 272, 21 S. E. 466.

recovery of the excess, if any.<sup>8</sup> Two important changes seem to have been wrought by that section: First, extending the right of recoupment to actions on sealed instruments, which did not exist at common law, and, second, permitting the *excess* over the plaintiff's demand to be recovered *in any case*, whether the plaintiff's demand be upon a sealed or an unsealed contract. Code, § 3300, preserves to the defendant his *equitable* defenses in two cases: (1) Where no plea is tendered setting them up, and (2) where such plea is tendered but is rejected for not *being offered in due time*. If rejected for any other reason no provision is made for any saving in favor of the defendant. The language of the act is different in many respects from the original act of 1831.

It is noticeable that there is no saving of *legal* defences. Just what is the effect of this is not altogether plain. There was no necessity for any saving of equitable defences, because the remedy afforded by § 3299<sup>9</sup> is only cumulative, and, further, because where equity has once acquired jurisdiction of a subject and is administering relief where none exists at law, it does not lose its jurisdiction simply because a legal remedy is furnished by statute, unless the equity jurisdiction is taken away by statute. It would seem, therefore, that there was no occasion for the saving provided by § 3300. It suggests, however, the *possibility* that § 3299 was intended to take away the common law defence of recoupment in all other cases on the principle *expressio unius, exclusio est alterius*. Was it so intended? The language of the statute is, "the defendant *may* file a plea." This seems to be permissive only. He is not compelled to file it, but may file it. Furthermore, the general rule of law is that a statute will not be held to repeal the common law in any case unless it plainly does so. This statute certainly does not *plainly* repeal the common law, and the doctrine of *expressio unius, etc.*, is by no means a safe guide in all cases to determine the legislative intent. For our present purpose we may assume that the common law is still in force. A defendant then in an action on an *unsealed* contract may defend (1) as at common law, or (2)

8. *Columbia Accident Ass'n v. Rocky*, 93 Va. 678, 25 S. E. 1009.

under § 3299. The relief is the same, except as to the excess over the plaintiff's demand. Such excess could not be recovered in the plaintiff's action at common law. For this he was put to his cross-action. He could recover to the extent of the plaintiff's demand and *surrender the excess*, or else stay out altogether and bring his cross-action for the whole matter of recoupment.<sup>9</sup> He could not recoup for a part, and sue in a separate action for the residue. If a defendant desires to recover the excess he must, therefore, make his defence under Code § 3299, by a *sworn plea*.

If the plaintiff sues in debt or assumpsit on a simple contract, and the defendant pleads the general issue, he may, under his plea, amongst other things, rely upon matter of recoupment. Suppose, for example, the plaintiff sues in assumpsit for a bill of goods amounting to \$1,000. The defendant claims (1) that he never ordered the goods or accepted them, and (2) that the goods were not as represented, and hence he is damaged to the extent of \$500. Now, clearly either of these defences could be relied on under the general issue. But suppose he elects to make only the first defence and says nothing as to the other, and there is a judgment against him for the full amount of the plaintiff's claim, can he then bring his separate action for the matter of recoupment? The books are filled with cases holding that the doctrine of *res judicata* "embraces not only what is actually determined in the first suit, but also extends to any other matter which the parties might have litigated in the case."<sup>10</sup> Now, plainly the matter of recoupment might have been litigated in the plaintiff's suit. How, then, is the defendant to escape from this dilemma? He can only do so, if at all, upon the ground that the rule has no application to matters of set-off, recoupment or counter-claims; that as to these the defendant has his election either to assert them in the plaintiff's action or by cross-action, and show by parol, for there is no other way of showing it, that the matter

9. Huff v. Broyles, 26 Gratt. 283.

10. Fishburne v. Ferguson, 85 Va. 321, 324, 7 S. E. 361; Aurora City v. West, 7 Wall. 82; 3 Va. Law Reg. 273.

of recoupment was not set up in the plaintiff's action.<sup>11</sup> It seems settled that at common law the defendant could always assert his matter of recoupment by a separate action, and it has been held that the object of § 3299 was "to enlarge the right of defence and not to *impair any previous right*, or to take away such defences where the law previously permitted them to be made."<sup>12</sup> It would seem, therefore, that the right to the cross-action still exists.<sup>13</sup>

*Reinvestment of Title to Real Estate.*—There is one class of cases, however, to which the defence provided by § 3299 does not apply. Where an action is brought to recover for the purchase price of *real estate* and the defence involves a rescission of the contract *and the reinvestment of the plaintiff with the title*, it has been repeatedly held that § 3299 does not apply, because the court of law has not the needed machinery either to compel or supervise the making of a conveyance.<sup>14</sup>

It has been insisted that § 3299 cannot be relied on in any case where the court cannot give *complete relief* in the case in which the plea is offered.<sup>15</sup> For example, if the legal title has not been conveyed to the defendant and he is sued for a part of the purchase money, it is said that if he were allowed to recoup for a part and the plaintiff recovered the residue, the result of the litigation would be to leave the plaintiff with the balance of the purchase money in his pocket, and the defendant still without the legal title, thus necessitating a suit in equity to obtain the title. This, it is argued, is not complete relief, and hence the defence of statutory recoupment cannot be made under § 3299. The cases, however, have not gone this far. They have restricted the refusal to the case where it is necessary to reinvest a plaintiff with title to real estate. Indeed, this question has been set at rest, and very properly, by *Watkins v. West*

11. 19 Encl. Pl. & Pr. 931.

12. *Columbia A. Ass'n v. Rockey*, 93 Va. 678, 25 S. E. 1009.

13. *Kenzie v. Reiley*, 100 Va. 709, 42 S. E. 872.

14. *Shiflett v. Orange Humane Society*, 7 Gratt. 297; *Mangus v. McClelland*, 93 Va. 786, 22 S. E. 364.

15. 4 Min. Inst. 796; Note 7 Va. Law Reg. 250, ff.

Wytheville Land Co., 92 Va. 1, 22 S. E. 554. In this case the plaintiff had sold real estate to the defendant, and the defendant had re-conveyed the property to a trustee to secure the balance of the purchase money. A part of the purchase price had been paid in cash. The plaintiff sued on the bonds for the deferred payments, and the defendant sought to recoup a part of the consideration under § 3299 on account of fraudulent representations made by the plaintiff which induced the contract of sale. These pleas were rejected by the trial court, and, on appeal, it was insisted that they were properly rejected because the defence set up under them was purely equitable and could not be made at law, and that the defendant by his plea sought to rescind and set aside his contract of purchase and to reinvest the vendor with the title to the lots. In dealing with this question, the court said: "We do not understand this to be the purpose or effect of these pleas. On the contrary, they expressly set out the value of the lots in consequence of the false representations complained of and only claim damage by way of offset for the difference. The purchase price of the lots was \$1,000. The pleas alleged that they are now worth \$100, and that the damage sustained, which is filed as an offset, amounts to \$900. No rescission of the contract of sale is asked for, nor is any needed. The defendant has a deed to the lots, and if he were to prevail in his defence, he would only have to move the court, under the statute (§ 2498) to have the deed of trust resting on the lots marked 'satisfied' on the deed book and produce the judgment in his favor as evidence of its satisfaction." The court then quotes the statute and examines some of the preceding cases discussing it, and concludes: "In a case, therefore, where the equitable grounds relied on would require a rescission of the contract and a reinvestment of the vendor with the interest alleged to have been sold, a plea by way of special set-off under § 3299 could not be relied on, but where no rescission is asked for and none is needed — the only purpose of the plea being to ascertain the damage sustained by reason of the default of the vendor — the plea can be relied on and the defence made at law under the statute. The pleas were therefore

improperly rejected on the ground that the defence could not be made at law.”

The defendant, however, must waive his right to a rescission of the contract in equity, and must, by his plea, go for reimbursement exclusively in the form of damages for the vendor's breach of contract. The defendant is put to his election between two rights. He may either go into equity for rescission, or seek damages at law. He cannot hold to both.<sup>16</sup>

If a plaintiff, having conveyed title to real estate to the defendant, sues at law to recover a part or all of the purchase price, and the defendant files a plea which seeks *rescission merely*, the plea is bad, as it requires a reinvestment of the plaintiff with the title,<sup>17</sup> and the plea is not aided by a tender of reconveyance, as a court of law has no machinery for supervising such a conveyance and determining whether it is a proper conveyance.<sup>18</sup> Nor is a plea good which offers to rescind.<sup>19</sup> In each of these cases the plea, if received, would require a court of law to do what it has no power to do, for if title is to be re-conveyed to the plaintiff, a court of law has no machinery by which it can make, or cause to be made, or examine or pass upon, when made, a deed to the plaintiff. For this reason relief by a plea under § 3299 is refused, and the party is left to his relief, in equity, if any.

*Rejection of Plea under Statute.*—Whether a party who offers a plea under § 3299 in time and has it rejected can obtain relief in equity has not been expressly decided. Section 3300 saves the relief in equity when the defendant *does not tender* such plea, “or, though he tender it, if it be rejected for *not being offered in due time.*” The section further provides, if, when issue in fact is joined thereon, such issue be found against the defendant, he shall be barred of relief in equity upon the matter alleged in the plea, unless upon such ground as would entitle a party to relief against a judgment in other cases. The statute

16. *Watkins v. Hopkins*, 13 Gratt. 745; 4 Min. Inst. 796, 797.

17. *Shiflett v. Orange Humane Society*, 7 Gratt. 297.

18. *Mangus v. McClelland*, 93 Va. 786, 22 S. E. 364.

19. *Tyson v. Williamson*, 96 Va. 636, 32 S. E. 42.

is silent as to the effect of a plea tendered in time, but rejected because of the inability of a court of law to grant relief, or where no issue in fact is joined thereon. I know of no decided case in which the point was involved. In *Shiflett v. Orange Humane Society*, 7 Gratt. 297, Judge Allen says: "The rejection of the plea does not preclude the party from applying to a court of equity for such relief as he may show himself entitled to on account of the matters alleged in the plea." The plea in that case was filed in time, but was rejected. The only point before the court was whether the plea was properly rejected. It was not necessary at all to say what *future* relief, if any, the defendant might be entitled to, but the conclusion stated so accords with right and justice that it will probably be followed. Indeed, any other conclusion would work the most serious injustice and practically frighten defendants away from offering pleas under § 3299. In a more recent case,<sup>20</sup> Judge Keith was careful to say that the decision of the court was "without prejudice to the defendant to go into a court of equity for such relief, etc." but in a still later case<sup>21</sup> the subject is not mentioned.

In the most recent reference to this subject,<sup>22</sup> it is said that if equitable defences which are only available under § 3299 of the Code are not made at law, they may be made in a suit in equity brought to enforce the judgment at law, provided nothing occurred in the action at law which the statute declares precludes the defendant from relief in equity. This throws but little light on the subject, as in that case the plea was not offered at law.

If the plea is so framed as to show that the defendant does not seek rescission, but an affirmance, he may lay his damages at any sum he pleases, even though it amounts to the full amount of the purchase money, but this should be made to *appear clearly*. The value of the property is to be ascertained as of the date of the contract for its purchase, and not as of the date of the plea pleaded,<sup>23</sup> and it seems well-nigh inconceivable that a purchaser could be found of property *absolutely worthless*, and the plea which claims *complete damages* for false representations

20. *Mangus v. McClelland*, 93 Va. 786, 790, 22 S. E. 364.

21. *Tyson v. Williamson*, 96 Va. 636, 32 S. E. 42.

22. *Selden v. Williams*, 108 Va. 542, 62 S. E. 380.

23. *Tyson v. Williamson*, *supra*.

with reference to property for which the defendant had contracted to pay a large sum of money, would seem of necessity to seek rescission. Such a plea should show very clearly, if not expressly, that the defendant still insisted on *affirmance*, and not on rescission.

*Action for Purchase Price of Personal Property.*—If the subject matter of the litigation be personal property, there is no trouble about administering complete justice in a court of law. Here the course is easy. If the purchaser elects to keep the property, he affirms and simply recoups the damages, or he may rescind, and if he does rescind, the contract of sale is by the judgment of the court avoided *ab initio* and thereby the plaintiff is reinvested with the title as fully as the defendant would be upon an execution satisfied in an action of *trover*.

*Notice of Recoupment.*—When recoupment is sought to be set up under one of the broad general issues, the courts are in conflict as to the necessity for notice of an intention to rely on such matters.<sup>24</sup> The Virginia cases give no intimation of such a requirement, but the practice of demanding a bill of particulars under § 3249 of the Code is so general that a plaintiff will rarely be taken by surprise, and, if he is, it is his own fault.

*Essentials of a Valid Plea.*—There are two essentials of a valid plea under § 3299. They are: (1) The plea must allege the *amount* to which the defendant is entitled by reason of the matters alleged in the plea,<sup>25</sup> and (2) the plea must be sworn to. But it would probably be too late to object to the want of an affidavit after an issue of law or fact has been taken on a plea not so verified.<sup>26</sup>

*Relief in Equity.*—The defendant is not obliged to avail himself of the relief afforded by the statute, but may go into equity for that purpose, and when he does, it is not necessary that he should aver in his bill any reason or excuse for not availing himself of such equitable defence at law.<sup>27</sup>

24. 19 Encl. Pl. & Pr. 744, and notes.

25. *Tyson v. Williamson*, 96 Va. 637, 639, 32 S. E. 42.

26. *Lewis v. Hicks*, 96 Va. 91, 30 S. E. 466.

27. *Bias v. Vickers*, 27 W. Va. 456; *Selden v. Williams*, *supra*.

*Recoupment (Common Law and Statutory) and Set-Offs may be contrasted as follows:*<sup>28</sup>

SET-OFF.	COM. LAW RECOUPMENT.	STAT. RECOUPMENT, § 3299.
1. Different transactions.	Same transaction.	Same transaction.
2. Must be liquidated.	Need not be liquidated.	Need not be liquidated.
3. May recover excess, § 3304.	No recovery over.	May Recover excess.
4. Must be pleaded or list filed, § 3298.	Shown under general issues of <i>nil debet</i> and <i>non assumpsit</i> .	Special plea sworn to, § 3299.
5. May be used against sealed instrument.	Cannot be used against sealed instrument.	May be used against sealed instrument.
6 Claims to which the defendant has only an equitable title may be relied on, § 2860, <i>ante</i> , § 50.	Purely equitable defences cannot be set up.	Purely equitable defences relied on. See <i>Kinzie v. Riely</i> , 100 Va. 709, 42 S. E. 872.

Professor Lile's excellent comments on this subject are given in the foot note.<sup>29</sup>

28. 7 Va. Law Reg. 332; *Sterling Organ Co. v. House*, 25 W. Va. 64. This case is very full on the subject.

29. "As between *common law* recoupment and *statutory* recoupment, the defendant may still use either at his option, unless (1) he desires a *recovery over*, or (2) the action is on a *sealed instrument*. The statute has in nowise abridged the scope of the general issue or the extent of common law recoupment, and the latter may still be set up under the general issue, and with like effect, as at common law. *Columbia, etc., Association v. Rockey*, 93 Va. 678, 25 S. E. 1009. The object of the statute was to enlarge the scope of the common law recoupment in the two particulars already mentioned, namely, to permit a *recovery over* against the plaintiff, and to allow recoupment against a *sealed instrument*.

"A few examples may aid some of our younger brethren in comprehending the distinctions mentioned: 1. A sells B a horse for \$250, with warranty of soundness, and takes his note for that amount. The warranty is broken, and the horse is worth only \$100. In an

### § 240. Who may rely upon the statute.

In the absence of the insolvency of the principal, or some other equitable ground, one who is a mere surety on a bond but no party to the contract out of which the bond arose cannot avail himself of the defence given by § 3299. For instance, if the purchaser of land gives a bond with surety for the purchase

action of debt by A on the note, B may, under the general issue of *nil debet*, prove the breach of warranty and the extent of his damage, thus reducing A's recovery to \$100. This is *common law recoupment*. B might have proceeded under § 3299 and exercised his right of statutory recoupment, but the result would have been the same, and he would have derived no advantage from the statutory proceeding.

"2. Suppose the same facts, save that B paid \$200 of the 250 cash, and the action is for the recovery of the balance of \$50. Here, if B relies upon common law recoupment, he repels A's claim of \$50, but his total damage is \$150—so that he is still out of pocket \$100, and it is doubtful whether he has not exhausted his remedy under the doctrine of *res judicata*. The proper step for him, therefore, is to resort to *statutory recoupment* (§ 3299), whereby he would not only repel the claim for \$50, but obtain a judgment over against the plaintiff for the full amount of damages suffered.

"3. Suppose the same facts as in the case first stated, except that B executes his bond (instead of a *note*) for \$250. Here the breach of warranty could not be set up under the general issue, by reason of the seal, which shuts off all inquiry into the sufficiency of the consideration. Hence B must either suffer judgment, and bring an independent action for his damages, or else proceed by statutory recoupment—§ 3299, in terms, giving this right in case of a sealed instrument.

"4. Suppose in any of the foregoing cases that there had been no breach of warranty or other failure of the seller to comply with his contract in the sale of the horse, but that B held A's note for the same, or a greater or less, amount, executed, before or after the sale of the horse, as the purchase price of a steam engine. Here, in an action by A against B for the purchase price of the horse, B might use A's note for the steam-engine as a set-off, either repelling A's claim in whole or in part, or recovering the excess over against him, according to the relative amounts of the two notes. This would be set-off and not recoupment, since the claim asserted by the plaintiff and that set up by the defendant arise out of distinct transactions, in no way connected with each other. Neither common law nor statutory recoupment would avail in this case." 7 Va. Law Reg. 332, 333.

price and the grantor conveys the land to the purchaser with a warranty that he has the right to convey, the covenant is broken, if at all, as soon as the deed is made, and the grantee may sue at once without waiting eviction or special damage; or, if the purchaser is sued on his bonds for the purchase price, he may recoup his damages under § 3299 of the Code, or he may stay out and bring his independent action for the breach of the covenant. Where there has been neither eviction nor special damages arising from the breach, if he should set up the breach he could recoup only nominal damages, but this would bar any further recovery if there should be subsequent eviction from the land in whole or in part. For this reason he may, and doubtless would, prefer not to rely upon statutory recoupment, but to stay out and bring a separate action for damages in the event that he should be evicted. This right of election, however, belongs to the principal alone, although the recovery, if any, would inure to the benefit of the surety. The principal alone has the right and power to determine whether he will assert his rights against the creditor in the latter's suit, or will bring a cross-action against him. The surety has no claim for damages against the grantor for a breach of covenant in a deed to which he is no party and under which he acquired no interest, and hence would not be permitted to occupy the position in the suit of claiming damages against the grantor. This right, as stated, belongs to the principal alone.<sup>30</sup> Nor can a surety set-off or recoup against the plaintiff's claim a purely legal demand growing out of an entirely different transaction from the claim asserted by the plaintiff. The provisions of § 3299 were not intended to alter or modify that provision of § 3298 which excludes the right of a surety to set off against the plaintiff's demand a claim due to such surety as principal by the plaintiff.<sup>31</sup>

In a common-law action against a principal and surety on a bond, the surety cannot set up a defence under the statute that the plaintiff creditor without the consent of the surety had released a lien which he had on the property of the principal

30. *Kinzie v. Riely*, 100 Va. 709, 42 S. E. 872.

31. *Stimmell v. Benthal*, 108 Va. 141, 60 S. E. 765.

debtor as a security for the debt. Such a defence is a matter of exclusive equitable jurisdiction.<sup>32</sup>

If, however, the matter of relief consists of mere failure of consideration, something showing that the plaintiff has no right to recover anything on account of some defect in the contract, not giving rise to a separate cause of action, then it would seem that the defence may be made by the surety. Failure of consideration here means practically a want of consideration, e. g., if the sale be of a patent right, and the patent is void.<sup>33</sup>

32. *Bank v. Parsons*, 42 W. Va. 137, 24 S. E. 554.

33. *Gillespie v. Terrance*, 25 N. Y. 306, 82 Am. Dec. 554.

## CHAPTER XXXI.

### CONTINUANCES.

§ 241. Discretion of trial court.

§ 242. When motion should be made.

§ 243. Causes for continuance.

1. Continuance of right.

2. Absence of witness.

(a) Materiality of witness.

(b) Inability to prove same facts by any other witness who is present.

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3. Absence of papers.

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5. Absence of counsel.

6. Absence of a party.

7. Any change in the pleadings.

8. Failure to serve process.

§ 244. Refusing a continuance.

§ 245. Cost of continuance.

#### § 241. Discretion of trial court.

A continuance is to be distinguished from fixing a day for trial, or postponement. The latter does not contemplate a delay to another term, but to a later day of the same term, and is more readily granted than a continuance, which means deferring the case to a later term. A motion for a continuance is always addressed to the sound discretion of the trial court, and though the action of the trial court is subject to the supervision of the appellate court, it will not be reversed unless plainly erroneous. Courts are generally more liberal in sustaining a motion to continue than in overruling it, as the damage in the first case involves only delay, while in the latter it may affect substantial rights.<sup>1</sup> A cause is rarely reversed because a motion

1. *N. & W. v. Shott*, 92 Va. 34, 22 S. E. 811; *Payne v. Tancil*, 98 Va. 262, 35 S. E. 725.

for a continuance has been improperly granted, but a criminal cause was reversed in Virginia and a new trial ordered because the trial court had improperly refused to force the commonwealth to trial at a given term of the court.<sup>2</sup> The effect was simply to give the prisoner a new trial, although he had already had a fair trial at the term to which his case was continued. A mere statement of the facts would seem sufficient to demonstrate the error of the ruling.<sup>3</sup>

### § 242. When motion should be made.

Usually a motion for a continuance should be made when the case is called for trial, and, except for a supervening cause, a motion thereafter is too late; but here, too, a wise discretion is vested in the trial court. *Properly* a motion to continue on account of absence of a material witness should not be made until the issue is made up, for upon the issue depends the *materiality* of the witness. The very absence of the witness, however, may prevent a party from concerting his defence, so the matter is left largely to the discretion of the trial court.

### § 243. Causes for continuance.

1. *Continuance of Right.*—It is provided by statute in Virginia,<sup>4</sup> Illinois, and probably other States, that any party to an action or proceeding in any court may have a continuance as a matter of right when the General Assembly is in session and a member or officer of the General Assembly has been employed or retained by him as attorney in such action or proceeding prior to the beginning of the session of the General Assembly. Generally also, a party to whom an issue is tendered is entitled as a matter of right to a continuance at the term at which the issue is tendered, but the party tendering the issue must always come prepared to sustain his position and is not entitled to a continuance.<sup>5</sup> Some of the judges, however, hold that if the

2. Benton *v.* Com., 90 Va. 328, 18 S. E. 282.

3. Benton's Case, 91 Va. 782, 21 S. E. 495.

4. Acts, 1906, ch. 29; 3 Code, p. 544.

5. Harrington *v.* Harkins, 1 Rob. 591; 4 Min. Inst. 810.

defendant pleads one of the narrow general issues the plaintiff will be compelled to go to trial at the same term unless he can show cause for a continuance, as he could reasonably expect to prepare for such a plea, and would not be taken by surprise. The general rule, however, is as above stated, and would seem to indicate that it is necessary for the defendant to make up the issue at the rules if he wishes to force a trial at the first term.

A new party brought into a suit by a *scire facias* or motion may have the case continued as a matter of right at the term at which the order is entered making him a party. If, however, the case be revived at rules by *scire facias* he is not entitled to such continuance as a matter of right.<sup>6</sup>

2. *Absence of Witness*.—By far the most frequent cause for a continuance is the absence of a material witness. On an application for a continuance on account of the absence of a witness, it is necessary for the party making the application to show, not only the absence of the witness, but his materiality, due diligence to secure his presence, inability to prove the same facts by another witness who is available, and reasonable probability of being able to secure the evidence on another trial.

(a) *Materiality of the witness*.—In order to show the materiality of the witness, it is usually necessary to have the affidavit or testimony of some one who has communicated with the witness, verbally or otherwise, and knows what the witness will testify to, and its materiality.<sup>7</sup>

(b) *Inability to prove the same facts by any other witness who is present*. Generally, if the same facts can be proved by other witnesses who are present, the absence of the witness is no ground for a continuance, and even after a continuance has been granted on account of the absence of a material witness, it may, during the same term, be set aside, and the party forced into trial, if it be discovered that the same facts that were ex-

6. Code, § 3308; *Stearns v. Richmond Paper Co.*, 86 Va. 1034, 11 S. E. 1057.

7. *Tompkins v. Burgess*, 2 W. Va. 187; *Dimmey v. Wheeling R. Co.*, 27 W. Va. 32.

pected to be proved by the absent witness can be proved by another witness who is present.<sup>8</sup> Sometimes, however, the character of the witness himself, or of the other witnesses, or the number of contradicting witnesses on the other side, may dispense with this requirement, as when the absent witness is a man of very high character and well known, and the other witnesses who know the same facts are Indians or negroes, or when the absent witness is one of several attesting witnesses to a paper the execution of which is disputed, or in matters of character.

(c) *Use of due diligence to procure the witness or to get his evidence.* It is generally sufficient to show that a subpoena was issued for the witness in due time and has been returned executed, or, if not returned executed, that it was placed in the hands of the officer in ample time for service, and that the party himself is in no fault. If the materiality of the witness has been shown, it would be good ground for a continuance, if the party could show that he had made diligent search for the witness and had been unable to find him, but that there was reasonable probability of being able to have him present at another term if the case were continued.<sup>9</sup> A witness is not compellable to attend unless there is paid or tendered to him when summoned, if he demands it, allowance for one day's attendance and his mileage.<sup>10</sup> A party will not be deemed to have exercised due diligence unless he has paid or tendered to the witness his mileage and attendance, if demanded before trial.<sup>11</sup>

8. *Scott v. Boyd*, 101 Va. 28, 42 S. E. 918.

9. *Foushee v. Lea*, 4 Call 279; *Deford v. Hayes*, 6 Munf. 390; *B. & O. R. Co. v. Wightman*, 29 Gratt. 431; *Matthews v. Warner*, 29 Gratt. 570; *Hewitt v. Comth.*, 17 Gratt. 627.

10. Code, § 3354. In Virginia the amount of attendance is 50c a day, and the mileage is 4c per mile for each mile over 10, going and coming, the same amount each way. Code, § 3549.

11. The first process to obtain the attendance of the witness is a *subpœna*. When this is executed the witness may demand mileage and attendance. If the process is returned duly executed, and the witness fails to attend, the court may award a *rule* against him to show cause why he shall not be fined and attached for his contempt. This is a proceeding by the court to enforce obedience to its process, and no mileage or attendance is required to be tendered. If the wit-

(d) *Reasonable probability that the witness can be had at another trial.* Unless such reasonable probability exists, there will be no reason for continuing the case on account of the absence of the witness, as a party would be in no better fix at the next term, hence it is always necessary to show that it is probable that the witness or his evidence can be had at the next term. If an absent witness is a non-resident, and so not amenable to the jurisdiction of the court, and especially if he is in the employment of the applicant for the continuance, it is not error to refuse a continuance on account of his absence after the party has had an opportunity to secure his presence.<sup>12</sup> In Virginia, if a witness be more than one hundred miles from the place of trial, his deposition may be taken and read in an action at law, but the trial court may, for good cause shown, compel his attendance in person. This cause may be shown by either party.<sup>13</sup>

It is not the practice in Virginia to require the applicant to state what he expects to prove by the absent witness, unless the court doubts the motives of the applicant, and suspects that the object of the motion is merely to obtain delay.<sup>14</sup> In West Virginia, however, it is expressly provided by statute that if a motion is made for a continuance on the ground of the absence of a material witness, an affidavit must be filed, if required by any party opposing, setting forth, in addition to other matters required in order to obtain a continuance, the name of the witness and the testimony he is expected to give, and the affiant must, if required by the opposing party, submit to cross-examination in open court upon the matters set forth in his affidavit.<sup>15</sup> The current of authority elsewhere seems to hold that the court may,

ness fails to appear in answer to the rule which has been executed upon him, then the court may issue an *attachment* directing the sheriff to arrest the witness and bring him into court. This, too, is a process to enforce obedience to the court's order, and no mileage or attendance is required to be tendered to the witness.

12. *Fire Assn. v. Hogwood*, 82 Va. 342, 4 S. E. 617.

13. Code, § 3365.

14. *Hewitt v. Com.*, 17 Gratt. 627; *Harman v. Howe*, 27 Gratt. 676, 686-7.

15. Code, W. Va., § 3976.

in the first instance, require the applicant to state what he expects to prove by the absent witness.<sup>16</sup>

3. The *absence of papers* necessary to a party's action or defence stands on practically the same footing as the absence of a witness.

4. *Surprise*. Surprise at the trial, without negligence on the part of the party or his counsel, is a ground for continuance. It has been held that where the wrong witnesses were summoned by mistake, but the mistake was not discovered until too late to correct the error, it was good ground for a continuance, where the court was satisfied that it was an honest mistake on the part of the applicant's counsel;<sup>17</sup> but where the issue had been made up in a personal injury case at one term of the court, and no bill of particulars of the plaintiff's claim was required until the next succeeding term, the action of the trial court in refusing a continuance for the defendant on the ground of surprise at the elements of damage claimed by the plaintiff was approved by the Court of Appeals, at least it was held that the appellate court could not say that the action of the trial court was erroneous. It would seem in this case that the defendant was negligent in not having asked for the bill of particulars at an early date.<sup>18</sup> Parol stipulations of counsel will not be regarded by the courts, but if they work a surprise, it may be good ground for a continuance.<sup>19</sup>

5. *Absence of counsel*. The absence of the leading counsel in a case by reason of sickness has been held good ground for a continuance,<sup>20</sup> and so of the sole counsel where there has not been sufficient opportunity to employ other counsel. Of course the rule would not apply in case of the protracted illness of the counsel, with no probability of his being able to be present.<sup>21</sup> It has likewise been held that a party is entitled to a continu-

16. 4 Encl. Pl. & Pr. 884; Abbot's Trial Brief 25, 32.

17. *Myers v. Trice*, 86 Va. 835, 11 S. E. 428.

18. *N. & W. Ry. Co. v. Spears*, 110 Va. 110, 65 S. E. 482.

19. *Spilman v. Gilpin*, 93 Va. 698, 25 S. E. 1004; *Collier v. Falk*, 66 Ala. 224; 4 Encl. Pl. & Pr. 831.

20. *Myers v. Trice*, *supra*.

21. 4 Encl. Pl. & Pr. 840; Abbott's Trial Brief 17.

ance by reason of the absence of his counsel in an adjoining circuit, in attendance upon a trial under a prior engagement, when there was no want of diligence on the part of the applicant;<sup>22</sup> but if the trial court refuses the continuance on account of the absence of one of the counsel, and other counsel are present and conduct the case, the appellate court will not for this cause set aside the judgment, where it does not appear that there was any mismanagement or mistake on the part of the applicant's counsel who conducted the defence, nor that any injury resulted to the applicant by reason of the absence of one of the counsel.<sup>23</sup>

6. *Absence of a party.* This is not *per se* ground for a continuance, but if he is a witness, he stands as any other witness, except, perhaps, it would not be necessary to show that he had been summoned. If his presence as a witness is needed, and from sickness, or other good cause, he is unable to attend, and it appears that he has been diligent in the preparation of his case and expected to appear to testify, it is good ground for a continuance.<sup>24</sup>

7. *Change in the pleadings.* Any change which materially affects the issue to be tried and necessitates evidence not before required would justify a continuance, otherwise not.<sup>25</sup> If there is a variance at the trial between the allegation and the proof, and the party is allowed to amend his pleadings to fit the proof, it is good ground for a continuance, if the amendment is material and it would prejudice the other party to be compelled to go on with the trial.<sup>26</sup>

8. *Failure to serve process.* In case of a joint tort in those jurisdictions where a judgment against one tort feisor merges a cause of action, or of a joint contract where the same result would follow, failure to serve process, without fault of the plaintiff, is good cause for continuance. Generally, where the

22. *Rossett v. Gardner*, 3 W. Va. 531. See, also, *Wise v. Com.*, 97 Va. 779, 34 S. E. 453.

23. *Va. Iron Co. v. Kiser*, 105 Va. 695, 54 S. E. 889.

24. *Carter v. Wharton*, 82 Va. 264; *Abbott's Trial Brief* 14.

25. *Travis v. Peabody Ins. Co.*, 28 W. Va. 583.

26. Code, § 3384.

party has done all that is required of him and the fault is with a public officer, there is good ground for a continuance.

Motions for continuances may be supported by affidavits or depositions, or by the examination of parties or witnesses in open court, and the motion may be resisted by like evidence. By professional courtesy counsel are generally not required to be sworn; their verbal statements being accepted as if sworn to, but this is not obligatory on the opposite party, his counsel, or the court.

In order to speed the hearing of causes and prevent the trial courts from continuing them on the docket without good cause, it is provided by statute in Virginia that "any party asking the court to hear a case may, if the court refuses to hear it, have his application spread upon the record with a statement of the facts in relation thereto."<sup>27</sup> This statute is a dead letter, and it is not believed that any case has ever arisen under it.

#### § 244. Refusing a continuance.

Refusing a continuance when it should have been granted is good ground for reversal. Generally, a court will refuse a continuance where the opposite party will admit (not the truth of what the witness would state) but that if the absent witness were present, he would state what the applicant says he can prove by him, and so it would be refused if it could be shown that the absent witness had no such knowledge as was imputed to him, or was not material, and the like. But an appellate court will not reverse the ruling of the trial court on a motion for a continuance unless such ruling appears to have been plainly wrong and may have resulted in material injury to the applicant.<sup>28</sup>

#### § 245. Cost of continuance.

The question of the cost of continuances usually rests in the discretion of the trial court, but costs are generally awarded

<sup>27</sup> Code, § 3380.

<sup>28</sup> *Harman v. Howe*, 27 Gratt. 676, Va. Rep. Anno.; *Means v. Bank of Randall*, 146 U. S. 620; *N. & W. Ry. Co. v. Spears*, 110 Va. 110, 65 S. E. 482.

against the applicant when the motion is allowed. If the continuance is general, that is, by consent of both parties, the costs abide the final determination of the cause, and are given in favor of the party in whose behalf the judgment is rendered. In Virginia the cost of continuances is placed largely in the discretion of the trial court.<sup>29</sup>

<sup>29</sup>. Code, § 3541.

## CHAPTER XXXII.

### JURIES.

- § 246. Who are competent to serve.
- § 247. Qualifications of jurors.  
    Selection of jurors.
- § 248. Objections to jurors.  
    Challenges.
- § 249. Special juries.
- § 250. Oath of jurors.
- § 251. Trial by jury.
- § 252. Custody and deliberations of the jury.  
    Disagreement of the jury.
- § 253. Misconduct of jurors.

#### § 246. Who are competent to serve.

This is, of course, purely statutory. In Virginia all male citizens over twenty-one years of age, who have resided in the state two years, and in the county, city or town in which they reside one year next preceding their being summoned to serve, and who are in other respects competent, are qualified to serve as jurors, except: (1) Idiots and lunatics; (2) persons convicted of bribery, perjury, embezzlement of public funds, treason, felony, or petit larceny. No male person, however, over sixty years of age can be compelled to serve as a juror. Of those competent to serve, many are for various reasons exempt from service if they choose to rely upon the exemption.<sup>1</sup> All persons while actually engaged in harvesting, or securing grain or hay, or in cutting or securing tobacco, are exempt from service, so also are licensed undertakers. Officers, soldiers, seamen, and marines are not considered residents for the purpose of jury service merely because stationed in the state.<sup>2</sup> The right "to vote and hold office" is no longer a test of qualification.

#### § 247. Qualifications of jurors.

Jurors must be physically able to see, and to hear and com-

1. Code, § 3140.

2. Code, §§ 3139, 3140, 3140a, 3141.

prehend the evidence and the instructions, and must be disinterested. In an action to which a corporation is a party, a juror who has shown on his *voir dire* that he is in other respects qualified cannot be asked whether he is prejudiced against corporations.<sup>3</sup> While a juror is not competent to sit in a case in which he has any interest, or is related to either party, or has formed or expressed any opinion, or is sensible of any bias or prejudice, the mere fact that he is indebted to one of the parties does not render him incompetent to sit, nor does the fact that one of the parties to the case being tried is the family physician of the juror render him incompetent to sit, where it appears from his statement on his *voir dire* that the relationship will not influence his verdict.<sup>4</sup> It is provided by statute in Virginia that the court shall, on motion of either party to a suit, examine a juror when called to ascertain whether any of the above objections do exist.<sup>5</sup> In Virginia, a person who has any controversy which has been or is expected to be tried at a term of the court is incompetent to serve as a juror at that term.<sup>6</sup>

*Selection of jurors.*—Those who are to serve as jurors for the year are required to be selected annually between January 1 and July 1 by the judge of the Circuit or City Court, as the case may be. The names are written on slips, folded and put into a box provided for the purpose, and are drawn out under the direction of the court, or judge from time to time during the year as their services are needed. The writ used for summoning a jury is called a *venire facias*, and the jury itself is often spoken of as the *venire*. If a sufficient number qualified to serve do not attend, or for any cause there is a deficiency of qualified jurors others of *like qualifications* (*talesmen*) may be obtained by another *venire facias*.

### § 248. Objections to jurors.

No exception to any juror on account of his age or other

3. *Atlantic & D. R. Co. v. Reiger*, 95 Va. 418, 28 S. E. 590.

4. *Richardson v. Planters' Bank*, 94 Va. 130, 26 S. E. 413; *Ches. & O. Ry. Co. v. Smith*, 103 Va. 326, 49 S. E. 487.

5. Code, § 3154.

6. Code, § 3165.

legal disability will be allowed after he is sworn, except by leave of the court, though the exception would have been good if made in time.<sup>7</sup> Exceptions to competency of jurors should be made before they are sworn.<sup>8</sup> The grounds of disqualification, such as prejudice, relationship, etc., may be disclosed by examining the juror on his *voir dire* (a special oath administered to the juror to make true answer to such questions as shall be propounded to him), or it may be shown by extraneous evidence.<sup>9</sup> The objection comes too late after the juror is sworn, except by leave of the court, and is certainly too late after verdict, save in very exceptional cases. It is provided in Virginia that no irregularity in any writ of *venire facias*, or in the drawing, summoning, returning or empanelling of the jurors shall be sufficient to set aside a verdict unless the party making the objection was injured by the irregularity, or the objection was made before swearing the jury.<sup>10</sup> Writs of *venire facias*, however, are not properly parts of the record unless made so by a bill of exception, or otherwise.<sup>11</sup>

*Challenges.*—Challenges of jurors may be (1) peremptory or (2) for cause, and the latter may be (a) a principal challenge; that is, for a cause which *per se* (as a matter of law) disqualifies, or (b) to the favor; that is, which raises some question of fact which may or may not disqualify; e. g., bias, prejudice, etc. The following are held good grounds for challenging: Bias, prejudice, relationship, interest, dependence, formation of decided opinions, and the like. The interest which will disqualify must be in the results of the particular case, and not merely in the legal questions involved. Relationship at common law must be within the ninth degree, counting from the juror back to a common ancestor, and then down to the party, reckoning one for each except the common ancestor. The relation-

7. Code, § 3155; *Hite v. Com.*, 96 Va. 489, 31 S. E. 895; *Suffolk v. Parker*, 79 Va. 660.

8. *Parsons v. Harper*, 16 Gratt. 64; Code, § 3156.

9. Code, § 3154.

10. Code, § 3156; *Charlottesville v. Failes*, 103 Va. 53, 48 S. E. 511.

11. *Spurgeon's Case*, 86 Va. 652, 10 S. E. 979; *Jones' Case*, 100 Va. 842, 848, 41 S. E. 951.

ship may be by consanguinity or affinity.<sup>12</sup> Citizens of a county or town cannot serve in a case where the county or town is interested, nor stockholders where the corporation is interested. Jurors in Virginia are not generally interrogated as to their qualifications except upon application therefor, or suggestion of disqualification; but the rule is otherwise in many states. Where the jury is to contain seven, plaintiff and defendant are each entitled to one peremptory challenge,<sup>13</sup> that is to strike off one without assigning any reason therefor.

### § 249. Special juries.

A special jury may be allowed by any court. The court directs such jurors to be summoned as it shall designate for the purpose, and from those summoned a panel of twenty qualified jurors is made, from which sixteen are drawn by lot. Then the plaintiff and defendant, or their counsel, alternately (beginning with the plaintiff) strike off one until the number is reduced to twelve, who shall compose the jury for the trial of the cause.<sup>14</sup> If parties or their counsel fail or refuse to strike the required number from the sixteen to reduce it to twelve, the jury of twelve is obtained from the sixteen by lot.<sup>15</sup> The statute provides for the sixteen to be chosen from the panel of twenty by lot, but, if from the panel of twenty, four are drawn out by lot, this makes the sixteen selected by lot, and is a compliance with the statute.<sup>16</sup>

### § 250. Oath of jurors.

Where an issue, or issues, have been made in a civil case, the jury are sworn to well and truly try the issue, or issues, joined between the plaintiff and the defendant, and a true verdict render according to the evidence. If no issues have been made, and the jury are simply executing a writ of inquiry, the oath

12. *Doyle v. Com.*, 100 Va. 808, 40 S. E. 925.

13. Code, § 3154.

14. Code, § 3158.

15. Code, § 3158.

16. *Duke v. N. & W. Ry. Co.*, 106 Va. 152, 55 S. E. 548.

administered is that they will diligently inquire of the damages sustained by the plaintiff by reason of the matters and things in the declaration mentioned. It sometimes happens that a jury is sworn to try the issue, or issues, when in fact no issue has been joined, usually in consequence of oversight on the part of one of the parties to join issue on some pleading that has been filed. It has already been pointed out<sup>17</sup> that the verdict of the jury in such case will not be set aside if the court can see that no injury could have resulted from the omission to take issue on a pleading. It is there stated that "the disposition of the courts in modern cases is to disregard mere technical objections which have occasioned no injury, and, where they can see that no injury has resulted to a party from the omission to join issue on a pleading, they will disregard the defect, and proceed to judgment on the merits of the case. Under such circumstances they hold the party to be estopped from setting up the technical objection of the want of issue for the first time in the appellate court." The same rule, for a like reason, should be applied in the trial court as in the appellate court when the objection is raised for the first time after verdict.

### § 251. Trial by jury.

The constitution of Virginia<sup>18</sup> provides that "in controversies respecting property and in suits between man and man, trial by jury is preferable to any other and ought to be held sacred." This is regarded as mandatory, but is not applicable to that class of cases where no jury was allowed at the time the provision was first adopted.<sup>19</sup> The constitution preserves the right of jury trial where it existed when the constitution was first adopted, but does not confer it in any case not expressly mentioned, and hence the right to demur to the evidence, as hereinafter pointed out,<sup>20</sup> has not been taken away.<sup>21</sup> The pro-

17. *Ante*, § 207.

18. Va. Constitution, 1902, § 11.

19. *Pillow v. Southwest Va. Imp. Co.*, 92 Va. 144, 23 S. E. 32.

20. *Post*, § 256.

21. *Reed & McCormick v. Gold*, 102 Va. 37, 45 S. E. 868; *Lynchburg Milling Co. v. Bank*, 109 Va. 639, 64 S. E. 980; *Meade v. Meade*, 111 Va. 451, 69 S. E. 330.

vision of Amendment VII to the Constitution of the United States which grants a trial by jury "in suits at common law" involving over \$20 applies only to the federal courts.

A common law jury was a jury of twelve, but by the Virginia constitution<sup>22</sup> you may have a jury of not less than seven in cases not cognizable by a justice of the peace at the time the constitution was proclaimed, or not less than five in cases so cognizable. Provision is also made for a jury of three, by consent of parties entered of record, each party to select one, and they to select the third, and it is provided that any two concurring shall render a verdict in like manner and with like effect as a jury of seven. The jurors so selected are required to be persons who are eligible as jurors.<sup>23</sup>

It is also provided by statute in Virginia:<sup>24</sup> "In any case, unless one of the parties demand that the case be tried by a jury, the whole matter of law and fact may be heard and determined and judgment given by the court;" and a similar provision is made as to proceedings by motion.<sup>25</sup> It will be observed that the court is to try the case unless a jury is demanded, but if either party demands it, he is entitled to it.

### § 252. Custody and deliberations of the jury.

Jurors are not generally required to be kept together in civil cases, though for good cause the court might probably require it. During the progress of the trial they may be adjourned from time to time in the discretion of the court, but always with the admonition that they are not to speak to any one, nor permit any one to speak to them on the subject of the case they are considering. A violation of this admonition would be a contempt of court, and, if the conversation were with a party to the litigation touching the subject of the controversy, would generally be good ground for a new trial. It is provided by statute in Virginia that papers read in evidence, though not un-

22. Va. Constitution, 1902, § 11.

23. Code, § 3166.

24. Code, § 3166.

25. Code, § 3213.

der seal, may be carried from the bar by the jury,<sup>26</sup> and it has been held that a deposition which has been read to the jury may be taken with them in their retirement, if what is objectionable in it has been erased.<sup>27</sup> A similar statute exists in West Virginia, declaring that "depositions or other papers read in evidence, may, by leave of the court, be carried from the bar by the jury."<sup>28</sup> It has been held, however, under this section, that depositions read in a trial at law by a jury cannot be carried out by the jury to be considered when deliberating on the case, *except by leave of the court*.<sup>29</sup> It was formerly held that the jury could take with them only such evidence as was under seal, but it is now generally held that all papers and documents given in evidence may properly be allowed to go to the jury, except that in some jurisdictions the depositions of witnesses are excluded, though it would seem that, even as to depositions, in the absence of statute, the question rests largely in the discretion of the trial court.<sup>30</sup>

*Disagreement of the jury.* Formerly, when the jury returned into court and reported their inability to agree, one of the jurors was withdrawn by consent of the parties and thereby the panel was broken, and the rest of the jury from rendering a verdict were discharged, which, of course, operated a continuance of the case. If the parties refused to consent to the withdrawal of a juror, the jury was adjourned from day to day until they agreed, or until the parties consented to withdraw a juror, or until the end of the term, when the jury was discharged of necessity.<sup>31</sup> The entry made upon withdrawal of a juror was: "A. B., one of the jurors, is, by consent of the parties and for reasons appearing to the court, ordered to be withdrawn, and the rest of the jury from giving their verdict are discharged." This practice is still sometimes observed where consent to withdrawal is given, but the better practice would seem to be simply to discharge the jury when

26. Code, § 3388.

27. *Hansbrough v. Stinnett*, 25 Gratt. 495.

28. W. Va. Code, § 3982.

29. *Graham v. Cit. Nat. Bank*, 45 W. Va. 701, 32 S. E. 245.

30. 12 Encl. Pl. & Pr. 590, ff.

31. 1 Rob. Pr. (old) 354.

they were unable to agree without going through the outworn formality of withdrawing a juror. Indeed, the court has said that it is improper for a trial court to make threats of keeping a jury until the end of the term, or to use any species of coercion to force a verdict, and that it is the safer and better practice to refrain from any expression of opinion which may be claimed to savor of threat or coercion as to the time the jury will be kept together if a verdict is not sooner rendered.<sup>32</sup> Sometimes a party may, without fault on his part, be taken by surprise in the midst of a trial, under such circumstances as that to compel him to proceed further with the trial would be a manifest injustice, and do him serious or irreparable wrong. When the plaintiff finds himself in this position, it is always permissible to him, at any time before the jury retire to consider of their verdict, to suffer a non-suit, and so prevent the injury which he would otherwise sustain. Such non-suit does not prevent a new suit for the same cause of action. If, however, by compelling him to institute a new action, his claim would be barred by the statute of limitations, the court may for good cause reinstate the action after the non-suit and thus preserve the continuity of his original action. The defendant, however, does not occupy so advantageous a position. He cannot suffer a non-suit, but if the case is one of genuine surprise, without fault on his part, and presents a situation where it would be unjust and unfair to compel him to proceed with the trial, it would seem that the trial court is invested with discretion to discharge the jury and continue the case until another term. There is no direct decision in Virginia to this effect, but it has been held that if a party, pending the trial, discovers an important witness that he did not know of before, and is without negligence in the premises, he should bring the matter promptly to the attention of the trial court, and ask to have the case delayed until the attendance of the witness can be procured, and that, failing to do this, he cannot make a motion after verdict for a new trial on the ground of after-discovered evidence. The reasoning of these cases leads to the conclusion that, if it is a case of genuine accident or surprise which would work injustice to the

32. *Buntin v. Danville*, 93 Va. 200, 24 S. E. 830.

defendant to compel him to proceed with the trial, the trial court may dismiss the jury, and continue the case to another term.<sup>33</sup>

### § 253. Misconduct of jurors.

The subject of the misconduct of jurors generally arises on motions for new trial, and the discussion of it is postponed till the consideration of that subject.

33. *Norfolk v. Johnakin*, 94 Va. 285, 290, 26 S. E. 830; *Jones v. Martinsville*, 111 Va. 103, 68 S. E. 265. The origin of withdrawing a juror is given in *Lancton v. State*, 14 Ga. 426, as quoted in 21 Encl. Pl. & Pr. 1004, as follows:

"There is but little satisfactory information to be obtained from the books in regard to the ancient practice, which used to be resorted to when a party was taken by surprise on a trial, of withdrawing a juror, and thus causing a mistrial, and, of necessity, a postponement of the case. It was originally confined to criminal cases, and seems to have been adopted for the purpose of avoiding a rule which once obtained, based largely upon a *dictum* of Lord Coke, that a jury sworn and charged in any criminal case could not be discharged without giving a verdict. To escape the effect of this rule, and yet apparently observe it to the letter, the courts resorted to the fiction of directing the clerk to call a juror out of the box when it appeared that the prosecution was taken by surprise on the trial, whereupon the prosecution objected or was supposed to object to proceeding with the eleven jurors, and the trial went over for the term; 2 Hawk. P. C. 619; 2 Hale P. C. 294; *Wedderburn's Case*, Foster 22; *People v. Olcott*, 2 Johns. Cas. (N. Y.) 301; *U. S. v. Coolidge*, 2 Gall. (U. S.) 364, 25 Fed. Cas. No. 14,858. It was nothing more, however, than a means of obtaining a continuance or postponement of the trial after the jury had been impaneled and sworn. *Usborne v. Stephen-son*, 36 Oregon 328."

It is now provided by statute in Virginia (Code, § 4026) that, in a criminal case, "the court may discharge the jury, when it appears that they cannot agree in a verdict, or that there is a manifest necessity for such discharge."

## CHAPTER XXXIII.

### OPENING STATEMENT OF COUNSEL.

§ 254. Nature of statement.

§ 255. Order of statement.

#### § 254. Nature of statement.

Immediately after the jury is sworn, counsel are expected to state the case to the jury, so that they may know at this early stage the questions to be decided by them, and make an intelligent application of the evidence as it is adduced. This is called the opening statement of counsel.<sup>1</sup>

It should be a clear, concise, and brief statement of what the parties expect to prove. It should not be an argument. Generally a chronological order of events will be the most readily understood and borne in mind by the jury, but the facts of some cases are too complex to render this order practicable. In any event, that statement should "be clear and clean-cut." Counsel should have every fact readily at command, and definitely fixed in his mind, and so present his facts that the jury may see the case as he does,—from his standpoint, through his glasses. Defences, so far as known, should be stated by anticipation, and the replies thereto plainly and clearly set forth. Legal propositions or contentions, and the application of the facts thereto should also be stated, but the statement should not be expanded into an argument. Too much emphasis cannot be laid on the importance of a proper opening statement. Minor or doubtful points should not be given too much prominence, but the strong points should be so put as to carry conviction to the minds of the court and jury, if possible. To impress the jury in the first instance, and put your adversary on the defensive from the start, is the *desideratum*.

1. Such a statement is now allowed in criminal cases also, but is not compulsory. Code, § 4029a; *Johnson v. Com.*, 111 Va. 877, 69 S. E. 1104.

**§ 255. Order of statement.**

In Virginia the practice is for the counsel for the plaintiff (or the party having the burden of proof) to make his statement first, and immediately thereafter the defendant's counsel makes his statement. As a rule, no counter statement from the plaintiff is allowed, but this is in the discretion of the trial court, and will be allowed to prevent surprise, or to aid the court or jury in a clear understanding of the evidence. Immediately after these statements, the introduction of evidence begins, and it is introduced in the same order as the opening statements. In many of the states the plaintiff's counsel makes his statement and follows it with his evidence, and then the defendant's counsel makes his statement and follows it with his evidence. Of course, these statements are not evidence, except, perhaps, by way of admissions.

## CHAPTER XXXIV.

### DEMURRER TO EVIDENCE.

- § 256. Nature of demurrer to evidence.
- § 257. Form and requisites of demurrer and joinder.
- § 258. Right to demur.
- § 259. Effect of demurrer to evidence.
- § 260. Joinder in demurrer.
- § 261. Concessions on demurrer to the evidence.
- § 262. Procedure on demurrer to the evidence.
- § 263. Rule of decision.
- § 264. Exceptions to rulings and writ of error.

#### § 256. Nature of demurrer to evidence.

A demurrer to the evidence is not a mere statement. It is a *pleading*, and, upon being filed, is as much a part of the record as any other pleading, and no bill of exception is necessary to make it a part of the record.<sup>1</sup> If, however, such a bill is filed, it does not affect the demurrer.<sup>2</sup> Like all other pleadings, it should be signed by counsel. The omission of the names of counsel, however, may be supplied at any time when the attention of the court is called to it,<sup>3</sup> and if it appears from the record that the opposite party joined in the demurrer, and that the case was heard and decided upon such a demurrer in the trial court the record will be deemed complete in this respect although the demurrer and joinder are not signed by counsel at all.<sup>4</sup> A demurrer to a pleading, in effect, says that the opposite party has not *stated* any ground of action or defence (as the case may be), while a demurrer to the evidence in effect says that the opposite party has not *proved* his ground of action or defence. It is thus seen that the former goes to the *statement* of the case, and the latter to the *proof* to sustain it. The very terms of the demurrer

1. *Manderville v. Perry*, 6 Call 78; *Ches. & O. Ry. Co. v. Sparrow*, 98 Va. 630, 37 S. E. 302.

2. *Ches. & O. Ry. Co. v. Pierce*, 103 Va. 99, 48 S. E. 534.

3. *McIntyre v. Smith*, 108 Va. 736, 62 S. E. 930.

4. *Ches. & O. Ry. Co. v. Sparrow*, 98 Va. 630, 37 S. E. 302.

to the evidence show its functions. It says that the matters shown in evidence are not sufficient in law to maintain the issue joined on behalf of the party offering it.

This method of procedure, it is said, has been expressly recognized and allowed in nineteen of the States. In the other States, the courts direct non-suits or order verdicts, and thereby, in effect, accomplish the same results.<sup>5</sup> The right to demur to evidence existed at common law and has not been taken away by constitutional provisions for trials by jury in civil cases. It existed before the constitutions of the several States were adopted and was not meant to be taken away by them.<sup>6</sup> The constitutions *preserved* the right of jury trial where it then existed, but did not confer it in any case not expressly mentioned.

If evidence is relevant to the issue, although entitled to but little weight, it is generally admissible, and a motion to reject when offered, or to strike it out after it has been received, is inapplicable. *If relevant*, but not deemed sufficient to maintain the issue joined, the opposing party should demur and not move to strike out. Such, at least, is the Virginia doctrine, which holds that a motion to strike out is not equivalent to a demurrer to the evidence.<sup>7</sup> A somewhat different rule, however, seems to prevail in West Virginia where it is held that a motion to exclude the evidence of the opposing party is equivalent to a demurrer to such evidence, at least, as to the rule of construing it.<sup>8</sup>

The right to demur to the evidence on the trial of an issue *devisavit vel non* under § 2544 of the Code exists as well as upon the trial of common law actions, and the demurrer to the evidence in such cases is not an invasion of the province of the jury in the trial of such issues. The jury are not the judges of the law in such cases, and the language of the statute "a trial

5. *Hopkins v. Nashville, etc., Ry. Co.*, 96 Tenn. 409, 34 S. W. 1029, 32 L. R. A. 354.

6. *Reed & McCormick v. Gold*, 102 Va. 37, 45 S. E. 868; *Lynchburg Milling Co. v. Bank*, 109 Va. 639, 64 S. E. 980.

7. *Southern Ry. Co. v. Cooper*, 98 Va. 299, 36 S. E. 388.

8. *Johnson v. Balto. & O. Ry. Co.*, 25 W. Va. 570. As to when it is proper to allow such a motion, see *Carrico v. W. Va. Ry. Co.*, 35 W. Va. 389, 14 S. E. 12.

by jury shall be ordered" only means a jury trial accompanied by all the incidents and the mode of procedure attendant upon such a proceeding. The word "shall" in the sentence above quoted does not prevent a waiver of trial by jury, but is to be construed in the sense of "may."<sup>9</sup>

### § 257. Form and requisites of demurrer and joinder.

"The original practice was to require the demurrant to admit *upon the record* the existence of all facts which the evidence offered by the other party *conduced* to prove. Those facts were to be ascertained by the court; and in this respect, the court might err in opinion; and if so, and the party refused to make the admission, he lost the benefit of his demurrer, or, if he made the admission on record, it bound him irrevocably. In the latter case, the error of the court could never be corrected; and in the former, not without a protracted litigation attended with great delay and expense, to wit: by bill of exception and appeal. To avoid this inconvenience, the modern practice is (especially in Virginia, where it has been sanctioned by repeated decisions of the court of appeals) to put all the evidence on both sides in the demurrer, and then to consider the demurrer as if the demurrant had admitted all that could reasonably be inferred by a jury from the evidence given by the other party, and waived all the evidence on his part which contradicts that offered by the other party, or the credit of which is impeached, and all inferences from his own evidence which do not necessarily flow from it. With these limitations, the party whose evidence is demurred to has all the benefit which the ancient practice was intended to give him, without subjecting the other party to its inconveniences; and no disputed fact is taken from the jury and referred to the court. Green, J., in *Whittington v. Christian*, 2 Rand. 357, with which opinion the decision of the court accorded. See also, Roane, J., in *Stephens v. White*, 2 Wash. 210; and Coalter, J., in *Taliaferro v. Gatewood*, 6 Munf. 326."<sup>10</sup> It has been earnestly contended that the recent Virginia act on demurrers to evidence, requiring the demurrant to "state in writing specific-

9. *Meade v. Meade*, 111 Va. 451, 69 S. E. 330.

10. 1 Rob Pr. (old) 351.

ally the *grounds* of demurrer relied on,"<sup>11</sup> was a return to the "original practice" above mentioned,<sup>12</sup> but the contention does not seem to be sustained either by the language of the Act, or the history of its enactment.<sup>13</sup> The Act seems to place demurrers to evidence on the same footing with demurrers to pleadings. It does not require the demurrant to admit upon the record the existence of all facts which the evidence of the demurree *conduces* to prove. Inferences are left where they were before the Act was passed. The object of the Act seems to be twofold: *first*, to notify the demurree of the *grounds* or causes of demurrer which the demurrant intends to rely on, and, *second*, to prevent the demurrant from relying upon one or more grounds in the trial court and then assigning different grounds in the appellate court. The present form of stating the grounds of demurrer is given in the margin, and is so general as to give the demurree but little more information than he had under the old form.

It has been held that on a demurrer to the evidence it is not necessary to state in the record that the evidence set forth is all that was offered, but the court should not compel a joinder unless all of the evidence is set out in the demurrer.<sup>14</sup> The present statute in Virginia requires that "the party tendering the demurrer to evidence shall state in writing specifically the grounds of demurrer relied on, and the demurree shall not be forced to join in the said demurrer until the specific grounds upon which the demurrant relies are stated in writing, nor shall any grounds of demurrer not thus specifically stated be considered except that the court may, in its discretion, allow the demurrant to withdraw the demurrer; may allow the joinder in the demurrer to be withdrawn by the demurree, and new evidence admitted, or a non-suit to be taken until the jury retire from the bar."<sup>15</sup> The mode of procedure is as follows: After all the evidence on both sides has been introduced (or, if the demur-

11. Acts (Va.) 1912, Chap. 42, p. 75.

12. 11 Va. Law Reg. 959; 12 Va. Law Reg. 275.

13. 12 Va. Law Reg. 195, 355.

14. *Adkins v. Fry*, 38 W. Va. 549, 18 S. E. 737; *Adkins v. Stephens*, 38 W. Va. 557, 18 S. E. 740.

15. Acts (Va.) 1912, ch. 42, p. 75.

rant does not wish to introduce any, after demurree has introduced all of his evidence), counsel for the party wishing to demur to the evidence states that fact to the court, and then writes out and signs his demurrer to the evidence. The counsel for the opposing party then writes out and signs his joinder in demurrer. This is the usual method of procedure. The form of such a demurrer and joinder is given in the margin.<sup>16</sup> The jury

16. Form of Demurrer to Evidence and Joinder:

Norton Coal Co.	} Trespass on the case.
Ads.	
Charles Creditor	

And the said plaintiff by his counsel produces to the jury to maintain the issue on his part the following evidence, to wit:

(Here insert plaintiff's evidence as given by witnesses and shown by the stenographer's report marked X hereto attached, pages 1-50.)

And the said defendant, by his counsel, produces to the jury the following evidence to maintain the issue on his part, to wit:

(Here insert defendant's evidence as given by witnesses and shown by stenographer's report marked X, hereto attached, pages 50-100.)

And the said defendant says the matter aforesaid so introduced and shown in evidence to the jury by the plaintiff is not sufficient in law to maintain the said issue on the part of the plaintiff and that it, the said defendant, is not bound by the law of the land to answer the same; wherefore, for want of sufficient matter in that behalf to the said jury shown in evidence the said defendant prays judgment and that the jury aforesaid may be discharged from giving any verdict upon the said issue, and that the said plaintiff may be barred from having or maintaining his aforesaid action against it, and for grounds of its said demurrer to the evidence, the defendant states in writing:

1. That the said evidence does not show that the defendant was guilty of any negligence which was the cause of this accident.
2. That the evidence shows that the proximate or contributory cause of the accident was the carelessness of the plaintiff, and that the plaintiff was guilty of contributory negligence.
3. That the evidence shows that the injury was the result of an accident which was unforeseen and could not be guarded against.
4. That the injury was the result of an accident which was ordinarily incident to the employment of the plaintiff and of which he assumed the risk: and,
5. Because if the defendant was guilty of any negligence whatsoever which caused the accident, yet the plaintiff had full knowledge thereof and assumed the risk of it.

AYERS & FULTON,  
Attys. for the defendant.

are not then discharged, but counsel proceed at once to argue before them the measure of damages, and they retire to consider of the damages, and, after agreeing upon the amount, bring in a verdict assessing the damages subject to the opinion of the court on the demurrer to the evidence. The amount of the damages being thus ascertained, counsel proceed to argue the case on its merits before the court. The *court decides* whether or not there shall be any recovery. If there is a recovery, the verdict of the *jury ascertains the amount thereof*.

### § 258. Right to demur.

Either party may demur to the evidence of the other, but this method of procedure is not advisable for the party who has the burden of proof on any issue, if there is any countervailing evidence, for it will be seen presently that the demurrant waives all of his evidence in conflict with that of the demurree, and this he could not afford to do if he had the burden of proof. If, however, he should demur to the evidence and there should be a joinder, he cannot avail himself of his error in the appellate court. He will not be allowed to take advantage of his own errors.<sup>17</sup> The right to demur extends to all actions, including actions for negligence.<sup>18</sup> It is provided by statute, both in Vir-

Charles Creditor	}	Joinder in Demurrer to Evidence.
<i>v.</i> Norton Coal Co.		

And the plaintiff says that the matters aforesaid, to the jurors in form aforesaid, shown in evidence, are sufficient in law to maintain the issue joined on the part of the plaintiff. Wherefore, for as much as the said defendant has given no answer to the same, the said plaintiff demands judgment, and that the jury be discharged, and that the defendant be convicted, etc.

KILGORE & BANDY,  
Attys. for the plaintiff.

The above form is taken chiefly from the record in the case of Norton Coal Co. *v.* Murphy, 108 Va. 528, 62 S. E. 268.

17. Childers *v.* Dean, 4 Rand. 406; Bennett *v.* Perkins, 47 W. Va. 425, 35 S. E. 8; 1 Rob (old) Pr. 350; Johnson *v.* Ches. & O. Ry. Co., 91 Va. 171, 21 S. E. 238.

18. Trout *v.* Va. & Tenn. R. Co., 23 Gratt. 619; Gerity *v.* Haley, 29 W. Va. 98, 11 S. E. 901; Johnson *v.* Ches. & O. R. Co., 91 Va. 171, 21 S. E. 238.

ginia and West Virginia, that in an action for *insulting words*, no demurrer shall preclude the jury from passing thereon.<sup>19</sup> Hence, in such an action the plaintiff cannot be compelled to join in a demurrer to the evidence by the defendant,<sup>20</sup> but the statute was enacted for the benefit of plaintiffs, and they may waive it if they choose, and if they do, the case may be heard on a demurrer to the evidence, just as other civil actions.<sup>21</sup> This statute does not apply to actions for common-law slander, but only for "insulting words" under the statute, and it is necessary for the plaintiff to show by his declaration that he is suing under the statute, else it will be held to be common-law slander, and a demurrer may be interposed as in other common-law actions.<sup>22</sup>

### § 259. Effect of demurrer to evidence.

The effect of a demurrer to the evidence is to withdraw the case from the jury and submit it to the determination of the court. It is usually resorted to chiefly by corporations, who get scant justice at the hands of juries, for the purpose of having the case determined by the court. The success of such a procedure is always dependent upon the weakness of the demurree's evidence, and the inferences to be drawn therefrom. It has been found in practice that the courts are more apt to say that a particular inference could not have been drawn by the jury if the case had been submitted to them, than they are to set aside a verdict by the jury after they have drawn such inference.

### § 260. Joinder in demurrer.

Where a party has the right to demur to the evidence, and does so, it is the duty of the court to compel the other party to join in the demurrer.<sup>23</sup> Whether or not, in a particular case, a party

19. Va. Code, § 2897; W. Va. Code (1906), § 3485.

20. Rolland *v.* Batcheldor, 84 Va. 664, 5 S. E. 695.

21. Brown *v.* Norfolk & W. R. Co., 100 Va. 619, 42 S. E. 664.

22. Hogan *v.* Wilmouth, 16 Gratt. 80.

23. Johnson *v.* Ches. & O. Ry. Co., 91 Va. 171, 21 S. E. 238; Peabody Ins. Co. *v.* Wilson, 29 W. Va. 528, 2 S. E. 888.

has the right to demur so that it becomes the duty of the court to compel the demurree to join therein, is, in a large measure, a question addressed to the sound discretion of the trial court. It is not an arbitrary but judicial discretion, the exercise of which may be reviewed on a writ of error.<sup>24</sup> An objection, however, to joining in a demurrer must be made in the trial court. It cannot be made in the appellate court for the first time.<sup>25</sup> It was formerly held that there were two classes of cases in which the court would not compel a joinder: the *first* when the case is clearly *against the demurrant*, and his motive for interposing the demurrer is to delay the decision; the *second* when the court *doubts* what *facts* may be *reasonably inferred* from the evidence demurred to, for in such case the jury is the most fit tribunal to decide. On a demurrer to the evidence it is necessary to incorporate the evidence into the demurrer. This sometimes requires considerable time. Formerly there were no stenographic reports or other means of speedily incorporating the evidence into the demurrer, and no provision was made for hearing such cases in vacation. The combined effects of these two difficulties rendered the continuance of the case to another term a practical necessity. Hence a party who had no case might gain a term of court by demurring to the evidence, although he was positive that the demurrer would be decided adversely to him. The practical removal of both these difficulties has led the Court of Appeals of Virginia, in a recent case, to say, *obiter*, that the fact that the evidence is plainly against the demurrant is no longer a ground for refusal to compel joinder in the demurrer.<sup>26</sup> If, however, a state of facts should arise in which the demurrer would cause such a delay it can hardly be doubted that the court, now, as formerly, would refuse to compel a joinder for that reason. The second ground for a refusal to compel a joinder still ex-

24. *Rohr v. Davis*, 9 Leigh 30; *University of Va. v. Snyder*, 100 Va. 567, 42 S. E. 337. The court may refuse to compel a plaintiff to join in a demurrer to evidence when he asks leave to introduce other relevant evidence, although he has rested his case. *Hunter v. Snyder*, 11 W. Va. 198.

25. *Hollandsworth v. Stone*, 47 W. Va. 773, 35 S. E. 864.

26. *University of Va. v. Snyder*, 100 Va. 567, 42 S. E. 337.

ists. The court may doubt what facts are to be reasonably inferred from the evidence demurred to for various reasons. Chief among these, is the deficiency of evidence on the part of the demurree. Sometimes also, the evidence on the part of the demurree is loose, indeterminate and circumstantial, or is conflicting, and as a result the court is in doubt as to what facts should be inferred.<sup>27</sup> These are the principal sources of doubt which beset the court in determining whether a joinder should be compelled or not. Of course, under the Virginia doctrine, if doubt should arise from contradictory evidence on behalf of the demurrant, this is no objection, as he waives such contradictory evidence by demurring to the evidence. The contradiction is removed by the waiver.<sup>28</sup> It has been held that it is not error for a court to compel the defendant to join in the plaintiff's demurrer to the evidence where it would be the duty of the court to set aside a verdict for the defendant.<sup>29</sup>

**§ 261. Concessions on demurrer to the evidence.**

The demurrant is considered as admitting the truth of all his adversary's evidence and all just inferences that can be properly drawn therefrom by the jury, and as waiving all of his own evidence which conflicts with that of his adversary, or which has been impeached, and all inferences from his own evidence (although not in conflict with his adversary's) which do not necessarily result therefrom.<sup>30</sup> The court, however, is not

27. *Harrison v. Brooks*, 1 Munf. 22; *Whittington v. Christian*, 2 Rand. 357; *Rohr v. Davis*, 9 Leigh 30; *Trout v. Va. & Tenn. R. Co.*, 23 Gratt. 635; *Johnson v. Ches. & O. R. Co.*, 91 Va. 171, 21 S. E. 238; *Merchants' Bank v. Evans*, 9 W. Va. 373.

28. *University of Virginia v. Snyder*, 100 Va. 567, 42 S. E. 337.

29. *Deaton v. Taylor*, 90 Va. 219, 17 S. W. 944.

30. *Ware v. Stephenson*, 10 Leigh 155; *Trout v. Va. & Tenn. R. Co.*, 23 Gratt. 619; *Johnson v. Ches. & O. R. Co.*, 91 Va. 171, 21 S. E. 238; *University of Va. v. Snyder*, 100 Va. 567, 42 S. E. 337; *Richmond v. Barry*, 109 Va. 274, 63 S. E. 1074.

Concessions made by the demurrant have been variously stated in different cases. It is said, "on a demurrer to the evidence, the court is to consider all of the demurrant's evidence in conflict with that of the demurree withdrawn, the credibility of the latter's witnesses admitted, and all facts admitted, which the demurree's evidence, thus

obliged to accept as true what it knows judicially to be untrue, nor what, in the nature of things, could not have occurred in the manner and under the circumstances mentioned, nor what is not susceptible of proof.<sup>31</sup>

considered, proves or conduces to prove, or which may be reasonably inferred from his whole evidence both direct and circumstantial; and, if several inferences may be drawn from that evidence, differing in degrees of probability, the court must adopt those most favorable to the demurree, provided they be not forced, strained, or manifestly repugnant to reason." *Horner v. Speed*, 2 Pat. & H. 616. Another phrasing of the rule is, "by a demurrer to the evidence the party demurring is considered as admitting the truth of the adversary's evidence, and all just inferences which can be properly drawn therefrom by a jury, and as waiving all of his own evidence which conflicts with that of his adversary, and all inferences from his own evidence (although not in conflict with his adversary's) which do not necessarily result therefrom." *Johnson v. Ches. & O. R. Co.*, *supra*. Still again it is said that, "the demurrant is entitled to the benefit of all of his unimpeached evidence not in conflict with his adversary's and to all inferences that necessarily flow therefrom." *Bowers v. Bristol*, 100 Va. 533, 42 S. E. 296. Upon the subject of *necessary* inferences, see *Rochester Ins. Co. v. Monumental Association*, 107 Va. 701, 60 S. E. 93. As to *just* inferences, see *Norfolk & Western R. Co. v. Sutherland*, 105 Va. 545, 54 S. E. 465; *Marsteller v. Coryell*, 4 Leigh 325; *Union Steamship Co. v. Nottinghams*, 17 Gratt. 115; *Hansbrough v. Thoms*, 3 Leigh 147; *Tutt v. Slaughter*, 5 Gratt. 364; *Land Co. v. Calhoun*, 16 W. Va. 374.

A demurrer to evidence in an action of ejectment does not have the effect of excluding from the consideration of the court the *title papers* of the demurrant. If a junior patent covers land embraced by a senior patent, there is a conflict in the grants to the extent that the same land is covered by both, but this is not a conflict of evidence. The grants do not contradict each other. The commonwealth issued both. The demurrant in such case does not waive the evidence of his title manifested by such title papers. *Fentress v. Pocahontas Club*, 108 Va. 155, 60 S. E. 633.

For a full collection of Virginia and West Virginia cases on the subject of concessions on demurrer to evidence, see Va. Reports Annotated, *Tutt v. Slaughter*, 5 Gratt. 364.

31. *Ches. & O. R. Co. v. Anderson*, 93 Va. 650, 25 S. E. 947; *Norfolk & W. R. Co. v. Crowe*, 110 Va. 798, 67 S. E. 518; *S. R. Co. v. Wiley*, 112 Va. 183, 70 S. E. 510.

Such great concessions are required of the demurrant by the demurrer as a condition of his withdrawing the cause from the jury that it becomes a very dangerous proceeding, and should not be resorted to when the demurrant's case depends on evidence in conflict with that of his adversary. The occasion for resorting to it is the extreme weakness of the adversary's case, coupled with a distrust of the jury, as in the corporation cases.<sup>32</sup> In nearly all the States where a demurrer to the evidence is used, the demurrant waives *all* of his evidence, but the rule is otherwise in Virginia; and "as is well understood, the demurrant is entitled to the benefit of all of his unimpeached evidence, not in conflict with his adversary's, and to all inferences that necessarily flow therefrom."<sup>33</sup> Such also was the holding in West Virginia until comparatively recently. Recent decisions in that State have modified the former holdings. Under what is termed the new rule in that State, the court considers all the evidence in the case. The demurrant does not waive any of his evidence which is competent, but where it conflicts with that of the demurree it is regarded as overcome unless it *decidedly preponderates*. If the evidence, though conflicting, *decidedly preponderates in favor of the demurrant*, the demurrer will be sustained.<sup>34</sup>

### § 262. Procedure on demurrer to the evidence.

A case is regularly proceeded with as any other action at law would be until all the evidence on both sides has been introduced,

32. See *Trout v. Va., etc., R. Co.*, 23 Gratt. 619; *Richmond, etc., R. Co. v. Anderson*, 31 Gratt. 812; *Creekmur v. Creekmur*, 75 Va. 430; *Orange, etc., R. Co. v. Mills*, 76 Va. 773; *Eubank v. Smith*, 77 Va. 206; *Richmond, etc., R. Co. v. Moore*, 78 Va. 93; *Rudd v. Richmond, etc., R. Co.*, 80 Va. 546; *Farley v. Richmond, etc., R. Co.*, 81 Va. 783; *Jones v. Old Dominion Cotton Mills*, 82 Va. 140; *Va. Mining, etc., Co. v. Hoover*, 82 Va. 449, 4 S. E. 689; *Norfolk, etc., R. Co. v. Harman*, 83 Va. 553, 8 S. E. 251; *Ayers v. Richmond, etc., R. Co.*, 84 Va. 679, 5 S. E. 582; *Johnson v. Chesapeake, etc., R. Co.*, 91 Va. 171, 21 S. E. 238; *Simmons v. Southern R. Co.*, 96 Va. 152, 31 S. E. 7.

33. *Bowers v. Bristol*, 100 Va. 533, 42 S. E. 296.

34. *Maple v. John*, 42 W. Va. 30, 24 S. E. 608; *Teal v. Ohio R. Co.*, 49 W. Va. 85, 38 S. E. 518; *Barrett v. Coal Co.*, 55 W. Va. 395, 47 S. E. 154.

if the demurrant elects to introduce any evidence. Then the counsel for the party desiring to demur states that he demurs to the evidence. Usually, counsel for the opposing party states that he joins in the demurrer. The demurrer and joinder are then drawn up, as hereinbefore indicated, and signed by counsel. Of course, if objection is made to joining in the demurrer, the objection is stated to the court and the question argued and decided by the court. If joinder is compelled, then the demurrer and joinder, after being reduced to writing, are signed by counsel. Under the English procedure the jury, at this stage of the proceedings, is discharged, and, if need be, after the decision is rendered, another jury is called to assess damages. In Virginia and West Virginia, the practice is not to discharge the jury, but to proceed with the argument before them as to the measure of damages, and, after the argument, the jury render their verdict subject to the opinion of the court on the demurrer to the evidence.<sup>35</sup> The question of whether there shall or shall not be any recovery in the case is a question of law for the court, and with this the jury are not concerned.<sup>36</sup> They are only required to assess damages conditionally, and, for this purpose, can consider the evidence only so far as it bears on the measure of damages. Counsel may argue upon all the evidence in mitigation of damages, but not in bar.<sup>37</sup> The usual and common form of the verdict, and the one adapted to most cases, is: "We, the jury, find for the —— (demurree) and assess his damages at \$—— subject to the opinion of the court on the demurrer to the evidence." Probably a more correct form, and one adapted to all cases, would be a finding in the alternative, thus: "If, upon the demurrer to the evidence, the court be of opinion for the plaintiff, then we find for the plaintiff and assess his damages at \$——, but if for the defendant, we find for the defendant." (and if any damages are to be assessed in

35. *Hansbrough v. Thom*, 3 Leigh 147; *Green v. Judith*, 5 Rand. 1; *Norfolk & W. R. Co. v. Harman*, 83 Va. 553, 8 S. E. 251; *Taylor v. Ches. & O. R. Co.*, 41 W. Va. 704, 24 S. E. 631; 1 Rob (old) Pr. 351.

36. *Humphreys v. West*, 3 Rand. 516; *Briggs v. Hall*, 4 Leigh 484; *Riddle v. Core*, 21 W. Va. 530.

37. *Norfolk & W. R. Co. v. Harman*, 83 Va. 553, 8 S. E. 251.

his favor) "and assess his damages at \$———."38 As has been seen, no bill of exception is necessary to the ruling of the court on the demurrer to the evidence. Nor is a motion for a new trial necessary to enable the Court of Appeals to review the decision of the trial court on the question as to whether the evidence does or does not support the issue. A demurrer to the evidence is as much a part of the record as any other pleading, but if the amount of damages assessed by the jury is deemed excessive, a motion must be made in the trial court to set aside or abate the verdict. Objection to the amount of damages cannot be made for the first time in the appellate court. If too large or too small, objection on that account must be made in the trial court.<sup>39</sup>

Proceedings on a demurrer to the evidence are largely under the control of the trial court, and in extreme cases, to prevent a manifest failure of justice, the trial court may, in the absence of a statute prohibiting it, permit the demurree to introduce additional evidence, even after joinder in demurrer, but this is rarely done. This is usually accomplished by permitting the demurree to withdraw his joinder and then introduce the evidence and the opposite party has then again to determine whether or not he will demur to the evidence,<sup>40</sup> or he might suffer a non-suit or probably amend under § 3384 of the Code.<sup>41</sup> The present statute in Virginia quoted in § 257, *ante*, permits the withdrawal of joinder in the demurrer and the introduction of new evidence, or a non-suit.

After the jury have rendered their verdict and it has been received by the court, they are discharged, and it then

38. *South Roanoke Land Co. v. Roberts*, 99 Va. 487, 39 S. E. 133.

39. *Rhule v. Seaboard Air Line R. Co.*, 102 Va. 343, 46 S. E. 331; *Riddle v. Core*, 21 W. Va. 530; *Proudfoot v. Clevenger*, 33 W. Va. 267, 10 S. E. 394.

40. *Peabody Ins. Co. v. Wilson*, 29 W. Va. 528, 2 S. E. 88; *Norfolk & W. R. Co. v. Coffey*, 104 Va. 665, 51 S. E. 729. See, also, *Hunter v. Snyder*, 11 W. Va. 198. As to additional evidence *before* joinder, see *Pocahontas Coal Co. v. Williams*, 105 Va. 768, 54 S. E. 868; *Taliaferro v. Gatewood*, 6 Munf. 321; *Fairfax v. Lewis*, 11 Leigh 233; *Hunter v. Snyder*, 11 W. Va. 198.

41. 2 Va. L. Reg. 192. Note by Judge Burks.

becomes necessary for the court to decide the issue of law arising on the demurrer. In determining the facts proved, the court looks to the whole evidence, including the cross-examination of witnesses, and defects in one answer may be supplied by statements in another. It is not permissible, however, to take a detached statement of a witness for the demurrant and say that that particular statement is not contradicted by evidence for the demurree, but the statements of the witness must be taken as a whole, and if, when so considered, they cannot be reconciled with the demurree's evidence the statements must be rejected.<sup>42</sup> If incompetent evidence has been admitted and duly excepted to, this will be excluded in considering the demurrer. The demurrer does not waive the exception.<sup>43</sup> The rule is probably otherwise outside of Virginia and West Virginia.<sup>44</sup> In cases of doubt as to what inferences should be drawn, those most favorable to the demurree should be adopted.<sup>45</sup> In determining what judgment should be entered, the court should consider, if a verdict were found in favor of the demurree, would the court be justified in setting it aside. If not, then the demurrer should be overruled.<sup>46</sup> The judgment of the court on a demurrer to the evidence in the trial court is final.<sup>47</sup>

If the demurrer to the evidence is overruled, but the conditional verdict of the jury is set aside, what judgment should be rendered by the trial court? Two courses would seem to be open to it, either to order a writ of inquiry or a new trial *de*

42. *Ware v. Stephenson*, 10 Leigh 155; *Norfolk & W. R. Co. v. Holmes*, 109 Va. 407, 64 S. E. 46.

43. *Dishazer v. Maitland*, 12 Leigh 524; *Taylor v. B. & O. R. Co.*, 33 W. Va. 39, 10 S. E. 29; *Huntington Nat. Bank v. Loar*, 51 W. Va. 540, 41 S. E. 901; but if after discarding the illegal evidence, there is still left sufficient legal evidence to support the judgment, it will not be set aside. *Lane Bros. v. Bott*, 104 Va. 615, 52 S. E. 258.

44. See 6 Encl. Pl. & Pr. 443.

45. *Ware v. Stephenson*, 10 Leigh 155.

46. *Ware v. Stephenson*, 10 Leigh 155, 165; *Lewis v. Ches. & O. R. Co.*, 47 W. Va. 650, 35 S. E. 908. If some only of the defendants demur to the evidence and there is a conditional verdict as to all, it should be set aside as to those who do not demur on the ground that the verdict is not responsive to the issue. *Howdashall v. Krenning*, 103 Va. 30, 48 S. E. 491.

47. *Fowler v. Balto. & O. R. Co.*, 18 W. Va. 579.

*novus*. The oath of a juror in civil cases requires him to well and truly try the issues joined and a true verdict render according to the evidence. The duty devolved on the jury, however, is twofold. It is not only to try the issues joined but to assess damages, and for this latter purpose, it may hear evidence.<sup>48</sup> By a demurrer to the evidence, the first duty, to wit, to decide the issue joined, is taken away from the jury and assigned to the court. The second duty it proceeds to discharge. When the court overrules the demurrer, it decides that the demurree is entitled to recover something at least. We have, then, the decision of the court to whom the demurrant especially referred the question that the demurree is entitled to recover, and the only thing that is left open is the amount. It would seem, therefore, that the proper mode of procedure would be to call another jury simply to assess the amount of the demurree's damages. The question of the liability of the demurrant, having been determined adversely to him, there can be no good reason why he should have another hearing on that question, although he is entitled to further hearing as to the amount of his liability.<sup>49</sup> The contrary view, however, was taken in a recent Virginia case.<sup>50</sup>

### § 263. Rule of decision.

In Virginia the rule of decision of a demurrer to the evidence has been stated in many cases to be that where, upon a demurrer to the evidence, the evidence is such that a jury *might* have found a verdict for the demurree, the court *must* give judgment in his favor; and if reasonably fair-minded men might differ about the matter, the demurrer should be overruled.<sup>51</sup> But in determining what verdict a jury might have found, the demur-

48. *McNutt v. Young*, 8 Leigh 542.

49. *Humphreys v. West*, 3 Rand. 516; *Green v. Judith*, 5 Rand. at p. 10; *Briggs v. Hall*, 4 Leigh 490; *Maple v. John*, 42 W. Va. 30, 34, 24 S. E. 608.

50. *Merchants' Trans. Co. v. Masury*, 107 Va. 40, 57 S. E. 613.

51. *Bass v. Norfolk Ry. Co.*, 100 Va. 1, 40 S. E. 100; *Ches. & O. R. Co. v. Pierce*, 103 Va. 99, 48 S. E. 534; *Citizens' Bank v. Taylor*, 104 Va. 164, 51 S. E. 159; *Wood v. Southern R. Co.*, 104 Va. 650, 52 S. E. 371; *Massey v. Southern R. Co.*, 106 Va. 515, 56 S. E. 275; *C. & O. Ry. Co. v. Hoffman*, 109 Va. 44, 63 S. E. 432.

rant is considered as admitting the truth of all his adversary's evidence, and all just inferences that can be properly drawn therefrom by a jury, and as waiving all of his own evidence which conflicts with that of his adversary, or which has been impeached, and all inferences from his own evidence (although not in conflict with his adversary's) which do not *necessarily* result therefrom. Such was also the rule in West Virginia until a comparatively recent time.

The present rule in West Virginia may be stated in the same terms, but the result is different because the concessions are not the same as formerly. In that State the demurrant is not considered as waiving all of his unimpeached evidence that conflicts with that of his adversary. Under the new rule now prevailing in West Virginia, the concessions of the demurrant are stated thus: "On the subject of the conflict of evidence the rule then would be that the evidence of the demurrant in conflict with the evidence of the demurree should be rejected unless the conflicting evidence of the demurrant so plainly preponderates over the evidence of the demurree, that if there were a verdict in favor of the latter it would be set aside, and in such case, the demurrer must be sustained. For if the evidence, although conflicting, plainly preponderates in favor of the demurrant, judgment should be entered accordingly."<sup>52</sup> This change in the concessions made by the demurrant is said to be the result of a change in the statute (made in 1891) which requires the trial court to certify all the evidence, on a motion for a new trial, and the Court of Appeals to consider the *evidence, both upon the application for and the hearing of a writ of error.*<sup>53</sup> It is said that the Court of Appeals must, under this statute, set aside a verdict if it is against a clear preponderance of the evidence, and that the statute has "thereby incidentally modified the rule relating to the consideration of the evidence on demurrer, and this is the new rule established in the case of *Maple v. John*. To hold otherwise we must say in cases of demurrer to evidence, that when the word verdict is used, it is according to its ancient effect prior to the decision of *Johnson v. Burns*. This would make unneces-

52. *Barrett v. Coal & Coke Co.*, 55 W. Va. 395, 398, 47 S. E. 154.

53. W. Va. Code (1906), § 3979.

sary confusion between the present rule relating to motions to set aside verdicts of juries, the motion to exclude the evidence, the motion to direct a verdict and a demurrer to the evidence, all which motions should be governed by the same principles of law, and this is that where the evidence plainly preponderates in favor of a litigant, he is entitled to judgment."<sup>54</sup> No such change has been made in the statute of Virginia, but where the evidence (not the facts) is certified, a plaintiff in error, seeking to reverse a verdict because contrary to the evidence, still goes up as on a demurrer to the evidence by him.<sup>55</sup>

### § 264. Exceptions to rulings and writ of error.

After a case has been decided by the trial court, on a demurrer to the evidence, that is the end of the case in the trial court. The demurrer containing all of the evidence, being a pleading, is a part of the record, and the record of the case is complete. Absolutely nothing remains to be done to prepare the case for the appellate court. No bill of exception is necessary, nor any kind of objection in any form to the ruling of the court on the demurrer.<sup>56</sup> If a writ of error is desired, a copy of the record is obtained as in other actions at law, and application is made for the writ of error as in other civil cases. If the writ of error is granted, the case is heard in the appellate court exactly as it was in the trial court, subject to the same concessions, but no more. If the appellate court is of the opinion to affirm the decision of the lower court, it does so, and that terminates the procedure in the appellate court as it does in any other case. If, however, the appellate court is of the opinion to reverse the decision of the trial court; it generally enters *final* judgment for the party prevailing. It does not remand the cause for a new trial.<sup>57</sup>

54. Barrett v. Coal & Coke Co., *supra*; Johnson v. Burns, 39 W. Va. 68, 20 S. E. 686; Maple v. John, 42 W. Va. 30, 24 S. E. 608; Teal v. Ohio Ry. Co., 49 W. Va. 85, 38 S. E. 518.

55. Va. Code (1904), § 3484.

56. Ante, § 256; Norfolk & W. R. Co. v. Dunnaway, 93 Va. 29, 24 S. E. 698; Fidelity Co. v. Chambers, 93 Va. 138, 24 S. E. 896; Riddle v. Core, 21 W. Va. 530; Proudfoot v. Clevenger, 33 W. Va. 267, 10 S. E. 394.

57. Norfolk & W. R. Co. v. Marshall, 90 Va. 836, 20 S. E. 823; Metropolitan Ins. Co. v. Rutherford, 98 Va. 195, 35 S. E. 361.

If the error committed by the trial court consisted in the failure to compel a joinder, and all of the evidence is in the record so that the court can do complete justice between the parties, and can plainly see not only that joinder should have been compelled, but also what judgment should have been rendered thereon, it will treat the verdict as an award of damages rendered upon a demurrer to the evidence, and proceed to enter such judgment thereon as the trial court ought to have entered if joinder had been required; thus ending the controversy without subjecting the parties to further delay.<sup>58</sup>

Generally, the judgment rendered in the appellate court on a demurrer to the evidence is final, but sometimes the case is remanded upon a question of damages, and occasionally for prejudicial error committed by the trial court in *the procedure* on the demurrer.<sup>59</sup>

58. *University of Va. v. Snyder*, 100 Va. 567, 42 S. E. 337.

59. In *N. & W. v. Coffey*, 104 Va. 665, 51 S. E. 729, after joinder in demurrer and a conditional verdict, the court and the plaintiff's counsel were taken by surprise by finding no replication to a plea of the statute of limitations, and it was held that the court should have set aside the demurrer to the evidence, and the award of damages thereon and have caused the issue to be made up on the plea, and ordered a *new trial* of the case, and for a failure to do this the judgment of the trial court should be reversed, and the cause remanded for further proceedings. In *Merchants' Trans. Co. v. Masury*, 107 Va. 40, 57 S. E. 613, it was held that when the demurrer to the evidence was overruled but the conditional verdict of the jury was set aside for lack of evidence to support it, the trial court should have permitted the withdrawal of the demurrer, and have directed a *new trial of the whole case*, and for failure to do this, the judgment of the trial court was reversed and the case remanded for a *new trial de novo*. In *Peabody Ins. Co. v. Wilson*, 29 W. Va. 528, 2 S. E. 88, the court of appeals of West Virginia set aside the verdict of the jury and also the demurrer to the evidence and awarded a new trial, because that was what the trial court ought to have done.

If, on a writ of error, the appellate court be of opinion that a demurrer to the evidence in the trial court should have been overruled and judgment entered for the demurree, but the amount of the verdict is excessive and the amount of the excess plainly appears from the record, the appellate court will not remand the case nor put the demurree upon terms, but will enter up final judgment for the correct amount which the record shows the demurree is entitled to recover. *Whitehead v. Cape Henry Syndicate*, 111 Va. 193, 68 S. E. 263

## CHAPTER XXXV.

### INSTRUCTIONS.

- § 265. Object of instructions.
- § 266. Charging the jury generally.
- § 267. Nature, construction and effect of instructions.
- § 268. Abstract propositions—partial view of case.
- § 269. Scintilla doctrine.
- § 270. Sufficiently instructed.
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#### § 265. Object of instructions.

The object of instructions is to point out the issues involved and the evidence relevant thereto, and to give the jury a brief, clear, and succinct statement of the law applicable to the case. Frequently no reference is made in the instructions to the evidence, but the jury is instructed only on the law applicable to the issues involved. Sometimes, however, it is desirable to make the instruction more concrete, and this is done by stating the facts hypothetically, leaving the jury to ascertain what facts are established by the evidence, without expression of opinion on the part of the court as to the weight of the evidence, or what facts are established. This is accomplished by instructing the jury that if they believe such and such facts to be established, then the law is so and so.

### § 266. Charging the jury generally.

In England and in the federal courts it is common practice for the judge, after the argument, and immediately before the jury retire, to sum up the evidence as the judge understands it, and to charge the jury upon the law of the case upon this summing up. No such practice exists in Virginia. On the contrary, it would be regarded as an invasion of the province of the jury for the judge to do so. It is not the practice in Virginia to give instructions unless requested, except where it is necessary to prevent a failure of justice, and, while the giving of instructions by the court unasked is not error if the instructions correctly propound the law, still the practice is condemned.<sup>1</sup> Any opinion as to the weight, effect, or sufficiency of the evidence submitted to the jury, or any assumption of a fact as proved, is generally regarded as an invasion of the province of the jury, and observations and instructions as to the weight to be given to the oral evidence is ground for reversal.<sup>2</sup>

The duty of charging the jury generally is regarded in Virginia as a burden which counsel cannot impose upon the court. "It has not been the practice in Virginia, as in England, for the courts to charge the jury upon the law of the case, and it is not error to refuse to give such charge, or to refuse to instruct generally upon the law of the case. If either party desire any specific instruction to be given, he has the right to ask it, and the court is bound to give it, provided it expounds the law correctly upon any evidence before the jury. A party cannot, by asking for an erroneous instruction, or, as I apprehend, by asking for a general instruction, devolve upon the court the duty of charging the jury on the law of the case. See *Rosenbaums v. Weeden, Johnson & Co.*, 18 Gratt. 785, 799. As before stated, if the refusal of an erroneous instruction asked for tends to mislead the jury, a proper instruction should be given in its stead, and it would be error not to give it."<sup>3</sup> In a late case<sup>4</sup> the defendant

1. *Blunt's Case*, 4 Leigh 689; *DeJarnette's Case*, 75 Va. 867.

2. *Tyler v. Ches. & O. R. Co.*, 88 Va. 389, 13 S. E. 975; *N. & W. R. Co. v. Poole*, 100 Va. 148, 40 S. E. 627.

3. *Womack v. Circle*, 29 Gratt. 192, 208.

4. *Ches. & O. R. Co. v. Stock*, 104 Va. 97, 51 S. E. 161.

asked certain instructions, and then presented the following request: "The defendant prays the court that, should the hypothesis of the facts whereon the several facts propounded by it be incorrect, or should the said instructions be inartificially or incorrectly expressed, or should the conclusion of law therein announced be incorrectly stated, the court will so amend the same as to accord with the facts and law of this case, to the end that the jury may be duly instructed on the phases of the case at bar presented by the said instructions." The court, after examining the authorities, declares: "We know of no authority in this court, or elsewhere, which imposes upon trial courts the burden sought to be placed upon them by the 'prayer' under consideration." In discussing the subject of refusal of erroneous instructions the court says: "It cannot be doubted that, if the instruction correctly states the law, and there be sufficient evidence to support the verdict, it should be given. It is equally plain that if it does not correctly state the law, it should not be given. The sole question is as to the duty of the court to amend an instruction offered by counsel. The rule as stated in *Rosenbaums v. Weeden*, *supra*, and approved in numerous decisions of this court, is that when an instruction offered is equivocal, so that either to give or refuse it might mislead the jury, the duty is imposed upon the court so to modify it as to make it plain; that if it be right, it should be given; if it be wrong, it should be rejected; if it be equivocal, it should be amended. By what test is a court to measure the duty thus imposed, and how is the jury to be misled by an instruction which the court declines to give? An equivocal instruction of course should not be given, because an equivocal instruction is an inaccurate expression of the law, and for that reason should be refused. To say that a jury may be misled by a refusal to give an instruction, and therefore the instruction should be amended and given, is to prescribe a rule so vague and indefinite as to embarrass rather than to assist trial courts in the performance of their duty. It is the duty of juries to respect the instructions given them. It is not to be supposed that they have any knowledge with respect to those which the court refuses to give; and finally, if it be conceded that the offer of instructions, their discussion, and the judgment of the court upon them, take place in the presence of the jurors, it is an im-

peachment of their integrity, or of their intelligence, to assume that they were influenced or misled by what has occurred."

There is room for difference of opinion as to the last statement in the foregoing quotation. It is easily conceivable that cases may arise where, without impeaching either the integrity or the intelligence of the jury, they may be influenced or misled by a refusal to instruct on a given point, or to correct an equivocal or erroneous instruction. While in practice instructions are generally discussed out of the hearing of the jury, still it not unfrequently happens that disagreement between counsel in the midst of the argument necessitates a request for an instruction in the presence of the jury and, as said in another case, "While the language used in each of the instructions upon one point was objectionable and they could not have been given as offered, the court ought to have amended them; or, if it rejected them, as it did, it was error to give its own in lieu of them without instructing them upon that point which was a *vital one* in the case."<sup>5</sup> If the point upon which the instruction is asked is "a vital one," the jury should not be left wholly in the dark as to what the law on the subject is. If, for instance, in an action for malicious prosecution, where conviction before a justice has been reversed on appeal, the court should be asked in the presence of the jury to instruct them that such conviction was conclusive evidence of probable cause, and the instruction should be couched in such language as to be either erroneous or equivocal in some aspects, and the court should simply refuse on that account to give it, the jury might, without impeaching either their integrity or intelligence, assume either that such conviction was not conclusive evidence, or was not even *prima facie* evidence, and the point being a vital one, and one which should terminate the case at once, it would seem to be error not to instruct the jury on the point, when the court could easily do so without having to charge the jury at large.<sup>6</sup> Of course if, under such circumstances, the jury nevertheless find a correct verdict, the verdict would not be set aside simply because the court failed to instruct the jury on

5. *Bertha Zinc Co. v. Martin*, 93 Va. 806, 22 S. E. 869.

6. *Womack v. Circle*, 29 Gratt. 192; *Ward v. Churn*, 18 Gratt. 801, 810.

the point, and if it found an erroneous verdict, the verdict would be set aside because contrary to the law and the evidence, and yet it is plain that the erroneous verdict was the result of the failure of the court to instruct on a "vital point" in the case, and hence the trial court should have given a correct instruction on the subject, and thus have speedily terminated the litigation.

### § 267. Nature, construction and effect of instructions.

Instructions must not assume facts not admitted, nor otherwise infringe on the province of the jury to weigh the evidence.<sup>7</sup> They must be read in the light of the evidence applicable to the issues joined.<sup>8</sup> When given, they are instructions of the court, no matter by whom asked,<sup>9</sup> and must be read as a whole, and a defect in one may be corrected by a correct statement of the law in another, if the court can see that (when read and considered together) the jury could not have been misled by the defective instruction.<sup>10</sup> All error, however, is presumed to have affected the verdict, unless the contrary plainly appears.<sup>11</sup> But if it can be seen from the whole record that, even under proper instructions, a different verdict could not have been rightly found, the verdict will not be set aside.<sup>12</sup> Furthermore, if, upon the whole record, the appellate court can see that the jury could not have found a different verdict, it will not stop to consider objections to instructions, nor will a verdict be set aside simply because it is in accord with an erroneous instruction to

7. *Fishburne v. Engledove*, 91 Va. 548, 22 S. E. 354.

8. *N. Y., etc., R. Co. v. Thomas*, 92 Va. 606, 24 S. E. 264; *Richmond Granite Co. v. Bailey*, 92 Va. 554, 24 S. E. 232.

9. *Gray's Case*, 92 Va. 772, 22 S. E. 858.

10. *Washington, etc., R. Co. v. Lacey*, 94 Va. 460, 26 S. E. 834; *Washington, etc., R. Co. v. Quayle*, 95 Va. 741, 30 S. E. 391; *Russell Creek Coal Co. v. Wells*, 96 Va. 416, 31 S. E. 614; *Kimball v. Borden*, 97 Va. 477, 34 S. E. 45.

11. *Kimball v. Borden*, *supra*; *Richmond Traction Co. v. Hildebrand*, 99 Va. 48, 34 S. E. 888; *Richmond, etc., Co. v. Allen*, 101 Va. 200, 43 S. E. 356.

12. *Winfree v. Bank*, 97 Va. 83, 33 S. E. 375; *Southern Ry. Co. v. Oliver*, 102 Va. 710, 47 S. E. 862; *Moore v. Baltimore & O. R. Co.*, 103 Va. 189, 48 S. E. 887; *Schwalm v. Beardsley*, 106 Va. 407, 56 S. E. 135.

which no objection was made, if, upon the whole cause, there appears to be sufficient evidence to warrant the verdict.<sup>13</sup>

### § 268. Abstract propositions—partial view of case.

A proposition is said to be abstract when there is no evidence to support it, or the question is outside of the issues. Instructions on mere abstract legal propositions are calculated to mislead the jury, and should not be given.<sup>14</sup> So, likewise, instructions which ignore all the evidence on one side of a case, thus giving only a partial view of it, or which give undue weight to the evidence on one side, or call special attention to only a part of the evidence and the fact or facts which they tend to prove, and ignore other important evidence in the case which, if believed, ought to produce a different result, are misleading and should not be given.<sup>15</sup>

### § 269. Scintilla doctrine.

It was formerly the settled law in Virginia, that "if an instruction is asked which correctly propounds the law, and there is evidence tending to support the hypothetical case stated, to however little weight the evidence may appear to the court to be entitled, or however inadequate, in its opinion, to make out the case supported, it should be given."<sup>16</sup> And such, it is said, is the law of Alabama, Arkansas, Illinois, Georgia, Indiana, Maryland, Iowa,

13. *Collins v. George*, 102 Va. 509, 46 S. E. 684; *Watts v. N. & W. Ry. Co.*, 39 W. Va. 196, 19 S. E. 521; *Richmond Passenger Co. v. Allen*, 103 Va. 532, 49 S. E. 656.

14. *Easley v. Valley Mut. Life Assn.*, 91 Va. 161, 21 S. E. 235; *B. & O. R. Co. v. Few*, 94 Va. 82, 26 S. E. 406; *Seaboard R. Co. v. Hickey*, 102 Va. 394, 46 S. E. 392.

15. *N. Y., etc., R. Co. v. Thomas*, 92 Va. 606, 24 S. E. 264; *Hansbrough v. Neal*, 94 Va. 722, 27 S. E. 593; *Kimball v. Borden*, 95 Va. 203, 28 S. E. 207; *N. Y., etc., Ins. Co. v. Taliaferro*, 95 Va. 522, 28 S. E. 879; *Montgomery's Case*, 98 Va. 852, 37 S. E. 1; *Gatewood v. Garrett*, 106 Va. 552, 56 S. E. 335; *Carlin & Co. v. Fraser*, 105 Va. 216, 53 S. E. 145; *Amer. L. Co. v. Whitlock*, 109 Va. 238, 63 S. E. 991. This is an important case and quite full on various questions relating to instructions.

16. *Reusens v. Lawson*, 96 Va. 285, 31 S. E. 528.

Missouri, Nebraska, Ohio, South Carolina and Texas.<sup>17</sup> In a very recent case the Court of Appeals of Virginia says: "It is true that what is known as the scintilla doctrine, has heretofore prevailed in this State, by force of which courts have been required to give instructions though the evidence by which they were to be supported was such that a verdict founded upon it could not be sustained. In other words, a trial court might, under what is known as the scintilla doctrine, be reversed for failure to give an instruction which rightly propounded the law, and then be again reversed for sustaining a verdict in obedience to the instruction, because not supported by sufficient evidence. Such a doctrine does not seem consonant with reason, nor promotive of good results in the administration of justice." And thus this "heir-loom," which has been treasured for more than a century, has been cast aside not merely as worthless, but as pernicious.<sup>18</sup> Since this decision, probably the correct rule is that if an instruction is asked which correctly propounds the law it should be given, if there is sufficient evidence in the cause to support a verdict found in accordance therewith.<sup>19</sup>

### § 270. Sufficiently instructed.

A jury is said to be sufficiently instructed when the instructions already given cover the points embraced in an offered instruction. It is not error to refuse further instructions when the instructions already given fully and fairly submit the case to the jury on the phases sought to be presented, even although they correctly state the law.<sup>20</sup>

### § 271. Conflicting instructions.

A material error in an instruction, complete in itself, is not cured by a correct statement of the law in another instruction.

17. 11 Encl. Pl. & Pr. 181.

18. *Ches. & O. R. Co. v. Stock*, 104 Va. 97, 51 S. E. 161, 11 Va. L. Reg. 263, and note.

19. *Amer. L. Co. v. Whitlock*, 109 Va. 238, 63 S. E. 991.

20. *Nicholas' Case*, 91 Va. 741, 21 S. E. 364; *N. & W. Ry. Co. v. Mills*, 91 Va. 613, 22 S. E. 556; *N. & W. Ry. Co. v. Marpole*, 97 Va. 594, 34 S. E. 462; *Amer. L. Co. v. Whitlock*, 109 Va. 238, 63 S. E. 991.

The two being in conflict, the verdict of the jury will be set aside, as it cannot be told by which instruction the jury was controlled.<sup>21</sup> This is undoubtedly the general rule, but if, notwithstanding such conflict, the court can see from the whole case that no other verdict could have been properly found than that which the jury has found, the verdict will not be set aside.<sup>22</sup>

### § 272. Conflicting evidence.

If the evidence is conflicting, instructions to meet the different views of the case should be given, if asked.<sup>23</sup> This rule, however, is subject to the rule previously stated that the instructions should not take a partial view of the evidence, nor so emphasize the evidence on one side as to mislead the jury.

### § 273. Directing a verdict.

If the evidence is such that the court would set aside any verdict found thereon in favor of a particular party, the great weight of authority is that the court may direct a verdict against such party, and such is the constant practice in the federal courts.<sup>24</sup> Such, however, has not heretofore been the practice in Virginia, and it has been held, even in a criminal case, that it is not the practice to give instructions which amount in substance to telling the jury that the evidence is not sufficient to convict the prisoner, and that such instructions should not be given.<sup>25</sup> In Virginia the practice has been either to demur to the evidence in a proper case, or to ask an instruction directing a verdict upon a hypothetical case, that is, to tell the jury if they believe so and so their verdict should be for the plaintiff, or the defendant, as the case may be. The tendency, however, of modern cases, leans towards permitting the trial court to direct a verdict, and it is said that "while directing a verdict is not in accordance with the

21. *Amer. L. Co. v. Whitlock*, *supra*.

22. *Southern Ry. Co. v. Oliver*, 102 Va. 710, 47 S. E. 862.

23. *Fishburne v. Engledove*, 91 Va. 548, 22 S. E. 354; *Low Moor Iron Co. v. La Bianca*, 106 Va. 83, 55 S. E. 532.

24. *Phoenix Ins. Co. v. Doster*, 106 U. S. 30; *Abbott's Civil Trial Brief*, 375, ff; 6 *Encl. Pl. & Pr.* 678.

25. *Montgomery's Case*, 98 Va. 852, 37 S. E. 1.

practice in this state, yet where it appears, as in this case, that no other verdict could have been properly rendered, the error was harmless, and the judgment will not be reversed on that ground."<sup>26</sup> The basis of the holding is that the party complaining could not have been prejudiced by the instruction. It is now provided by statute in Virginia, however, "that in no action tried by a jury shall the trial judge give to the jury a peremptory instruction directing what verdict the jury shall render."<sup>27</sup>

### § 274. Law and fact.

Generally the court determines questions of law and the jury questions of fact, and the jury are bound by the law as laid down by the court. If, however, the verdict is correct, it will not be set aside merely because the trial court erroneously instructed the jury.<sup>28</sup> It is error to refer a question of law to the jury.<sup>29</sup> In one case the court said: "It is a duty which the court owes to its own self-respect, as well as to the speedy administration of justice, not to allow counsel to discuss before the jury the same matter which has already been decided by it."<sup>30</sup> In another case,<sup>31</sup> the court quotes with approval the following language by Mr. Justice Story in *United States v. Battiste*, 2 Sumn. 240: "My opinion is that the jury are no more judges of the law in a capital or other criminal case, upon the plea of not guilty, than they are in every civil case tried upon the general issue. In each of these cases, their verdict, when general, is necessarily compounded of law and fact, and includes both. In each they must necessarily determine the law as well as the

26. *Hargrave v. Shaw Land Co.*, 111 Va. 84, 68 S. E. 278; *Taylor v. B. & O. R. Co.*, 108 Va. 817, 62 S. E. 798.

27. Acts 1912, ch. 27, p. 52.

28. *Collins v. George*, 102 Va. 509, 46 S. E. 684; 11 Encl. Pl. & Pr. 59.

29. For example, whether or not an alteration in a written instrument is *material* is a question of law, but whether or not it was *made* is a question of fact. *Keene v. Monroe*, 75 Va. 424; *People v. Alton* (Ill.), 56 L. R. A. 95. For further illustration, see *Houff v. German Ins. Co.*, 110 Va. 585, 66 S. E. 831.

30. *Delaplane v. Crenshaw*, 15 Gratt. 457.

31. *Brown v. Com.*, 86 Va. 466, 10 S. E. 745.

fact. In each they have the physical power to disregard the law, as laid down to them by the court. But I deny that, in any case, civil or criminal, they have the moral right to decide the law according to their own notions or pleasure. On the contrary, it is the duty of the court to instruct the jury as to the law, and it is the duty of the jury to follow the law as it is laid down by the court."<sup>32</sup>

*Foreign laws.* Foreign laws, or the laws of other states, though regarded as facts to be proved as other facts, are to be interpreted and their effect declared by the court.<sup>33</sup>

*Written Instruments.* It is the duty of the court, and not of the jury, to construe all written instruments, and an instruction giving the court's construction of such instruments is no invasion of the province of the jury.<sup>34</sup>

*Court's Opinion on the Evidence.* In England, in the Federal courts, and in some of the State courts, where not prohibited, the court may express its opinion as to the weight of the evidence, or any part thereof, but the decided weight of authority is against thus infringing upon the province of the jury, and, even where it is allowed, the court must be careful to state to the jury that they are the sole judges of the facts, and not in any way bound by the opinion of the court as to what facts are established by the evidence. It is said that, while the judge may sum up the facts to the jury and express an opinion upon them, he should take care to separate the law from the facts and leave the latter in unequivocal terms to the judgment of the jury.<sup>35</sup> In Virginia, no such expressions of opinion are allowed, and if made they will vitiate the verdict.<sup>36</sup>

32. *Newport News, etc., R. Co. v. Bradford*, 100 Va. 231, 40 S. E. 900.

33. *Union Cent. Life Ins. Co. v. Pollard*, 94 Va. 146, 26 S. E. 421. But see 1 Gr. Ev. (16 Ed.), § 81-g.

34. *Burke v. Lee*, 76 Va. 386; *Pettyjohn v. Bank*, 101 Va. 111, 43 S. E. 203.

35. *Starr v. U. S.*, 163 U. S. 614; 11 Encl. Pl. & Pr. 91-93.

36. *Fishburne v. Engledove*, 91 Va. 548, 22 S. E. 354; *N. & W. R. Co. v. Poole*, 100 Va. 148, 40 S. E. 627.

### § 275. Oral or written.

In the absence of statute, instructions may be oral, or in writing, or partly one and partly the other. When statutes exist they are generally held to be mandatory, and apply to explanations and modifications as well as to the original instruments.<sup>37</sup> In Virginia we have no statute on the subject, but the practice is to give all instructions in writing.

### § 276. Time of giving.

The time of giving instructions is regulated by statute in some states, and, where so regulated, that time should be observed, but, in the absence of statute, it rests in the sound discretion of the trial court. Unless there is some good reason to the contrary, they should be applied for and given *before argument*, for in this way much bad law and useless discussion is kept from the jury. Developments, however, may render it proper, if not necessary, to give instructions during a concluding argument, or even after the jury has retired to consider its verdict. Certainly they may be then given by the court on a request of the jury, but generally it is not allowed as a matter of right at the instance of a party.<sup>38</sup>

*Order of Reading to Jury.*—In West Virginia, the statute not only prescribes the time when instructions shall be given, but also the order in which they shall be read to the jury. The statute declares: "All instructions shall be read before the argument to the jury in the following order, to wit: the instructions given by the court upon its own motion, if any, shall be read first; those given upon the motion of the plaintiff shall be read second, and in any event before the instructions for the defendant are read; and those given upon the motion of the defendant shall be read last; no instructions shall be read twice, unless it is necessary to read them after being changed as provided in section one of this chapter, or upon special request by

37. Abbott's Civil Trial Brief, 411-425.

38. Williams v. Com., 85 Va. 807, 8 S. E. 470; State v. Cobbs, 40 W. Va. 718, 22 S. E. 310; B. & O. v. Polly, 14 Gratt. 457-8; Hoge v. Turner, 96 Va. 624, 32 S. E. 291; Lewis v. Com., 78 Va. 732; 11 Encl. Pl. & Pr. 283-6.

the jury."<sup>39</sup> This act has been held to be mandatory, and hence trial courts have no discretion in the premises, but must read instructions in the order named, or else it is reversible error.<sup>40</sup> In construing this act, it has also been held that if an instruction offered by a party is refused "as offered," and is amended by the court over the objection of the party offering it and given in its amended form, it must be read as an instruction given by the court upon its own motion, and read in that order, else it will be reversible error, but that the right given by the statute may be waived, and will be deemed to have been waived unless objection is made at the time the instructions are read to the jury.<sup>41</sup> There is no such statute in Virginia.

### § 277. Multiplication of instructions.

The Court of Appeals of Virginia has more than once warned against the multiplication of instructions.<sup>42</sup> In a recent case it repeats the caution, saying that the practice of asking for a great number of instructions in cases which involve few law questions has grown up in recent years, and, instead of aiding the juries in reaching right conclusions, tends to mislead and confuse them, and imposes a heavy and unnecessary burden upon trial courts.<sup>43</sup>

### § 278. Find for the plaintiff.

An instruction which concludes with a direction to the jury to "find for the plaintiff" or "find for the defendant," as the case may be, should state a complete case, and embrace all elements necessary to support a verdict. It should also be based upon the evidence in the case, and not be partial, nor omit all reference

39. Acts W. Va. (1907), ch. 38, § 5, p. 224.

40. *State v. Clark*, 64 W. Va. 625, 63 S. E. 402; *State v. Huffman* (W. Va. Jan. 12, 1912), 73 S. E. 292, 295.

41. See cases cited in last note.

42. *Bright Hope R. Co. v. Rogers*, 76 Va. 454; *Newport News Co. v. Beaumeister*, 102 Va. 677, 43 S. E. 821; *Wallen v. Wallen*, 107 Va. 131, 57 S. E. 596.

43. *Seaboard R. Co. v. Vaughan*, 104 Va. 116, 119, 51 S. E. 452.

to material evidence in the case.<sup>44</sup> If the evidence be such that if the jury believe one state of facts, they should find for the plaintiff, and if they believe another state of facts, they should find for the defendant, then the instruction should be given in the alternative.

### § 279. Inviting error.

A party cannot complain of an erroneous instruction given at his instance. He cannot invite the court to commit an error, and then complain of it. He is estopped from making such an objection.<sup>45</sup>

### § 280. How instructions are settled.

After the evidence is all in, the court usually affords counsel an opportunity to prepare such instructions as they may desire to offer. Counsel on each side thereupon prepare such instructions as they think necessary or proper to present their views of the law to the jury. The argument on these instructions is generally heard in chambers, away from the presence of the jury. Counsel repair to such place as the judge may designate to hear argument on the instructions. Usually counsel for the plaintiff will read such instructions as he desires the court to give, and then counsel for the defendant reads the instructions he has prepared. Generally, counsel for the plaintiff will then argue before the court his ground for thinking that the instructions tendered by him should be given, and the objections, if any, which he has to the instructions tendered by counsel for the defendant. Counsel for the defendant then makes his argument in support of his own instructions, and points out and argues the objections which he has to instructions tendered by the plaintiff. To this argument counsel for the plaintiff generally replies. The whole

44. *Sun Life Assurance Co. v. Bailey*, 101 Va. 443, 44 S. E. 692; *Wright v. Agelasto*, 104 Va. 159, 51 S. E. 191; *Vaughan Mach. Co. v. Stanton Co.*, 106 Va. 445, 56 S. E. 140; *So. Ry. Co. v. Blanford*, 105 Va. 373, 54 S. E. 1; *Life Ins. Co. v. Hairston*, 108 Va. 832, 62 S. E. 1057.

45. *Richmond Traction Co. v. Clarke*, 101 Va. 382, 43 S. E. 618; *Bugg v. Seay*, 107 Va. 648, 60 S. E. 89.

process, however, is very informal. The argument is before the judge in chambers, and there is no definite order fixed as to who shall open and conclude. This will be regulated in large measure by the trial judge. After the arguments *pro* and *con* the judge takes time to consider, if he so desires, if not, he will pass on the instructions at once, designating which he will give and which he will refuse, sometimes adding one or more independent instructions of his own, and frequently making some additions to or subtractions from those offered by counsel. Instructions are no part of the record, and hence if either party is dissatisfied with the ruling of the court, either on his own instructions or on the objections to the instructions of his adversary, or to instructions given by the court, or modifications of instructions made by the court, he states that he excepts to the ruling of the court thereon, and at the proper time prepares and tenders his bill of exception. A fair copy of the instructions which the court decides to give is generally then made, the court and counsel repair to the court room, and the court gives the instructions to the jury, and the trial proceeds.

## CHAPTER XXXVI.

### BILLS OF EXCEPTION.

- § 281. Origin and purpose of bills of exception.
- § 282. How points are saved.
- § 283. Rejected evidence.
- § 284. Competency of witnesses.
- § 285. Form of bill of exception where evidence is excluded.
- § 286. Supplying defects by reference.
- § 287. Granting or refusing instructions.
- § 288. Motion for new trial.
- § 289. Evidence to support an instruction.
- § 289a. Verdict not supported by the evidence.
- § 290. Time and manner of filing.
- § 291. Evidence of authentication.

#### § 281. Origin and purpose of bills of exception.

Bills of exception are wholly creatures of statute. They were unknown to the common law and were unnecessary as no writ of error would lie on rulings on questions of fact.<sup>1</sup> The record in a civil case "is made up of the writ (for the purpose of amendment, if necessary), the whole pleadings, papers of which profer is made and oyer demanded, and such as have been specially submitted to the consideration of the court by a bill of exception, a demurrer to the evidence, or a special verdict, or are inseparably connected with some paper or evidence so referred to. These, with the several proceedings at the rules, or in the court, *until the rendition of the judgment*, constitute the record in common law suits, and are to be noticed by the court, and no others."<sup>2</sup> It will be observed that this record is a mere skeleton, and gives nothing of the interesting details of a trial. It contains none of the evidence nor the rulings of the trial court on its acceptance or rejection. It does not contain the instruc-

1. *Battershall v. Roberts*, 107 Va. 269, 58 S. E. 588; 3 Encl. Pl. & Pr. 378.

2. *White v. Toncray*, 9 Leigh 351, cited and approved in *Roanoke, etc., Co. v. Karn*, 80 Va. 589.

tions of the court, nor the rulings of the court in matters affecting the alleged misconduct of the parties or their counsel, or of third persons, nor of the jury. If any of these matters are to be made a ground of complaint in the appellate court, they must be made a part of the record of the trial court, and the method of doing this is by a bill of exception. Of course, no bill of exception is necessary to introduce a matter already a part of the record. If the record sufficiently shows a fact, for instance, that a motion was made to require a bill of particulars, either of the plaintiff's claim or the defendant's grounds of defence, and was overruled, no bill of exception is necessary, as the order showing the ruling of the court is in the nature of a judgment, and is *per se* a part of the record.<sup>3</sup> The object of the bill is to put that into the record which would not otherwise be there, or appear. The mere copying of instructions into the record by the clerk, however, will not suffice. The noting at intervals in stenographic notes that objections to questions were made and overruled, and exceptions taken, is not sufficient. There must be a bill of exception signed by the judge.<sup>4</sup> The rule is otherwise in West Virginia.<sup>5</sup> Nor will the bill be dispensed with, although counsel so stipulate in writing.<sup>6</sup>

The office of the bill is "to set forth a specific and definite allegation of error, and so much of the evidence as is necessary to a clear apprehension of the propriety or impropriety of the ruling made by the court."<sup>7</sup>

Two or more points may be saved in one bill if they are distinctly set forth with necessary circumstantiality, but the better practice is to file a separate bill for each point saved.<sup>8</sup>

### § 282. How points are saved.

The trial of a case is not ordinarily stopped in order to pre-

3. *Driver v. So. R. Co.*, 103 Va. 650, 49 S. E. 1000; *Blue Ridge L. & P. Co. v. Tutwiler*, 106 Va. 54, 55 S. E. 539.

4. *N. & W. v. Shott*, 92 Va. 34, 22 S. E. 811.

5. *Kay v. Glade Creek & R. R. Co.*, 47 W. Va. 467, 35 S. E. 973.

6. *Kibler v. Com.*, 94 Va. 804, 26 S. E. 858.

7. *Holleran v. Meisel*, 91 Va. 143, 21 S. E. 658.

8. *Holleran v. Meisel*, *supra*; *N. & W. v. Shott*, *supra*.

pare the bill of exception. There are several good reasons for this. One is to save delay, and another is that the case may be decided in favor of the party filing the bill of exception, and then he would not need a bill—being content with the verdict. When a question is asked which is objected to, the party simply says, "I object," and assigns his reasons for his objection, and if the trial court decides adversely to him, he says, "I wish to save the point," or, "I except." A note of this is taken and kept until after the trial is over. The bill is then written out and presented to the judge for his signature. The usual course of procedure is for the party filing the bill to write it out in full and tender it to the counsel on the other side for his inspection. If the latter agrees that the bill fairly states the case, he assents to it, and usually the judge signs it without more. If he objects, and the counsel cannot agree among themselves upon points connected with the bill, the points of difference are submitted to the judge, and he decides them, and the bill is made up in accordance with his rulings.<sup>9</sup>

### § 283. Rejected evidence.

The evidence in an action at law is no part of the record, hence if it is desired to make it a part of the record, a bill of exception is necessary. When the exception is taken to the rejection of evidence, the bill should recite so much of the evidence already adduced as will show the relevancy and pertinency of the question asked. If the question is answered, the answer should be given, because the witness might answer that he knew nothing on the subject, and this would show that the question was immaterial. If no answer is given, then the bill should state what the exceptor expects to prove by the witness. This is generally done, after reciting so much of the evidence as is pertinent, by stating that the exceptor, with a view to proving such and such facts, asked the witness the following questions. If the exception is taken because evidence has been received which it is thought ought not to have been received, the bill of exception

9. Page *v.* Clopton, 30 Gratt. 415.

should clearly point out in what respect the evidence is objectionable.<sup>10</sup>

**§ 284. Competency of witnesses.**

“When a witness is rejected on account of his incompetency, it is not necessary in the bill of exception to state what it is expected to prove by him. The objection to his competency implies materiality, and that he is adverse.”<sup>11</sup>

**§ 285. Form of bill of exception where evidence is excluded.**

Be it remembered, that on the trial of this case the plaintiff, in order to maintain the issue on his part, introduced as a witness John Smith, who testified as follows (here insert his evidence in chief), and thereupon the said John Smith was turned over to the defendant’s counsel for the purpose of cross examination, and the defendant by his counsel, with the view to showing the bias and prejudice of the witness, propounded to him the following question: “Is not your wife the sister of Ira Jones the plaintiff in this case?” but the plaintiff, by his counsel, objected to any answer being given to said question, which objection was sustained by the court, to which action of the court in sustaining said objection and in refusing to permit the witness to answer said question, the said defendant excepts, and prays that this, his bill of exception No. 1 may be signed, sealed and enrolled as a part of the record, which is done accordingly.

..... (Seal.)

**§ 286. Supplying defects by reference.**

In the absence of a statute permitting a different course each bill of exception must be complete in itself, and one bill cannot

10. *Union Central Life Ins. Co. v. Pollard*, 94 Va. 146, 26 S. E. 421; *Driver v. Hartman*, 96 Va. 518, 31 S. E. 899; *Clark v. Sleet*, 99 Va. 381, 38 S. E. 183; *Nease v. Capehart*, 15 W. Va. 299; *Snooks v. Wingfield*, 52 W. Va. 441, 44 S. E. 277.

11. *Mutual Ins. Co. v. Oliver*, 95 Va. 445, 28 S. E. 594; *Martz v. Martz*, 25 Gratt. 367; *Metz v. Snodgrass*, 9 W. Va. 190.

be looked to in order to supply facts to support a point raised in another, without reference from one to the other, except in a very few cases.<sup>12</sup> If, however, all of the evidence has been set out in one bill, that bill may probably be looked to in order to support a point made in another bill.<sup>13</sup> This matter, however, is regulated by statute in Virginia.<sup>14</sup>

### § 287. Granting or refusing instructions.

Instructions are not *per se* part of the record, and objections thereto cannot be considered if no bill of exception is taken.<sup>15</sup> If, however, upon the trial, instructions are given to the jury, *to which no exception is taken*, and, after verdict, a motion is made for a new trial, on the ground of *misdirection* it is the duty of the trial court to consider the correctness of the instructions, and if of opinion that they are not correct and were calculated to mislead the jury, to set aside the verdict and grant a new trial. But if the trial court, believing the instructions to be correct, when, in fact, they were not, refuses to set aside the verdict, and a bill of exception is taken on that ground, in which the erroneous instructions are embodied, the appellate court will supervise the action of the trial court in this respect; and if it finds that the instructions were in fact erroneous, will set aside the verdict and award a new trial. The appellate court, however, does not look upon this method of procedure with favor, and in reviewing the ruling of the trial court will consider whether under all the circumstances the party complaining has been prejudiced by the instruction, and if of opinion that a just verdict has been rendered, will not set it aside on account of that objection.<sup>16</sup>

12. *Hall v. Hall*, 12 W. Va. 1.

13. *Klinkler v. Wheeling*, 43 W. Va. 219, 27 S. E. 237.

14. Section 3484a of the Code is as follows: "Any evidence in the record may be considered by the appellate courts, if certified in any bill of exceptions, as though certified in each."

15. *Norfolk v. Johnakin*, 94 Va. 285, 26 S. E. 830; *Taylor v. Mallory*, 96 Va. 18, 30 S. E. 472; *Clark v. Com.*, 90 Va. 360, 18 S. E. 440; *Bull v. Com.*, 14 Gratt. 613; *Stephenson v. Wallace*, 27 Gratt. 77.

16. *Stephenson v. Wallace*, 27 Gratt. 77; *Bull v. Com.*, 14 Gratt. 613. For other cases on the subject of instructions, see note to *Womack v. Circle*, 29 Gratt. 192, Va. Rep. Ann.

Instructions copied into the record when there is no bill of exception or order of the court referring to them, will not be regarded as part of the record.<sup>17</sup>

### § 288. Motion for new trial.

Formerly in Virginia, it was necessary to make a motion for a new trial, and if that motion was overruled, to take an exception to the ruling of the court thereon in order to have the benefit of any exception taken during the trial of the case. At least, it was necessary for the *record to show* that such a motion was made and overruled.<sup>18</sup> The reason assigned was that the judge might, upon a deliberate motion for a new trial, supported by argument and authority, retract a hasty opinion expressed by him in the progress of the trial. This is still the law in West Virginia, Arkansas, and other states,<sup>19</sup> but has been changed, in Virginia by statute.<sup>20</sup>

### § 289. Evidence to support an instruction.

If the objection is taken to an instruction, on the ground that there is *no evidence* to support it, of course, it will be necessary to recite all the evidence in the bill of exception in order to establish that fact.

### § 289a. Verdict not supported by the evidence.

An assignment of error merely stating that the "verdict is not supported by the evidence" is not entitled to notice, if it does not affirmatively appear that the evidence in the record is the *whole evidence* introduced on the trial,<sup>21</sup> and this is proper, as the ver-

17. *Winters v. Null*, 31 W. Va. 450, 7 S. E. 443.

18. *Central Land Co. v. Obenchain*, 92 Va. 130, 22 S. E. 876.

19. *Danks v. Rodeheaver*, 26 W. Va. 274; *Young v. King*, 33 Ark. 745.

20. Section 3385a of the Code is as follows: "The failure to make a motion for a new trial in any case in which an appeal, writ of error, or supersedeas lies to a higher court shall not be deemed a waiver of any objection made during the trial if such objection be properly made a part of the record."

21. *Oswego v. Traveller Ins. Co.*, 70 Fed. 225, 17 C. C. A. 77; *Bank v. Berkeley*, 3 W. Va. 386.

dict should be presumed to be supported by the evidence until the contrary appears.

### § 290. Time and manner of filing.

As hereinbefore stated, bills of exception were unknown to the common law, and are wholly of statutory origin. The time and manner of their filing are, therefore, to be determined from the statute. If the statute simply allows a bill of exception to be taken to the rulings of the trial court and fixes no time when this may be done, it must be done before the adjournment of the term at which the final judgment is entered. When the final judgment is entered and the term ended, the record is closed and nothing can be added to it except by express statutory provision. The signing of a bill of exception so as to make it a part of the record is a judicial act, and must be performed within the time, if any, prescribed by the statute. If none is prescribed, then it must be signed, as stated, before the adjournment of the term at which final judgment is entered. The power of the judge to sign is derived from and measured by the statute. The leave of the court with the consent of the parties, though both be entered of record, cannot confer upon the court or the judge authority to sign a bill at any other time than that fixed by statute. The question is jurisdictional, and a bill of exception not signed at the time prescribed by the statute is no part of the record, and cannot be considered by the appellate court on a writ of error.<sup>22</sup>

The Virginia statute<sup>23</sup> provides "that bills of exception may be tendered to the judge and signed by him either during the term at which the opinion of the court is announced to which exception is taken, or within thirty days after the end of such term, either in term time or vacation, whether another term of said court has intervened or not, or at such other time as the parties, by consent entered of record, may agree upon, and any bills of exception so tendered to and signed by the judge, as aforesaid, either in term time or in vacation, shall be a part of the record of the case. The same rule shall apply when cases are heard or

22. Va. Dev. Co. v. Rich Patch Iron Co., 98 Va. 700, 37 S. E. 280.

23. Code, vol. 3, § 3385.

opinions are rendered in vacation, in which case the party excepting shall have thirty days from the day that such opinion is rendered." The act is applicable to criminal cases as well as civil.

Under this statute, if the time of signing is postponed beyond thirty days, consent to that effect must be entered of record as a part of the final order of the court, else the exception is not well taken, and the bill is no part of the record. "The court cannot, on the mere motion of the exceptor, and without such consent entered of record, postpone from term to term the signing of such bills. A memorandum signed by counsel on both sides, and annexed to bills of exception filed several terms thereafter, to the effect that such bills of exception 'have been examined and agreed to,' is not sufficient. The signing of bills of exception so as to make them a part of the record is a judicial act of purely statutory origin, and the provisions of the statute must be strictly observed."<sup>24</sup> If a bill of exception is signed more than thirty days after the adjournment of the court, it can only be done by consent of the parties entered of record; and although the parties may have consented to the signing, if the record does not show such consent, the bill cannot be considered, nor can the fact that the consent was given at the time be shown (unless allowed by statute) by a *nunc pro tunc* order. So stringent is the rule that it has been applied in a criminal case where the prisoner was under sentence of death. The court says: "The authority of a judge to sign bills of exception after the lapse of more than thirty days after the end of the term at which the opinion of the court is announced to which exception is taken rests upon consent, and that consent must appear of record. It is of the very essence of his jurisdiction, and without it the judge has no authority or power to act. An order, made during the term, that 'the prisoner is allowed sixty days from the adjournment of this court within which to file his bills of exception,' but which fails to show that the sixty days was agreed upon and entered of record by consent of parties is wholly ineffectual to extend the time beyond the thirty days fixed by statute. Nor has the trial court any power, after the adjournment of the term at which a final

24. *Battershall v. Roberts*, 107 Va. 269, 58 S. E. 588.

order is entered, to amend its final order so as to show that the sixty days was in fact agreed upon and to be entered of record by consent of parties.

“During the term of the court at which a judicial act is done, the record remains in the breast of the court, and may be altered or amended; but, after the adjournment of the term, amendments can only be made in cases in which there is something in the record by which they can be safely made. Amendments cannot be made after the adjournment of the term, upon the individual recollection of the judge, or upon evidence *alibunde*.”<sup>25</sup>

It has been further held, under the above statute, that bills of exception signed in vacation and within thirty days after the end of the term at which final judgment is rendered are within the time prescribed by the statute. They are not required to be filed at the term at which an adverse ruling is made, nor within thirty days thereafter.<sup>26</sup>

In a case in which a writ of error lies, a party has a right to a bill of exception to the ruling of the trial court if the truth of the case be fairly stated therein, and if the judge refuses to sign such a bill, he may be compelled to sign it by a *mandamus*, but if a party accepts a bill as signed by the judge, he cannot thereafter question its correctness.<sup>27</sup>

The making of a bill of exception is a judicial act and the power to make it cannot be delegated. A trial judge cannot sign a skeleton bill of exception and direct the clerk to insert all the evidence introduced on both sides “as appears from the stenographer’s report thereof.” The evidence inserted must be in some way identified or earmarked by the judge under his own hand, otherwise it is not part of the bill, and cannot be considered by an appellate court.<sup>28</sup>

It had been held that if the evidence was not sufficiently identified and made a part of the bill of exception within the time

25. Wright’s Case, 111 Va. 873, 69 S. E. 956.

26. Manchester Loan Ass’n v. Porter, 106 Va. 528, 56 S. E. 337.

27. Collins v. George, 102 Va. 509, 46 S. E. 684.

28. Thornton v. Com., 113 Va. —, 73 S. E. 481; Blackwood Coal Co. v. James, 107 Va. 656, 60 S. E. 90; N. & W. R. Co. v. Rhodes, 109 Va. 176, 63 S. E. 445.

prescribed for taking the bill the defect could not be remedied by a *nunc pro tunc* order,<sup>29</sup> but at the recent session of the legislature it was enacted "that no case shall be heard or decided in the Court of Appeals on an imperfect or incomplete record, but when said court shall be of opinion that any record or part thereof, testimony or proceeding has not been properly identified or certified, so as to make it a part of the record in the case, and to bring it properly before the appellate court, and that justice may be done by directing the trial court to cure the defects in the record, it shall so order; and when the defects shall have been so cured it shall proceed with the hearing on the merits."<sup>30</sup> The trial court may now make a *nunc pro tunc* order, under directions from the Court of Appeals, and thereby cure a defect that was formerly regarded as fatal. But it must not be supposed that this statute dispenses with the other requirements of Section 3385 of the Code. The bill must still be filed within the time prescribed by the statute, and possess the other requisites of a valid bill of exception. A *nunc pro tunc* order, however, is an order made *now* causing the record to show something that was in fact done at a *previous time*, but the doing of which the record fails to disclose. If no such act was done its omission cannot be supplied by a *nunc pro tunc* order.<sup>31</sup> Whether the language of the act is broad enough to cover the case when the clerk fails to enter on record the agreement of counsel for the extension of time within which bills of exception may be filed (when such an agreement is actually made and announced in open court) is not entirely free from doubt, but the agreement is a part of the "proceeding" in the cause which "has not been properly identified and certified" and is probably covered.

In *Anderson v. Com.*, 105 Va. 533, 54 S. E. 305, it was held that, if the bill was *tendered in time* but not signed and returned in the time prescribed by the statute, it was too late. This holding would not seem to be sound, as the defendant had certainly done everything that could be reasonably required of him.<sup>32</sup>

29. *Hot Springs L. Co. v. Revercomb*, 110 Va. 140, 65 S. E. 557.

30. Acts 1912, p. 533.

31. *Witmore v. Karrick*, 205 U. S. 141.

32. 3 Cyc. 44.

*Boonville v. L. 118 Va. 792, 795*

The bill of exception to the judgment of the court *overruling a motion for a new trial*, on the ground that the verdict is contrary to the evidence, differs in one respect from the other bills taken in the case. In this bill, it should be distinctly and plainly certified that the evidence certified in the bill is *all* of the evidence that was introduced on the trial. The form of this bill is brief, and is substantially as follows:

“Be it remembered that on the trial of this case, and after the jury had rendered their verdict in the following words and figures to-wit: (here insert the verdict) the defendant moved the court to set aside the said verdict, because the same is contrary to the evidence, which motion the court overruled, to which action of the court in overruling said motion the defendant excepts, and prays that this, his bill of exception No. . . . . ., may be signed, sealed and enrolled as a part of the record, which is done accordingly. And in order to save to the defendant the benefit of his said exception, the court doth certify that the following is *the evidence*, and *all* of the evidence, introduced on the trial of said case. (Here insert the evidence in full.)

“ . . . . . (Seal.) ”

It has been held, however, that it is sufficient if the bill certifies that the following was “the” evidence, etc.; that “the” in that connection means *all*.<sup>33</sup>

### § 291. Evidence of authentication.

Unless required by statute, it is not necessary for a bill of exception to be sealed. The present statute in Virginia declares that when signed by the judge it “shall be a part of the record of the case.”<sup>34</sup> Formerly it was required by statute that bills of exception in criminal cases should be signed and sealed by the judge and entered in the record by the clerk.<sup>35</sup> It is no longer necessary in Virginia that the bill should be entered on the record, but it is necessary that the bill should be signed by the judge. An unsigned bill is no part of the record.<sup>36</sup> Furthermore, there

33. *Manchester Loan Ass'n v. Porter*, 106 Va. 528, 56 S. E. 337.

34. Code, § 3385.

35. 1 Rev. Code (1819), chap. 133, § 2, p. 523.

36. *Colby v. Reams*, 109 Va. 308, 63 S. E. 1009.

should be some record evidence of the authentication of the bills. The record must in some way show that the bill of exception was signed by the judge, and that it was signed within the time prescribed by law. These facts cannot be made to depend upon parol evidence. The appellate court will take judicial notice of the signature of the trial judge, but in order that the bill may be a part of the record it must be signed with the purpose of making it such and within the time prescribed by law. The clerk has no authority to make a bill a part of the record, nor does the mere copying by him of unauthenticated bills into the record have that effect. When time has been given beyond the term for filing a bill of exception, the record must show affirmatively that it was filed within the time limited. The mere signature of the judge without more makes the bill as much a part of the record as if it were copied *in extenso* in the order book and his signature affixed thereto, but in order to have this effect it must in some way appear that this official act was done within the time prescribed.<sup>36a</sup> Just how this shall be made to appear from the record is not stated, but as the statute declares the *bill* to be a part of the record, if the bill itself is dated, the date will be taken at least as *prima facie* correct, if not conclusive, and would seem to answer the requirements of the statute. The judge should give the date of his signature and the clerk should note the date of filing. The following forms would seem to be sufficient.

At the foot of the bill let the judge sign and address the bill, as follows:

(Signature)

John Smith (Seal.)

Judge Fifth Judicial Circuit.

June 10, 1910.

**36a.** The statement of the text that the record must show that the bill was signed and filed within the time prescribed by law, is believed to be subject to the qualification that if the party excepting has done all that was required of him, that is has presented a proper bill in due time to the judge for his signature and the judge has failed to sign it within the time prescribed, from negligence or other cause, the exceptor will not be deprived of his bill of exception. But see *Anderson v. Comth*, 105 Va. 533, 54 S. E. 305.

To A. B., Clerk, Fifth Judicial Circuit of Virginia.

You will note the filing of the foregoing bill of exception.

John Smith, Judge.

June 10, 1910.

Filed June 10, 1910.

(Signed.) A. B., Clerk.

This mere memorandum by the clerk would seem to be sufficient in addition to the signature of the judge giving the date of the bill. There ought to be some note by the clerk to show when the bill reached him officially. It would be better practice for the clerk to note on his order book a memorandum to the following effect:

In the vacation of the Circuit Court of X county, June 10, 1910.

Smith

v. Memo.

Coke

Bills of exception, Nos. 1, 2, 3, and 4, taken to rulings of the court during the trial of the above case, duly signed and sealed by the judge of this court, were this day filed.<sup>37</sup>

In West Virginia it has been held that the mere signing of a bill of exception is not sufficient but that there must be some order or memorandum on the order book showing the exception.<sup>38</sup>

37. *Standard Peanut Co. v. Wilson*, 110 Va. 650, 66 S. E. 772; *Buena Vista Co. v. Hickman*, 108 Va. 665, 62 S. E. 804.

38. *Bank v. Showacre*, 26 W. Va. 48, 53; *Koontz v. Koontz*, 47 W. Va. 31, 34 S. E. 752. See, also, *Thornton v. Com.*, 113 Va. —, 73 S. E. 481.

## CHAPTER XXXVII.

### ARGUMENT OF COUNSEL.

- § 292. Opening and conclusion.
- § 293. Number of counsel.
- § 294. Duration of argument.
- § 295. Reading law books to the jury.
- § 296. Scope of argument.

#### § 292. Opening and conclusion.

The party having the burden of proof generally has the right to open and conclude, and if the plaintiff has the burden on any issue, even the establishment of damages, or as to any defendant, he has the right to open and conclude. Whether the necessity for proving damages only on the part of the plaintiff is such an affirmative as entitles him to open and conclude is said not to be perfectly clear, but that where such evidence forms part of the proof necessary to sustain the action, as in an action of slander for words actionable only in respect of the special damage thereby occasioned, the plaintiff would have the right to open and conclude, and, by the weight of authority, the right to open and conclude is given to the plaintiff whenever the damages in dispute are unliquidated, and to be settled by a jury upon such evidence as may be adduced, and not by a mere computation.<sup>1</sup> It is generally conceded everywhere that upon an application to probate a will, the executor has the burden of proof and is entitled to open and conclude. The rule in Virginia has been stated to be that wherever the defendant relies upon a plea which puts in issue the plaintiff's demand and casts upon him the burden of proof, the plaintiff has the right to open and conclude the argument; that it is only when the defendant pleads some affirmative matter alone, the proof of which rests upon him, that he can claim the right to open and conclude the argument.<sup>2</sup> If a plaintiff opens, and his opponent declines to reply, then the argu-

1. 1 Gr. Ev. (16 Ed.), §§ 75, 76.

2. *Wright v. Collins*, 111 Va. 806, 69 S. E. 942.

ment is concluded, and the plaintiff cannot again argue by way of conclusion.<sup>3</sup> Whether the refusal of the right to open and conclude is of itself ground for reversal is a subject of some doubt. In Virginia it is held that if the right to open and conclude be denied to a party entitled to it, the appellate court will reverse if the verdict is contrary to the evidence, or injury or injustice results therefrom, but not otherwise.<sup>4</sup> In West Virginia it is held that where a party entitled to open and conclude the argument is denied that right, the presumption is that he is prejudiced thereby, and the judgment will be reversed unless it clearly appears that he could not have been prejudiced thereby.<sup>5</sup> The courts elsewhere are divided on the subject, but probably a majority hold that the mere improper denial of the right, is ground for reversal.<sup>6</sup>

### § 293. Number of counsel.

In the absence of statute, the number of counsel who may speak rests in the discretion of the trial court. In Virginia and West Virginia not more than two can speak on the same side unless by leave of the court.<sup>7</sup>

### § 294. Duration of argument.

The duration of the argument is generally determined by the sound discretion of the trial court under all the circumstances of the particular case, subject to review for abuse. In the absence of statute there is no fixed rule as to time. In a case of felony, where seventeen witnesses were examined, it was held that a limit of thirty minutes to a prisoner's counsel was unreasonably short,<sup>8</sup> but in other cases it has been held that one and a half and two hours, respectively, was not an unreasonable

3. Abbott's Civil Trial Brief, Ch. IV; also, p. 395.

4. *Steptoe v. Harvey*, 7 Leigh 501; *Valley Mut. Ins. Co. v. Teewalt*, 79 Va. 427.

5. *Sammons v. Hawvers*, 25 W. Va. 678.

6. Abbott's Civil Trial Brief, 105, ff.

7. Code, § 3386; Code, W. Va., § 3980.

8. *Jones' Case*, 87 Va. 63, 12 S. E. 226.

limit.<sup>9</sup> In West Virginia the argument of each counsel cannot exceed two hours unless by leave, and it is further provided that the court may, in its reasonable discretion, still further limit the time of argument on each side.<sup>10</sup>

### § 295. Reading law books to the jury.

On this subject the cases are in conflict. It was once held in Virginia that it was an unwarrantable restriction upon the legitimate scope of argument, if not a flagrant usurpation, for a trial court to prohibit counsel from referring to and reading from recognized authorities, especially the decisions of the Court of Appeals of this State,<sup>11</sup> but this decision has been overruled, the court saying: "It being the settled rule in Virginia that it is the duty of the court to instruct the jury as to the law, and the duty of the jury to follow the law as laid down by the court, and it being further the prevailing and proper practice, for the court to give its instructions in writing, in advance of the argument, it would seem to follow as a necessary consequence that counsel should be confined, in their argument from legal premises, to the propositions of law embodied in the court's instructions. To allow authorities to be read to the jury from the books would be calculated to confuse and mislead them, and cause them to disregard the court's instructions, and deduce from the books their own idea of the law, which they are not permitted to do. It is often difficult to interpret the language of the books, and a matter of perplexity and doubt to apply the principles involved, or to determine whether the ruling in a given case has any application to the case under trial. These doubts and difficulties are supposed to have been solved by the court, and the law applicable to the particular case deduced from the books, and given to the jury in the form of written instructions. Whatever may be avowed by counsel for the purpose for which authorities are read, that does not obviate the evil effect that would almost cer-

9. *Cunningham's Case*, 88 Va. 37, 13 S. E. 309; *Thompson's Case*, 88 Va. 45, 13 S. E. 304.

10. Code, W. Va., § 3980.

11. *N. & W. R. Co. v. Harman*, 83 Va. 553, 8 S. E. 251.

tainly flow from permitting them to be read. The due and speedy administration of justice, to say nothing of the duty which the court owes to its own self-respect, demands that counsel should be confined in their argument before a jury, from legal premises, to the propositions of law embodied in the court's instructions, and should not be permitted to read authorities from the books."<sup>12</sup> The rule forbidding law books to be read to the jury is held in Virginia, Georgia, California, Michigan, Indiana, and probably other States. In West Virginia, Texas, and other States, the matter rests in the discretion of the trial court. It is said in a West Virginia case, that if the law read be good law and relevant to the case, it is clearly not ground of error; if it be bad law or irrelevant to the case, and calculated to mislead the jury, yet if the court has given instructions correctly stating the law on the subject, it is not reversible error, but in the absence of such instructions it would be.<sup>13</sup> But in this same jurisdiction it was held that, on the trial of an action for damages, it is error for the court to permit counsel for the plaintiff, over the objection of the defendant, to read to the jury on the question of the measure of damages extracts from reported cases showing large damages held not excessive.<sup>14</sup> If instructions have been given, certainly it would seem that the counsel should not be permitted to read authorities to the contrary.

### § 296. Scope of argument.

Counsel may, of course, comment on the evidence, the demeanor of witnesses, their bias, prejudice, relationship, manner of testifying, and the like, and on the failure to put available witnesses of importance on the stand, or to produce available documentary evidence important to a party's case, but they have no right to cast aspersions on a witness not warranted by what has transpired in the case, nor refer to matters not given in evidence, and may, at any time while transgressing, be stopped by oppos-

12. *Newport News v. Bradford*, 100 Va. 231, 240, 40 S. E. 900. See, also, *Alleghany Iron Co. v. Teaford*, 96 Va. 372, 31 S. E. 525; *Ches. & O. R. Co. v. Rowsey*, 108 Va. 632, 640, 62 S. E. 363.

13. *Gregory v. Ohio R. Co.*, 37 W. Va. 606, 16 S. E. 819.

14. *Ricketts v. C. & O. R. Co.*, 33 W. Va. 433, 10 S. E. 801.

ing counsel or the court. While much latitude is allowed in argument, appeals to the sympathy or prejudice of a jury are, as a rule, improper.<sup>15</sup> If improper remarks are made by counsel in his address to the jury, and the opposing party wishes to object to them, the objection should be made at the time, and the court requested to instruct the jury to disregard them, and, unless made at the time, the objection will be deemed to have been waived. Such objections come too late after verdict.<sup>16</sup> Arguments should be concise and to the point. Counsel should confine themselves to the issues made by the pleadings.<sup>17</sup> Generally it is not permissible to read from medical books not given in evidence, or to use maps or diagrams not put in evidence.<sup>18</sup>

If the case be heard on a demurrer to the evidence, the argument of counsel before the jury must be confined to the quantum of damages. Counsel for the demurrant may argue in diminution of damages, but not in bar of the right of recovery.<sup>19</sup> The argument before the court on the hearing of the demurrer, of course, may be in bar of any right of recovery whatever.

15. *So. Ry. Co. v. Simmons*, 105 Va. 651, 55 S. E. 459.

16. *Wickham v. Turpin*, 112 Va. 236, 70 S. E. 514.

17. On the general subject of misconduct of counsel in argument, and the duration of argument, respectively, see notes 9 Am. St. Rep. 559-570; 46 Am. St. Rep. 23-28.

18. 2 Encl. Pl. & Pr. 739, 741.

19. *N. & W. R. Co. v. Harman*, 83 Va. 553, 8 S. E. 251.

## CHAPTER XXXVIII.

### VERDICTS.

§ 297. Different kinds of verdicts.

§ 298. Special verdicts and case agreed.

Case agreed.

§ 299. Definition and rendition of general verdict.

§ 300. Essentials of a general verdict.

1. The verdict must respond to all the issues.
2. The verdict must respond to the whole of each issue.
3. The verdict should not find matters outside of the issues.
4. The verdict must be certain.
5. The verdict must be unanimous.
6. The verdict should be delivered in open court.  
Sealed verdicts.  
Chance verdicts.
7. The verdict should be received and recorded.
8. Verdict should accord with instructions of the court.
9. Verdict should not be excessive.
10. Verdict should not be too small.

Interest.

§ 301. Entire damages on defective counts.

§ 302. Objections to verdicts.

### § 297. Different kinds of verdicts.

Verdicts may be general or special, but, in the absence of statute, the jury may find either at its election. It is not compellable to find a special verdict. A general verdict is a finding for either the plaintiff or the defendant on all the material issues of the case. A special verdict is a finding of *all the facts* necessary to enable the court to determine the cause. No facts can be inferred by the court from those found.<sup>1</sup>

### § 298. Special verdicts and case agreed.

A special verdict, as just pointed out, is a finding of all the

1. 22 Encl. Pl. & Pr. 1013, 839, 891; *Hall v. Ratliffe*, 93 Va. 327, 24 S. E. 1011; *Monticello Bank v. Bostwick*, 77 Fed. 123; *Hodges v. Eastern*, 106 U. S. 408.

facts established by the evidence before the jury. No facts can be inferred by the court from those found. Hence it is not sufficient to find the evidence from which the jury might have inferred facts.<sup>2</sup> The facts being found, however, the court may draw inferences of law from them. If a special verdict fails to find the facts established by the evidence, the proper remedy is for a *venire facias de novo* and not to coerce the jury to find the facts.<sup>3</sup> So, likewise, if a special verdict is so vague and uncertain as not to disclose the merits of the case, a *venire de novo* should be ordered; but where the verdict is certain and unambiguous, and the plaintiff's case appears from it to be defective, judgment must be given for the defendant.<sup>4</sup> In finding a special verdict, the jury in their verdict say: "We the jury find such and such facts," stating them, and then concludes to the following effect, "that they are ignorant in point of law on which side they ought, upon these facts, to find the issue, and that if, upon the whole record, the court should be of opinion that the issue is proved for the plaintiff, they find for the plaintiff accordingly, and assess his damages at such a sum, but if the court be of an opposite opinion, then they find for the defendant." This form of finding is called a special verdict. The jury, however, really have very little to do with the preparation of the special verdict. When it is agreed between counsel that a special verdict is to be given, the jury merely declare their opinion as to any fact remaining in doubt, and then the verdict is drawn up by counsel without further interference from the jury. "It is settled, under the correction of the judge, by the counsel and attorneys on either side, according to the state of facts as found by the jury, with respect to all particulars on which they have delivered an opinion, and with respect to other particulars according to the state of facts which it is agreed that they *ought* to find upon the evidence before them. The special verdict, when its form is thus settled, is, together with the whole proceedings on the trial,

2. *Brown v. Ralston*, 4 Rand. 504.

3. *Pittsburg R. Co. v. Montgomery*, 152 Ind. 1, 49 N. E. 582, 71 Am. St. Rep. 301.

4. Min. Inst. 925; *Brown v. Ferguson*, 4 Leigh 37.

then entered *on record*; and the question of law arising on the facts found is argued before the court in bank, and decided by that court, as in case of demurrer. If the party be dissatisfied with their decision, he may afterwards resort to a court of error."<sup>5</sup> As already stated, the jury are not bound to find a special verdict, hence the parties cannot insist upon it, and, if they are unwilling to find a special verdict, the party objecting is forced either to demur to the evidence, or to ask a hypothetical instruction covering the case, or else, if the counsel can agree upon it, to state a case agreed. Sometimes a party is unwilling to risk a demurrer to evidence, and resorts to a special verdict to refer a legal question to the court in much the same way that it would be referred on a demurrer to evidence. It will be observed that the special verdict is made a part of the record just as a general verdict is.

*Case Agreed.* A case agreed is also called a special case, or a general verdict subject to a special case. All three terms are used to designate the same thing. A special case is a written statement of all the facts in the case drawn up for the opinion of the court by counsel on both sides under the supervision of the trial judge, and is very similar to a special verdict. It is, as stated, the agreement of counsel on both sides as to what the facts of the case are, signed by counsel, and referring to the court the question of law arising thereon. Like a special verdict, no facts are considered except those that are agreed. No inferences of fact from the facts agreed are permissible.<sup>6</sup> Of course there can be no such thing as a case agreed except in a pending action, as parties cannot agree upon a state of facts out of court and bring them into the court for decision, except in some pending action. A special case, however, may be agreed at any time before or after the issues have been made up. If the case is agreed before the defendant pleads, the agreement cures the want of a plea, and the cause is submitted to the court upon the agreed facts without reference to any particular issue, and the court decides upon the whole case as submitted as to what

5. Stephen's Pleading, § 125.

6. *Sawyer v. Corse*, 17 Gratt. 230.

the judgment should be, but if the agreement is made after issue joined the decision is restricted to the issue.<sup>7</sup> It is said that a special case is not (like a special verdict) entered on record, and consequently a writ of error does not lie to the decision,<sup>8</sup> but no such distinction is made in Virginia. A case agreed is entered of record just as a special verdict is, and a writ of error lies to the decision in the same manner. In Virginia a case agreed is a substitute for a special verdict, and subject to like rules.<sup>9</sup> In a case agreed, counsel, as stated, agree upon the facts and write out and sign a statement containing the facts, substantially as follows: "We agree that (here set out the facts). We further agree that if, upon the foregoing statement of facts the plaintiff is entitled to recover, then the judgment shall be entered for him for (here insert the judgment. If for money, state the amount.) But if the law upon the whole matter be for the defendant, then judgment shall be rendered for the defendant."<sup>10</sup> Sometimes the parties differ as to what fact or facts are established by the evidence. They probably agree upon most of the facts, but there are one or more points or facts, upon which they disagree. These have to be submitted to the jury for their determination and settlement. The jury (after hearing argument, if desired) retire and consider these points, and when they have agreed, they report their determination in open court, and the counsel then write out the special verdict containing all *the facts found*, and one of the jury signs it as the verdict of the jury and it is so recorded. It is only when the parties cannot agree upon the facts that a special verdict is necessary. If they could agree the facts, they would simply write out "a case agreed," and thus save the delay and expense of a special verdict.

### § 299. Definition and rendition of general verdict.

In the chapter on Juries, the oath of a juror in a civil case is given. This defines fairly well the duty of the jury, but, as here-

7. Sawyer *v.* Corse, *supra*.

8. Stephen's Pl., § 125.

9. Sawyer *v.* Corse, 17 Gratt. 230.

10. Slaughter *v.* Greene, 1 Rand. 3.

inbefore pointed out,<sup>11</sup> where issues are joined, the jury which tries the issues also assesses such damages as are to be assessed in the case. In civil cases they decide according to the preponderance of the evidence, and, in the absence of all evidence, or in a case so doubtful that they cannot determine for whom to find, the verdict should be against the party having the burden of proof. Unless otherwise provided by statute, the verdict must be unanimous. A verdict is the finding of a jury on one or more questions of fact submitted to its determination. It is generally in writing, and properly should be so, but in the absence of statute need not be. A verdict is what is entered of record as a verdict, and not merely what the jury says it is. In case of a variance between the verdict as written out and the verdict entered of record, the record, if incorrect, could probably be corrected by reference to the written verdict under provisions of statute.<sup>12</sup> But until corrected, the verdict *as recorded* is the verdict of the jury. If the record shows a verdict rendered in open court, it is immaterial, even in a criminal case, that the verdict is not signed.<sup>13</sup>

### § 300. Essentials of a general verdict.

1. *The Verdict Must Respond to All the Issues.*—A general finding for the defendant is sufficient, and if the defendant succeeds on any issue it is usual to find for him generally. Where, in an action of assumpsit on an open account, the pleas were *non assumpsit* and the statute of limitations, a general verdict for the plaintiff assessing his damages was held to be responsive to all the issues.<sup>14</sup> In an action of tort against several defendants for an alleged joint trespass, although they *severally* plead not guilty, there is but one issue submitted to the jury, and a general finding in favor of the plaintiff, without naming the defendants, is a finding against all of the defendants.<sup>15</sup>

11. *Ante*, § 181, note 14.

12. Code, § 3451.

13. *Wood v. Com.*, 86 Va. 933, 11 S. E. 799; *Hall v. Com.*, 89 Va. 171, 15 S. E. 517.

14. *Hansbrough v. Neal*, 94 Va. 722, 27 S. E. 593. See, also, *Black v. Thomas*, 21 W. Va. 709.

15. *Fishburne v. Engledove*, 91 Va. 548, 22 S. E. 354.

In an action against several for a single wrong where there is no personal defence set up by any one, but all unite in one plea of not guilty, the verdict should be for the amount due by the most culpable and for a single amount. If the jury severs in its verdict, no judgment can be properly entered thereon, and a *venire de novo* is necessary, but the plaintiff may elect to take judgment as to one and dismiss as to the others, in which event no *venire de novo* need be awarded. The jury should make a single assessment of damages against all liable.<sup>16</sup>

2. *The Verdict Must Respond to the Whole of Each Issue.* If, in an action against two obligors, one dies, and the action abates as to him and the other pleads payment, and there is a verdict that the surviving defendant has not paid the debt in the declaration mentioned, this is not responsive to the whole issue.<sup>17</sup> So in detinue, if the verdict is silent as to some of the goods claimed, or fails to fix values to others, the verdict would be bad at common law, and a *venire de novo* would be necessary, but in Virginia it is provided that if no verdict be found for part of the goods, the plaintiff shall be barred of his title to the things omitted, and if the verdict omit the price or value, the court may at any time have a jury impanelled to ascertain the same.<sup>18</sup> So also in a joint action against two tortfeasors, where there is a joint plea of not guilty, a verdict against one, making no mention of the other, is equivalent to a verdict in favor of the other. The verdict in such case does respond to the whole of the issue.<sup>19</sup>

3. *The Verdict Should Not Find Matters Outside of the Issues.*—It is not within the commission of the jury as prescribed by their oaths to find matters outside of the issues. The parties have not come prepared to meet such matters, and the excess beyond the issues will be treated as surplusage. Where, in an action of detinue for three slaves, the verdict found for the plaintiff but further found that one of the slaves had died since the

16. *Crawford v. Morris*, 5 Gratt. 90.

17. *Triplett v. Micou*, 1 Rand. 269.

18. Code, § 2912.

19. *Ivanhoe Furnace Corp. v. Crowder*, 110 Va. 387, 66 S. E. 63.

action was brought, the court held the latter finding outside of the issue, and, treating it as surplusage, directed judgment to be entered for all the slaves, or their alternate value.<sup>20</sup>

4. *The Verdict Must Be Certain.*—It should be certain as to (1) parties, (2) specific property, (3) estate in the property, (4) the amount of recovery, etc. Where there are two defendants in an action of tort, but the record fails to disclose any connection whatever of one of the defendants with the wrong complained of, and the whole inquiry at the trial was directed to the liability of the other defendant, a verdict simply finding “for the defendant” is decisive of the case. The reasonable intendment is that “defendant” was unintentionally used for “defendants” and a *venire de novo* should not be awarded on account of the uncertainty of the verdict. A verdict should not be set aside for the mere want of form in its wording when the meaning of the jury can be satisfactorily gathered from the verdict.<sup>21</sup> As to the certainty of description of property and estate, this is generally regulated by statute, as is hereinbefore pointed out,<sup>22</sup> with reference to verdicts in ejectment and detinue. In connection with verdicts in ejectment, it should have been stated that it has been held in Virginia that “where the declaration charges that the plaintiff owned a fee simple title to the land, a verdict finding the defendant ‘guilty in manner and form as the plaintiff in his declaration hath complained,’ is a sufficient finding of a fee simple title in the plaintiff, though informal.<sup>23</sup> A similar verdict in West Virginia, under these circumstances is held not to be good, though the statute is substantially the same as the Virginia statute.<sup>24</sup>

*Amount.*—A finding for the plaintiff “nominal damages,” without stating the amount, is bad for uncertainty,<sup>25</sup> and so is a gen-

20. *Austin v. Jones, Gilmer* 341. See, also, *Martin v. Ohio River Co.*, 37 W. Va. 349, 16 S. E. 589.

21. *Adamson v. Norfolk Cò.*, 111 Va. 556, 69 S. E. 1055.

22. *Ante*, §§ 125, 133.

23. *Hawley v. Ferguson*, 24 Gratt. 516.

24. *Low v. Settle*, 22 W. Va. 389; *Oney v. Clendennin*, 28 W. Va. 34; overruling *Elliott v. Sutor*, 3 W. Va. 37.

25. *Sellers v. Mann*, 113 Ga. 643, 39 S. E. 11.

eral finding for the plaintiff in an action for unliquidated damages, which specifies no amount;<sup>26</sup> and so of a finding in favor of a plaintiff for "fifty acres of land where the dwelling house now stands."<sup>27</sup> But where the defence was offsets, a verdict, "We the jury find for the plaintiff and assess his damage at \$805.55, with interest from August 5, 1893, and on the offsets claimed by the defendant we find for the defendant and assess his damages at \$204.66 with interest from Aug. 5, 1893," was held sufficiently certain and upheld.<sup>28</sup> The verdict of a jury, however, which necessarily disposes of all the issues in the case is sufficient, although it may not respond specifically to each several issue or fact presented by the pleadings. For instance, where the defendant in *assumpsit* pleads payment and files a list of set offs exceeding in amount the plaintiff's demand, and the verdict finds for the defendant simply a gross sum, such verdict must be interpreted as finding that the set off of the defendant exceeded the amount to which the plaintiff was entitled by the sum so found, and the verdict is therefore not ambiguous or uncertain.<sup>29</sup>

5. *The Verdict Must Be Unanimous.*—Although unanimous in the jury room, any juror may withdraw his assent at any time before his verdict is delivered in open court and the jury discharged.<sup>30</sup> In some jurisdictions, a verdict may be rendered by less than all of the jury.

6. *The Verdict Should Be Delivered in Open Court.*—Verdicts delivered to the judge during recess, by consent, are called *privy* verdicts, and require subsequent ratification in open court. They have not been generally adopted in this country, and are not allowed in Virginia.<sup>31</sup>

26. *City of Washington v. Calhoun*, 103 Ga. 675, 30 S. E. 434.

27. *Lee v. English*, 107 Ga. 152, 33 S. E. 39.

28. *Smith v. Packard*, 94 Va. 730, 27 S. E. 586. See, also, *Messick v. Thomas*, 84 Va. 891, 6 S. E. 482; *Benn v. Hatcher*, 81 Va. 25; *Slocum v. Compton*, 93 Va. 374, 25 S. E. 3.

29. *Black v. Thomas*, 21 W. Va. 709.

30. 43 L. R. A. 33.

31. 22 Encl. Pl. & Pr. 1003; *B. & O. v. Polly, Woods & Co.*, 14 Gratt. 447.

*Sealed Verdicts* are allowed in many jurisdictions when the jurors agree during an adjournment or recess of the court. They write out their verdict, seal it and deliver it to the clerk, and then disperse to reassemble at a later time and confirm it. Upon reassembling, one or more of the jurors may dissent. If they do, the courts are divided as to whether a new trial should be granted, or the jury be sent back to their rooms to consider further of their verdict.<sup>32</sup> Upon a sealed verdict, where one of the jurors is unable to attend the opening of the verdict by reason of sickness, a judgment entered on such a verdict is *not a nullity*, but only an irregularity to be corrected by a direct proceeding for that purpose.<sup>33</sup>

If upon opening a sealed verdict one juror dissents (although he had previously assented), but the verdict is such as the court might *with propriety have directed* in the first instance, it is not error to refuse to send the jury to their rooms and to enter a judgment on the verdict.<sup>34</sup> In those jurisdictions where sealed verdicts are allowed it generally rests in the discretion of the trial court to say whether it will be allowed in that particular case or not.

In *U. S. v. Ball*, 163 U. S. 662, 670-1, it is said that the reception of a verdict and discharge of the jury is but a ministerial act, involving no judicial discretion, or that it is an act of necessity, and hence may be done on *Sunday*, but that no judgment thereon can be rendered on that day.

In Virginia it is held that "parties cannot by consent authorize a jury to render their verdict to the clerk in the absence of the judge, and be discharged. And if a verdict is thus rendered and the jury discharged, it is no verdict."<sup>35</sup> In Virginia verdicts can only be rendered in open court, and as the court cannot sit on Sunday, no verdict can be rendered on that day.<sup>36</sup> In a large number of the states, including Alabama, Florida,<sup>37</sup> Geor-

32. 22 Encl. Pl. & Pr. 1009, 1010.

33. *Humphries v. District of Columbia*, 174 U. S. 190.

34. *Grimes Dry Goods Co. v. Malcolm*, 164 U. S. 483.

35. *B. & O. v. Polly, Woods & Co.*, 14 Gratt. 447.

36. See, *Lee v. Willis*, 99 Va. 16, 37 S. E. 826.

37. *Hodge v. State*, 29 Fla. 500.

gia, Illinois, Indiana, Kentucky, New York, New Jersey, North Carolina, Pennsylvania, and Texas, sealed verdicts are allowed to be rendered on Sunday.<sup>38</sup>

A court has no right to coerce a verdict, but the jury should be left free and untrammelled in all respects by the court. Threats of keeping them together until they agree are not to be made, and, if persisted in, will avoid the verdict.<sup>39</sup>

*Chance Verdicts.*—Verdicts should be the deliberate findings of juries. If the jury casts lots for the verdict it is no verdict, but what is called a *chance verdict*. So, if they are unable to agree upon amounts, and *agree in advance* that each juror shall put down his figures and that the aggregate, divided by the whole number of the jury, shall be the verdict, the verdict is bad. But if the process be purely tentative, and *after the result is ascertained* they agree on that sum for a verdict, it is good. The latter is called a *quotient verdict*.<sup>40</sup>

7. *The Verdict Should Be Received and Recorded*—“A verdict is not complete and valid until it is rendered in open court by the jury, and received and *recorded* by the clerk.”<sup>41</sup> The verdict as recorded is, as a rule, *the* verdict. If there is a variance the recorded verdict will, as a rule, prevail.<sup>42</sup> The court may direct amendments of *mere form*, but *not of substance*, and when amended it should be read to the jury, and their assent be obtained.<sup>43</sup>

8. *Verdict Should Accord with the Instructions of the Court.* A large number of the states, probably the majority, hold that although an instruction be wrong, a verdict which is contrary to the instruction should be set aside. In other words, although the verdict be right, if in conflict with an erroneous instruction,

38. 20 Encl. Pl. & Pr. 1194.

39. *Buntin v. Danville*, 93 Va. 200, 24 S. E. 830.

40. *Watson v. Reed*, 15 Wash. 440, 55 Am. St. Rep. 899; *Abbott's Civil Trial Brief*, 525; *Hank v. Allen* (Ind.), 11 L. R. A. 706; *Consolidated Ice Mach. Co. v. Trenton Ice Co.*, 57 Fed. Rep. 898; *Wash. Luna Park Co. v. Goodrich*, 110 Va. 692, 66 S. E. 977, and cases cited.

41. *B. & O. v. Polly, Woods & Co.*, *supra*.

42. 22 Encl. Pl. & Pr. 938-9.

43. *Porterfield v. Com.*, 91 Va. 801, 22 S. E. 352.

it should be set aside, as it would tend to degrade the judiciary and unhinge the whole system of the administration of justice to allow juries to overrule the trial court on the legal question involved. It is said that, so far as the jury are concerned, there is no such thing as the charge of the judge being contrary to law, because whatever may be his charge is law to them, that the instruction is binding on the jury, and they can no more be permitted to look beyond the instructions to ascertain the law than they would be allowed to go outside of the evidence to find the facts of the case. To allow the jury to find a verdict in conflict with the instructions of the court would make them, and not the court, the judges of the law of the case.<sup>44</sup> In Virginia, West Virginia, Illinois, and other States, a different doctrine is held, and a verdict which is correct will not be set aside simply because in conflict with an instruction which is erroneous.<sup>45</sup>

9. *Verdict Should Not Be Excessive.*—If the verdict is excessive (i. e., in excess of what the party is entitled to, though not in excess of what he claims) the excess may be voluntarily released or the court may put the successful party on terms to release a part or else submit to a new trial, or it may be released by the trial court within three years on motion after reasonable notice in writing; or, if there is no other objection to the verdict except that it is too large, and the record clearly points out what the excess is so that judgment may be safely entered for the correct amount, the trial court, it would seem, may enter up judgment for the correct amount, and if it fails to do so, the appellate court may correct the error and enter up final judgment for the correct amount.<sup>46</sup> Where a verdict is excessive and a mo-

44. *Dent v. Bryce*, 16 S. C. 1; *Fla. R. Co. v. Rhodes*, 25 Fla. 40, 5 South. 633; *Emerson v. Santa Clara County*, 40 Cal. 543; *Abbott's Civil Trial Brief*, p. 506.

45. *Richmond & D. R. Co. v. Medley*, 75 Va. at p. 503; *Collins v. George*, 102 Va. 509, 46 S. E. 684; *Watts v. N. & W. R. Co.*, 39 W. Va. 196, 19 S. E. 521; *West Chicago R. Co. v. Manning*, 170 Ill. 417, 48 N. E. 958.

46. *Buena Vista Co. v. McCandlish, etc.*, 92 Va. 297, 23 S. E. 781; *Fry v. Stowers*, 98 Va. 417, 36 S. E. 482; *N. & W. Ry. Co. v. Neeley*, 91 Va. 539, 22 S. E. 367; *Aultman v. Gay*, 108 Va. 647, 62 S. E. 946; *McIntyre v. Smith*, 108 Va. 736, 62 S. E. 930; Code, § 3451. See, also, *Abbott's Civil Trial Brief*, 520 et seq.; note 14 L. R. A. 677.

tion is made to set it aside on that ground, several courses are open to the trial court as indicated just above. It may either (1) set aside the verdict for that reason, or (2) where the record plainly discloses the amount of the excess, and it may be safely done, enter up judgment for the correct amount, or (3) if the record is not in such condition, and yet the verdict is excessive, it may say to the successful party, "unless you will release the excess, I will grant a new trial." This is called *putting the successful party on terms*. As a general rule, no writ of error lies in either case until after the new trial, if one has been had, and a final judgment has been entered. If the successful party accepts the reduction, and takes judgment for the reduced amount, he cannot, in the absence of statute, except because put on terms.<sup>47</sup> If he desires to except, he must decline to allow the verdict to be thus reduced. If the verdict is set aside, the party whose verdict is set aside may except, and after the new trial is had apply for a writ of error to test the correctness of the ruling of the trial court in setting aside the first verdict. If not set aside, the other party may except and apply for a writ of error as soon as judgment is rendered.<sup>48</sup> In West Virginia it is provided by statute<sup>49</sup> that in any civil case where there is an order granting a new trial or rehearing, an appeal may be taken from the order without waiting for the new trial or rehearing to be had. In Virginia it is provided "that in any action at law in which a circuit or corporation court or other law court of record shall require a plaintiff to remit a part of his recovery, as ascertained by the verdict of a jury, or else submit to a new trial, such plaintiff may remit and accept judgment of the court thereon for the reduced sum under protest, but, notwithstanding such remitter and acceptance, if under protest, the judgment of the court in requiring him to remit may be reviewed by the Supreme Court of Appeals upon a writ of error awarded the plaintiff as in other ac-

47. It is not necessary that the losing party should consent to the remittur. *James River Co. v. Adams*, 17 Gratt. 435; 2 Anno. Cas. 675.

48. *Buena Vista Co. v. McCandlish*, *supra*; *Fry v. Stowers*, *supra*; *Lynch. Tel. Co. v. Booker*, 103 Va. 594, 50 S. E. 148.

49. W. Va. Code, § 4038 (9).

tions at law; and, in any such case in which a writ of error is awarded the defendant, the judgment of the court in requiring such remitter may be the subject of review by the Supreme Court of Appeals, upon a cross appeal by the plaintiff, as in other actions at law."<sup>50</sup> It would seem from this statute that where the matter is pecuniary, the amount remitted must be not less than \$300, in order to give the Court of Appeals jurisdiction on application of the party whose verdict is reduced, as the review is to be had "as in other actions of law."

Where there is no legal measure of damages, the rule is believed to be without exception that the verdict of the jury cannot be set aside unless it is so grossly excessive (or inadequate) as to indicate that the jury has been actuated by prejudice, partiality, or corruption, or that they have been misled by some mistaken view of the merits of the case.<sup>51</sup> Where a motion was made to set aside as excessive a verdict of \$15,000 for the loss of an arm, the court said: "It is true that \$15,000 is a larger verdict than we usually encounter as an award of damages for the loss of an arm; but this furnishes no warrant for our interference with the finding. The question to be considered is not whether this court, if acting in the place of the jury, would give more or less than the amount of the verdict, but whether the damage awarded by the jury is so large or so small as to indicate that the jury has acted under the impulse of some undue motive, some gross error, or misconception of the subject. There is no rule of law fixing the measure of damages in such cases, and it cannot be reached by any process of computation. It is, therefore, the established rule, settled by numerous decisions extending from *Farish & Co. v. Reigle*, 11 Gratt. 697, 62 Am. Dec. 666, to the recent case of *N. & W. Ry. Co. v. Carr*, 106 Va. 508, 56 S. E. 276, that this court will not disturb the verdict of the jury, unless the damages are so excessive as to warrant the be-

50. Acts 1906, p. 251; 3 Va. Code, §§ 657, 658.

51. *Norfolk & W. R. Co. v. Shott*, 92 Va. 34, 22 S. E. 811; *Ches. & O. R. Co. v. Harris*, 103 Va. 635, 49 S. E. 997; *So. Ry. Co. v. Smith*, 95 Va. 187, 28 S. E. 173; 14 Encl. Pl. & Pr. 756. Where the verdict is the result of prejudice or passion, it cannot be rendered valid by remitting the excess. 3 Anno. Cas. 939.

lief that the jury must have been influenced by partiality or prejudice, or have been misled by some mistaken view of the merits of the case."<sup>52</sup> And, in a West Virginia case, it was held that a verdict for \$18,000 for breaking the plaintiff's leg, whereby she was unable to walk for four months and suffered great pain and was put to considerable expense would not be set aside as excessive.<sup>53</sup> Where there is no legal measure of damages, but the verdict is plainly excessive the court may put the successful party on terms to release what it regards as excessive, although there is no standard by which the excess can be measured. The court simply exercises its best judgment as to what is right under the circumstances of the case, subject to review for error committed.<sup>54</sup> But the court cannot act arbitrarily. The assessment of damages is peculiarly the province of the jury, and when the question before the jury is merely as to the *quantum* of damages to which the plaintiff is entitled, and there is evidence to sustain the verdict, no mere difference of opinion, however decided, can justify an interference with the verdict for that cause. Whether the jury has been so influenced or not is to be determined from the evidence in the case alone, taken in connection with the verdict. No extraneous evidence on the subject can be received.<sup>55</sup> If the trial court sets aside a verdict as excessive, and on a subsequent trial the verdict is materially reduced in amount, or is found for the opposite party, the appellate court will take into consideration the fact that some discretion is vested in the trial court in granting or refusing new trials.<sup>56</sup>

The amount of damages given by a verdict should not exceed the damages claimed in the writ and declaration, but this restriction is confined to the principal of recovery, that is to say, if the damages laid in the declaration are large enough to cover the prin-

52. *So. Ry. Co. v. Smith*, 107 Va. 553, 560, 49 S. E. 372.

53. *Sheff v. Huntington*, 16 W. Va. 309. As to excessive damage, see note 16 Anno. Cas. 8; 18 Anno. Cas. 1209.

54. *N. & W. R. Co. v. Neeley*, 91 Va. 539, 22 S. E. 367; *Hoffman v. Shartle*, 113 Va. —, 74 S. E. 171.

55. 14 Encl. Pl. & Pr. 760.

56. *Cit. Bank v. Taylor*, 104 Va. 164, 51 S. E. 159.

cial of the damages allowed by the verdict it is sufficient.<sup>57</sup> But if there is such excess in the verdict, and judgment is rendered therefor by the trial court, it has been held that no writ of error lies unless such *excess* is within the jurisdictional amount of the appellate court.<sup>58</sup> In order to sustain a verdict for damages, it is not necessary that the damages should be laid in the *ad damnum* clause of the declaration, although that would be the better form of pleading. A declaration in an action, even though sounding in damages, is not demurrable because it does not state the amount of damages claimed in the form of an averment. It is sufficient if the damages claimed appear in any part of the declaration. For instance, it has been held sufficient where in the opening statement of the declaration the plaintiff complained of the defendant "who has been summoned to answer the plaintiff on a plea of trespass on the case to recover against him the sum of \$10,000 damages."<sup>59</sup>

10. *The Verdict Should Not Be Too Small.*—In Virginia it is provided by statute<sup>60</sup> that "a new trial may be granted as well where the damages are too small as where they are excessive." The same rule with reference to setting aside the verdict of a jury when there is no legal measure of damages applies where the damages are too small as are applied where the damages are excessive, and if it appears that the verdict was induced by prejudice or passion it will be set aside. Where the jury gave a young girl of good character a verdict for "\$5 and costs" for slander upon her chastity, it was set aside by the Court of Appeals as inadequate because indicating passion or prejudice.<sup>61</sup> The rule is probably otherwise in England, but in the States generally it is held that if there is any fixed standard of measurement, and this has been plainly ignored or violated by the jury to the prej-

57. *Ga. Home Ins. Co. v. Goode*, 95 Va. 750, 30 S. E. 366. As to the effect of a verdict for damages in excess of the amount laid in the declaration see *ante*, § 88, pp. 145, 146.

58. *Gibboney v. Cooper*, 57 W. Va. 74, 49 S. E. 939.

59. *Jenkins v. Montgomery* (W. Va.), 72 S. E. 1087.

60. Code, § 3392.

61. *Blackwell v. Landreth*, 90 Va. 748, 19 S. E. 791. As to inadequacy of verdict, see note, 8 Anno. Cas. 903; 17 Id. 1073; 20 Id. 879.

udice of a party, he may have the verdict set aside for inadequacy of the amount allowed.<sup>62</sup> In slander, libel, malicious prosecution, trespass *vi et armis*, and the like, there is no fixed standard, and unless it appears in some way that the jury has been actuated by improper motives, or have been misled, or have grossly misconceived the law, the verdict will be permitted to stand.

*Interest.*—At common law, interest was not allowed, but it is now generally provided by statute that all judgments shall bear interest from date, where the verdict is silent on the subject. In Virginia, the jury is permitted, in actions of tort, as well as contract, to allow interest and fix the date from which it is to run, and if a verdict is rendered which does not allow interest, the sum found bears interest from the date of the verdict.<sup>63</sup> On a promise to pay money at a given day, interest runs from that day as an incident of the debt, and neither courts nor juries can deprive the creditor of it. If the creditor is absent from the country (out of the State), when the debt falls due and has no agent to receive it, or if the debtor and creditor are on opposite sides of hostile lines, interest does not run during that period, but the burden of proof is always on the debtor to show that he is not to pay interest.<sup>64</sup> A promise to pay money after date with interest is a promise to pay interest from date,<sup>65</sup> and if the promise is to pay extraordinary interest from date, it is held in probably a majority of the States that the extraordinary interest continues after maturity until payment. This rule prevails in Florida, Mississippi, Missouri, North Carolina, Tennessee, Texas, West Virginia, and other States. But only the legal rate after maturity is allowed in the United States courts, Arkansas, Alabama, Connecticut, Kentucky, Pennsylvania, Rhode Island, South Carolina, and other States. If the contract is for *less* than the legal rate, then after maturity probably a majority of the States

62. Abbott's Civil Trial Brief, 521, ff.

63. Lewis *v.* Arnold, 13 Gratt. 454; Fry *v.* Leslie, 87 Va. 269, 12 S. E. 671; Code. § 3390.

64. Roberts *v.* Cocke, 28 Gratt. 207; McVeigh *v.* Howard, 87 Va. 599, 605, 13 S. E. 31; 4 Min. Inst. 909.

65. Cecil *v.* Hicks, 29 Gratt. 1; Evans *v.* Rice, 96 Va. 50, 30 S. E. 463; Cromwell *v.* Sac County, 96 U. S. 51.

hold that the legal rate prevails until payment. This doctrine is held in Alabama, Maryland, Mississippi, New York, Pennsylvania, South Carolina, Wisconsin and other States. In some States the subject is regulated by statute, as in California, Kansas and Kentucky.<sup>66</sup> In Virginia the question has not been adjudged, nor can it be settled by analogy to the holdings in other States, as there is no uniformity about their holdings where the contract is to pay more or less than the legal rate. Where the contract is to pay a greater rate, the debtor can always relieve himself by paying the debt and getting rid of the excessive rate of interest, and it would be to his interest to do so, whereas if the contract is for less than the legal rate, it is greatly to the interest of the debtor not to pay, and he has no inducement to do so, and the contract on the part of the creditor to accept less than the usual rate is generally induced by temporary conditions, and the ability of the creditor to collect his money either on demand or upon short notice. It would not seem, therefore, to be inconsistent to declare that if the contract is for a greater rate that rate shall continue until payment, and if for a less rate, the legal rate should prevail after demand of payment. This would seem to reach the justice of the situation.

It is held in some jurisdictions that the state legislature may reduce or take away interest on judgments previously rendered. It is said that this is not interest in a strict sense, but damages for detention, that such a law, though retrospective, does not impair the obligation of the contract, nor deprive the creditor of due process of law.<sup>67</sup> The rule is otherwise in Virginia<sup>68</sup> and the better reasoning would seem to indicate that it is otherwise on principle.<sup>69</sup> In Virginia the interest cannot be abated after having been once reduced to judgment.<sup>70</sup> The Virginia doctrine is that, in contracts for the payment of money, interest is not al-

66. 16 Am. & Eng. Encl. Law (2nd Ed.) 1058-9; 6 Va. Law Reg. 655, ff.

67. *Read v. Mississippi County*, 69 Ark. 365, 63 S. W. 807, 86 Am. St. Rep. 202; *Morley v. Lake Shore Ry. Co.*, 146 U. S. 162.

68. *Roberts v. Cocke*, 28 Gratt. 207.

69. *Ratcliffe v. Anderson*, 31 Gratt. 105.

70. *Rowe v. Hardy*, 97 Va. 674, 34 S. E. 625.

lowed as damages, but as an incident to the debt, and neither courts nor juries have any discretion to refuse it.<sup>71</sup>

There is much conflict of authority as to the time from which interest will run on money paid by mistake. Generally, he who has the use of another's money must pay interest on it from the time he receives it until he repays it, unless there is an agreement, express or implied, to the contrary; but, according to the better rule, where money has been paid or received under a mutual mistake of fact, and no fraud or improper conduct can be imputed to the party receiving it, interest will not be allowed except from the time when the mistake was discovered and repayment demanded.<sup>72</sup>

### § 301. Entire damages on defective counts.

At common law, if there was a general verdict for the plaintiff on a declaration containing several counts, one of which was bad, and entire damages were given, it was necessary to arrest the judgment, as the court could not tell on which count the verdict was founded, or how much was founded on one count and how much on another, and it could not apportion the damages. At an early period, prior to 1807, this rule of the common law was changed by statute, which provides: "Where there are several counts, one of which is faulty, the defendant may ask the court to instruct the jury to disregard it; yet, if entire damages be given, the verdict shall be good."<sup>73</sup> By entire damages is meant a lump sum for all the causes of complaint set forth in the declaration, without anything in the verdict to indicate how, if at all, these damages were apportioned by the jury between the several counts. Apparently, therefore, if a plaintiff sues for a single cause of action, and sets it forth in two or more counts in his declaration, or for two or more wrongs in the same declaration, and sets forth each wrong in a separate count, one or more of which counts, in each case, is bad, yet "if entire damages be given, the verdict shall be good." This statute first

71. *Tidball v. Bank*, 100 Va. 741, 42 S. E. 867.

72. *Hall v. Graham*, 112 Va. 560, 72 S. E. 105.

73. 1 Rev. Code (1819), p. 512, § 104; Code (1904), § 3389.

came under review in 1807.<sup>74</sup> In that case there was a general demurrer to the declaration as a whole, and not to the separate counts. The defendant had the right to demur to each count separately, as each count is regarded as a separate declaration,<sup>75</sup> but he did not choose to do this. He demurred simply to the declaration as a whole. At one time the effect of such a demurrer was to strike out the bad counts and leave the good intact,<sup>76</sup> but this practice was soon departed from, and the established doctrine at common law and in Virginia from the earliest day has been that if a declaration contained several counts, and the demurrer was to the declaration as a whole, the demurrer was overruled, because the effect of the demurrer was to state that nowhere in the declaration had a case been stated, and if a case was stated anywhere in the declaration, the demurrer was bad.<sup>77</sup> In the case cited in the margin, there was no bill of exception setting out the evidence, nor any demurrer to the evidence, and hence the evidence was not made a part of the record, and the court could not see whether the evidence at the trial was applicable to the bad counts or the good, and inasmuch as the defendant had not availed himself of the above statute, the verdict was upheld in accordance with the very terms of the statute. The question is discussed at some length in the seriatim opinions of the judges. The matter was again the subject of discussion in 1827;<sup>78</sup> but here again the demurrer was to the declaration as a whole, and the holding in *Roe v. Crutchfield* was adhered to. The statute again came under review in 1836.<sup>79</sup> Here the subject was discussed at some length by counsel in argument and by the judges in their opinions, and again *Roe v. Crutchfield* was affirmed. In this case, also, there was an original declaration containing four counts, three of which were regarded bad, and there was a demurrer to the declaration as a whole. The demurrer was overruled, but the

74. *Roe v. Crutchfield*, 1 H. & M. 361.

75. *Roe v. Crutchfield*, *supra*.

76. *Godfrey's Case*, 11 Coke 45a.

77. *Ante*, § 202, and cases cited.

78. *Cook v. Thornton*, 6 Rand. 8.

79. *Power v. Ivie*, 7 Leigh 147.

plaintiff, not being satisfied with his declaration, substituted a new declaration for it containing eleven counts, all of which were regarded by the appellate court as bad except one, but the demurrer was to the declaration as a whole, and not to each count thereof, so that there was involved the same question as in the case first cited, and it was held that, as the defendant had not availed himself of the statute, the verdict would be upheld, although the appellate court held that ten of the counts in the declaration were bad and only one good; the trial court having overruled the demurrer as to all the counts. The judges delivered seriatim opinions, and Judge Brockenbrough, discussing the demurrer to the original declaration, and treating it as still in the case, in the course of his opinion says: "No injury was done to the defendant by overruling the demurrer, considering it as a demurrer *to each* of the three counts, because there was one good count, which it appears the plaintiff supported by his proofs." This was wholly unnecessary to the decision of the case, as it is followed immediately by the statement that even if he was wrong in this view, yet on the amended declaration the verdict would have to be sustained because the demurrer was to the declaration as a whole.<sup>80</sup> From that time until now (three-quarters of a century) the statute has not been noticed by the bar, nor mentioned by the court.

There is a corresponding statute, however, applicable to criminal cases, which has been construed. Section 4045 of the Code declares: "Where there are several counts in an indictment or information, and a general verdict of guilty is found, judgment shall be entered against the accused, if any count be good, though others may be faulty, but on the trial the court, on motion of the accused, may instruct the jury to disregard any count that is faulty." This statute was first enacted at the general re-

80. The court paid the following *compliment* to counsel in the trial court: "This record certainly exhibits but a poor specimen of skill in pleading. Here are fifteen counts in a declaration in a plain action of assumpsit, the greater part of which are so defective that they will not stand the test of a general demurrer. Yet the defendant's attorney was not adroit enough to avail himself of the defects and has sustained a defeat in the court below, and I do not think this court can help him."

vision of the criminal laws of Virginia in 1848. It had been previously held that as the jury fixed the penalty in Virginia, the verdict in such case should be set aside as it could not be told on which count the verdict was rendered.<sup>81</sup> It was said by the Revisors of 1849 in their Report<sup>82</sup> that this section was enacted probably to meet these cases. This statute first came under review in *Rand v. Com.*, 9 Gratt. 738, but the court deemed it unnecessary to construe the statute as a whole, because it held that the prisoner had in effect brought himself within the terms of the latter part of the statute allowing the defendant to move the court to exclude the defective count from the consideration of the jury. It next came under review in *Shifflet v. Com.*, 14 Gratt. 652, and the prior decisions and the effect of the statute were discussed by the court, and the question made by the statute squarely met. In that case the prisoner was charged with a felony by an indictment containing three counts, one of which was plainly defective and had been quashed. There was a change of venue afterwards, and the prisoner was re-arraigned and pleaded to the *whole* indictment, taking no notice of the fact that one count had been quashed, so that he was tried on the whole indictment. In construing this statute, the court said: "*If it be conceded that he did not, in effect, waive the benefit of the order quashing the second count, and that it was error to arraign and try him on the whole indictment after that count had been quashed, still I think it is not an error to his prejudice, and therefore not good ground for the reversal of the judgment.*" At common law, there was a settled distinction between a general verdict in civil and in criminal proceedings. In the former case, if some of the counts were bad when entire damages were given, it was necessary to arrest the judgment, because the court could not apportion the damages; while in the latter, the court ascertained the penalty, and could apply it to the good counts which were supported by the evidence; and therefore, where the defendant was found guilty of the charge in general, if there were any good counts, the verdict was sufficient, and an entire judgment might have been given. 1 Chit. Cr. Law

81. *Mowbray v. Com.*, 11 Leigh 643; *Clare v. Com.*, 3 Gratt. 615.

82. Report of Revisors (1849), ch. 208, § 34.

249, 640. At an early period in this state, the common law rule in civil cases was changed by statute, which provided, that "when there are several counts, one of which is faulty, and entire damages are given, the verdict shall be good; but the defendant may apply to the court to instruct the jury to disregard the faulty count." 1 Rev. Code of 1819, p. 512, § 104. The rule in criminal cases remained unchanged by statute until a very recent period, as will be presently noticed.

"In Kirk's Case, 9 Leigh 627, it was held that the common law rule was applicable to a conviction for felony, punishable by imprisonment in the penitentiary, and that the judgment should not be reversed if any count was good, even though the court below overruled the motion of the prisoner to quash the bad counts. In Mowbray's Case, 11 Leigh 643, and Clare's Case, 3 Gratt. 615, it was held, contrary to Kirk's Case, that the common law rule was not applicable to offences punishable by confinement in the penitentiary, as the reason of the rule did not apply. Thus stood the law and the adjudications upon it when the act of March 14, 1848, was passed, containing a provision (see Sess. Acts, p. 152, § 43), which has been since substantially embodied in the Code, p. 778, § 34, in these words: 'When there are several counts in an indictment or information, and a general verdict of guilty is found, judgment shall be entered against the accused, if any count be good, though others be faulty. But on the trial, the court, on the motion of the accused, may instruct the jury to disregard any count that is faulty.' See Rand's Case, 9 Gratt. 738, in which the cases and statutes on this subject are reviewed in the opinion of the court, delivered by Judge Daniel. The effect of the provision in the Code is to make the common law rule applicable to all criminal cases, whatever may be the mode of punishment, and however the measure of it may be ascertained. But the accused is effectually protected from injury, by the right which is given him to have the faulty counts excluded from the consideration of the jury. If he does not avail himself of that right; if he does not move the court to instruct the jury to disregard the faulty counts, how can he complain of injury? How is he prejudiced by the judgment? Is not the presumption conclusive,

that if he does not make the motion, it is because there is no evidence to sustain the faulty count, or it can do him no harm? In this case, the first and third counts are certainly good, even if the second be faulty, and a general verdict of guilty has been found. Why should not a judgment be entered against the accused according to the direction of the statute? A judgment has been entered. Why should it be reversed? Is it because it was error in the court to try the prisoner on the whole indictment, when one of the counts had been quashed? He voluntarily pleaded to the whole indictment, and had only to move the court to exclude the second count from the consideration of the jury, the court having already decided it to be faulty. He would have made that motion, if he could have derived any benefit from it.

“I think there is no error in the judgment and am for affirming it.”

It would seem clear that the prisoner, by pleading to the whole indictment, when arraigned the second time, waived the benefit of the previous order quashing the second count, and that the first sentence quoted above from Judge Moncure's opinion was unnecessary to the decision of the case, and that the case might have been safely rested on this waiver by the prisoner. In a later case, where there was *no demurrer to the defective count*, it is said: “and the verdict, being general, if supported by either count, must be sustained.”<sup>83</sup> In *Richards v. Com.*, 81 Va. 110, there were two counts in the indictment, one of which was bad, but the evidence being certified, the court could see that the verdict could not have been found on the good count, and consequently set it aside, although there was no motion to disregard that count. In *Jones v. Com.*, 86 Va. 950, 12 S. E. 950, it was said that the judgment should have been arrested because one count of the indictment was defective, there having been a demurrer to each count overruled. The statute<sup>84</sup> was not cited, and only those two cases were cited which were decided before the statute was enacted, so that this case can hardly be regarded as authority under the statute for the proposition that

83. *Hendricks v. Com.*, 75 Va. 934, 943.

84. Code, § 4045.

if either count is defective the verdict must be set aside. This is the last reported case arising under the criminal statute. The statutes in civil and criminal cases are practically the same and whatever construction is put upon one should be placed upon the other.

There is a very similar statute in Illinois providing that "whenever an entire verdict shall be given on several counts, the same shall not be set aside or reserved on the ground of any defective count, if one or more of the counts in the declaration is sufficient to sustain the verdict." Under this statute it has been held that when there is a good count in the declaration to support the judgment a motion in arrest of judgment cannot be made.<sup>85</sup>

So much for the history of the statute and the decisions thereunder. In recent years it is a well established doctrine of the court that if error be committed in overruling the demurrer to a bad count of a declaration, it is ground for reversal (as the court cannot tell on which count the jury rendered their verdict), unless the court can see from the whole record, including the evidence certified, that the defendant could not have been prejudiced thereby.<sup>86</sup> In none of the recent cases is any reference made to the Virginia statute above mentioned, and it remains to be considered whether the recent cases are in conflict with the statute and the cases construing it, hereinbefore mentioned. At common law, a defendant could either demur or plead, but could not do both, and hence had no opportunity of objecting to defects of the character referred to by the statute. If he demurred to the declaration and to each count thereof and his demurrer was sustained, there would be no verdict. If the demurrer was overruled, then judgment was given against him for want of an answer to the declaration, unless he obtained the leave of the court to withdraw his demurrer, and if he did this,

85. *Gebbie v. Mooney*, 121 Ill. 255, 12 N. E. 472; *Shreffler v. Nadelhoffer*, 133 Ill. 536, 25 N. E. 630; *Swift v. Fue*, 167 Ill. 443, 47 N. E. 761. See, also, *Bond v. Dustin*, 112 U. S. 604.

86. *Ante*, § 208, and cases cited; *Va. Cedar Works v. Dalea*, 109 Va. 333, 64 S. E. 41; *Newport News v. Nicolopoolos*, 109 Va. 165, 63 S. E. 443; *C. & O. R. Co. v. Melton*, 110 Va. 728, 67 S. E. 346.

then the declaration would remain without any objection whatever to it on the record. It is true that he might demur to the bad counts and plead to the good, but the same rule applied, and if his demurrer to the bad count was overruled, judgment would be given against him on that count for want of an answer, unless he withdrew it, and if he did there was no objection to the count. The result was, as stated, that if the declaration contained several counts, some good and others bad, and entire damages were found, the trial court could not tell upon which count the jury rendered their verdict, and hence a motion in arrest of judgment was necessary to prevent injustice. To meet this situation, the statute in question was passed, providing a method by which the defective counts might be effectually removed from the consideration of the jury, and declaring that unless this was done, the judgment should not be arrested when entire damages were found, if any count in the declaration was good. Now, however, the defendant may plead as many several matters of law or fact as he chooses, and as he can both demur and plead, he can readily bring to the attention of the court by a demurrer every defective count in the declaration, but this fact does not take away from the defendant the remedy given him by the other statute.<sup>87</sup> If a declaration contains several counts, and there is a demurrer to the declaration as a whole, we have seen that the demurrer must be overruled because it is defective in not bringing before the court the consideration of defects in each separate count. The demurrer, then, in that form, is, in effect, no demurrer to the separate counts. It is no valid demurrer to each count and the statute<sup>88</sup> was enacted, it would seem, to meet the case where there had been no demurrer, or a defective demurrer, or the *defective count had not been otherwise brought to the attention of the court*. The language of the statute, however, is broad enough not only to cover these cases, but also the case where there has been a demurrer to the defective count which has been overruled; but if there has been a demurrer to the defective count which has been overruled, it would seem to be a *usless process to again*

87. Code, § 3389.

88. Code, § 3389.

*call the attention of the court to the defect* by asking the court to instruct the jury to disregard that count. As said by Judge Tucker in his dissenting opinion in *Power v. Ivie*, *supra*, "It is not incumbent on the defendant to move the court at the trial to instruct the jury to disregard that count as faulty which the court had just decided to be good." Some such view must have been entertained by the profession, as the statute has not been brought to the attention of the court in civil matters for three-quarters of a century. Under the modern cases, if the appellate court can see that the verdict is founded on the good count it will uphold the verdict.<sup>89</sup> If it can see that it was founded on the bad count it will set it aside.<sup>90</sup> If it is unable to see upon which count the verdict was rendered, but the evidence was applicable to both, it will set it aside. The modern holding seems to be so manifestly just and proper that it is not likely that the court will reverse the long line of cases establishing it, but will construe the statute as furnishing a cumulative remedy, and *treat the demurrer to the defective count as in the nature of a request to the court to instruct the jury to disregard that count.*<sup>91</sup> If there has been no demurrer, or the demurrer is to the declaration as a whole, which has to be overruled for the reasons stated, then the statute furnishes the desired relief, but if there is a demurrer to each count or to the defective count, and it is sustained as to the defective count or counts, they are thereby withdrawn from the consideration of the jury; but if overruled the demurrer will still be treated as *a request to the court* (though overruled it is true) *to instruct the jury to disregard such count or counts*, and if the defendant may have been prejudiced thereby, the verdict will be set aside and a new trial awarded. As the demurrer is *per se* a part of the record, no bill of exception is necessary.

89. *Newport News v. Nicolopoulos*, *supra*.

90. *Richards v. Com.*, *supra*.

91. In *Rand v. Com.*, 9 Gratt. 738, an objection to evidence was treated as a request to instruct the jury to disregard the count to which the evidence was applicable.

**§ 302. Objections to verdicts.**

Objections either to the amount or the form of a verdict must be made in the trial court, else they will not be noticed on a writ of error.<sup>92</sup> A verdict is a part of the record, and no bill of exception is needed to put it on the record,<sup>93</sup> but objections to verdicts are no part of the record, and, if overruled, must be made a part of the record by a proper bill of exception. The subject of impeachment of verdicts for various reasons is discussed in the next succeeding chapter. Verdicts are to be liberally construed and upheld if possible. Mere form should not, as a rule, affect them, if the court can clearly see what is meant.<sup>94</sup> As to the power of the trial court to direct a verdict, see *ante*, § 273.

92. Phillips Schneider Brewing Co. v. Amer. Ice Co. (C. C. A.), 77 Fed. 138.

93. Roanoke L. Co. v. Karn, 80 Va. at 591; Daube v. Phil., etc., Co. (C. C. A.), 77 Fed. 713.

94. Rickett v. Rickett, 2 Bibb. (Ky.), 178; Black v. Va. Portland Cement Co., 106 Va. 121, 55 S. E. 587.

## CHAPTER XXXIX.

### MOTIONS AFTER VERDICT.

§ 303. Motion for a new trial.

1. Error or misconduct of the judge.
2. Error or misconduct of the jury.  
Impeachment of verdict by jurors.
3. Misconduct of counsel.
4. Misconduct of parties.
5. Misconduct of third persons.
6. After-discovered evidence.
7. Verdict contrary to the evidence.
8. Accident and surprise.
9. Damages excessive or too small.

§ 304. Number of new trials—conditions.

§ 305. Arrest of judgment.

§ 306. Judgment non obstante veredicto.

§ 307. Repleader.

§ 308. Venire facias de novo.

The principal motions that are made after verdict are (1) for a new trial, (2) in arrest of judgment, (3) judgment *non obstante veredicto*, (4) repleader, and (5) *venire facias de novo*.

§ 303. Motion for a new trial.<sup>1</sup>

It is said that a motion for a new trial should be made before a motion in arrest of judgment, because the latter admits the existence of a legal verdict, which the former assails, but if both motions are made simultaneously they will be treated as if made in due order.<sup>2</sup> Doubtless this was formerly true, but it seems to be a matter so technical that it is doubtful whether such a

1. Section 3392 of the Code is as follows: "In any civil case or proceeding, the court before which a trial by jury is had, may grant a new trial, unless it be otherwise specially provided. A new trial may be granted as well where the damages awarded are too small as where they are excessive. Not more than two new trials shall be granted to the same party in the same cause."

2. *Sweeney v. Baker*, 13 W. Va. 158, 216, 217; 2 Encl. Pl. & Pr. 818.

ruling would now be permitted to cause a failure of justice. The motion for a new trial should be made before judgment is entered on the verdict, but, as the record is in the breast of the court until the end of the term, it may be made at any time during the term, even after judgment has been entered.<sup>3</sup> But it would require a very clear case to justify the court in setting aside the judgment and awarding a new trial. After the term is ended at which judgment is entered, the case is off the docket and it is too late to ask for a new trial. Motions for new trials are addressed to the sound discretion of the trial court, subject to review for error, and are based upon the ground that justice has not been done. The most usual grounds for new trial are those stated below:

1. *Error or Misconduct of the Judge.*—The most common error of the judge which is made the basis of a motion for a new trial is that committed in granting or refusing instructions to the jury, or in admitting or rejecting evidence. When the motion is made on these grounds it is said to be a motion to set aside the verdict because contrary to law. It has been pointed out<sup>4</sup> that objection should be made to instructions at the time of the ruling of the court thereon, and generally comes too late afterwards, but if a motion for a new trial is made on the ground that the jury was improperly instructed, and the motion is overruled, it is subject to review in the appellate court, if the instructions are set forth in the bill of exception.<sup>5</sup> It is entirely competent for the court, of its own motion, in a proper case, to set aside the verdict of the jury.<sup>6</sup> Formerly it was necessary in Virginia for the record to show that a motion for a new trial was made, and overruled, in order to warrant a review in the appellate court of any ruling of the trial court on any other question, but this has been changed by statute in Virginia.<sup>7</sup> But this rule is still in effect in West Virginia,<sup>8</sup> Arkansas,<sup>9</sup> and

3. 4 Min. Ins. 756.

4. *Ante*, § 287.

5. *Stevenson v. Wallace*, 27 Gratt. 77; *Bull v. Com.*, 14 Gratt. 613.

6. *Ivanhoe Furnace Corp. v. Crowder*, 110 Va. 387, 66 S. E. 63.

7. Code, § 3385a.

8. *Dauks v. Rodeheaver*, 26 W. Va. 279.

9. *Young v. King*, 33 Ark. 745.

other states. The reason assigned was that the judge might, upon a deliberate motion for a new trial, supported by argument and authority, retract a hasty opinion expressed by him in the progress of the trial. A new trial will not be granted simply because erroneous instructions were given, if the court can see that no other verdict could properly have been rendered under correct instructions. Such is the law in Virginia, West Virginia, and a number of other states, but probably the weight of authority is *contra*.<sup>10</sup> Moreover, if a verdict accords with instructions which were not objected to, the appellate court will not inquire whether the instructions were correct or not.<sup>10a</sup>

*Misconduct of Judge*.—Anything that has been said or done by the trial judge that is substantially prejudicial to a party, and may have improperly influenced the jury in arriving at their verdict, is proper ground for a motion for a new trial. Expressions of opinion as to the weight of the evidence, compelling a jury to find a verdict in consequence of threats, or the like, and improper refusal to change the venue, are all grounds for a new trial.<sup>11</sup>

2. *Error or Misconduct of the Jury*.—Under this head come verdicts for damages too large or too small. This subject has been already discussed, and the discussion need not be here repeated.<sup>12</sup> The same may be said of chance verdicts.<sup>13</sup> Misconduct of jurors covers all acts on their part prejudicial to the party making the objection. Any communication between the jury and a party litigant touching the subject matter of the litigation, and tending to affect the result will be ground for a new trial,<sup>14</sup> but if known, it should be called to the attention of the court before verdict, else it will, as a rule, be deemed to have been waived. Accepting bribes is, of course, ground for a

10. *Ante*, § 300, p. 540; *Richmond & D. R. Co. v. Medley*, 75 Va. 503; *Leftwich v. Wells*, 101 Va. 255, 43 S. E. 364; *So. R. Co. v. Oliver*, 102 Va. 710, 47 S. E. 862; *Watts v. N. & W. R. Co.*, 39 W. Va. 196, 19 S. E. 521.

10a. *Collins v. George*, 102 Va. 509, 46 S. E. 684.

11. *Bunting v. Danville*, 93 Va. 200, 24 S. E. 830; *Jones v. Com.*, 111 Va. 862, 69 S. E. 953.

12. *Ante*, § 300, p. 541.

13. *Ante*, § 300, p. 540.

14. *Jones v. Martinsville*, 111 Va. 103, 68 S. E. 265.

new trial, and so is any other misconduct that is substantially prejudicial to a party litigant. In criminal cases, the separation of the jury, when required to be kept together, is at least *prima facie* prejudicial.

*Impeachment of Verdict by Jurors.*—The tendency of the courts, and especially in Virginia, is to hold that, as a rule, jurors should not be permitted to testify to their own misconduct in the jury room.<sup>15</sup> But there are many cases in which the misconduct of jurors could not be made the subject of a motion for a new trial at all if the jurors were not permitted to testify as to their misconduct. Such, for instance, is the case where they have cast lots for their verdict, where they have been improperly influenced by papers or other documents put into their possession, or by the presence of third parties in the jury room during their deliberations. The law upon this subject is well stated by Chief Justice Fuller as follows: “In *United States v. Reid*, 12 How. 361, 366, affidavits of two jurors were offered in evidence to establish the reading of a newspaper report of the evidence which had been given in the case under trial, but both deposed that it had no influence on their verdict. Mr. Chief Justice Taney, delivering the opinion of the court, said: ‘The first branch of the second point. presents the question whether the affidavits of jurors impeaching their verdicts ought to be received. It would, perhaps, hardly be safe to lay down any general rule upon this subject. Unquestionably, such evidence ought always to be received with great caution. But cases might arise in which it would be impossible to refuse them without violating the plainest principles of justice. It is, however, unnecessary to lay down any rule in this case, or examine the decisions referred to in the argument, because we are of opinion that the facts proved by the jurors, if proved by unquestioned testimony, would be no ground for a new trial. There was nothing in the newspapers calculated to influence their decision, and both of them swear that these papers had not the slightest influence on their verdict.’ The opinion thus indicates that public policy which forbids the reception

15. *Wash. Park Co. v. Goodrich*, 110 Va. 692, 66 S. E. 977; *Read's Case*, 22 Gratt. 924.

of the affidavits, depositions or sworn statements of jurors to impeach their verdicts, may in the interest of justice create an exception to its own rule, while, at the same time, the necessity of great caution in the use of such evidence is enforced.

“There is, however, a recognized distinction between what may and what may not be established by the testimony of jurors to set aside a verdict.

“This distinction is thus put by Mr. Justice Brewer, speaking for the Supreme Court of Kansas in *Perry v. Bailey*, 12 Kans. 539, 545: ‘Public policy forbids that a matter resting in the personal consciousness of one juror should be received to overthrow the verdict, because being personal it is not accessible to other testimony; it gives to the secret thought of one the power to disturb the expressed conclusions of twelve; its tendency is to produce bad faith on the part of a minority, to induce an apparent acquiescence with the purpose of subsequent dissent; to induce tampering with individual jurors subsequent to the verdict. But as to overt acts, they are accessible to the knowledge of all the jurors; if one affirms misconduct, the remaining eleven can deny; one cannot disturb the action of the twelve; it is useless to tamper with one, for the eleven may be heard. Under this view of the law the affidavits were properly received. They tended to prove something which did not essentially inhere in the verdict, an overt act, open to the knowledge of all the jury, and not alone within the personal consciousness of one.’

“The subject was much considered by Mr. Justice Gray, then a member of the Supreme Judicial Court of Massachusetts, in *Woodward v. Leavitt*, 107 Mass. 453, where numerous authorities were referred to and applied, and the conclusions announced, ‘that on a motion for a new trial on the ground of bias on the part of one of the jurors, the evidence of jurors as to the motives and influences which affected their deliberations, is inadmissible either to impeach or to support the verdict. But a juryman may testify to any facts bearing upon the question of the existence of any extraneous influence, although not as to how far that influence operated upon his mind. So a juryman may testify in denial or explanation of acts or declarations outside of the jury room, where evidence of such acts has been

given as ground for a new trial.' See, also, *Ritchie v. Holbrook*, 7 S. & R. 458; *Chews v. Driver*, 1 Coxe (N. J.), 166; *Nelms v. Mississippi*, 13 Sm. & Marsh. 500; *Hawkins v. New Orleans Printing Co.*, 29 La. Ann. 134, 140; *Whitney v. Whitman*, 5 Mass. 405; *Hix v. Drury*, 5 Pick. 296.

"We regard the rule thus laid down as conformable to right reason, and sustained by the weight of authority. These affidavits were within the rule, and being material their exclusion constitutes reversible error. A brief examination will demonstrate their materiality."<sup>16</sup>

Wherever, therefore, the alleged misconduct is evidenced by *overt acts* open to the knowledge of all or any number of the jurors, the affidavits of the jurors should be received:

3. *Misconduct of Counsel*.—As hereinbefore pointed out,<sup>17</sup> appeals to the passions and prejudices of a jury, references to matters not given in evidence, aspersions of a witness not warranted by what has transpired in the case, are all, if persisted in, improper conduct of counsel, for which a new trial may be granted. Many other specific acts of misconduct on the part of counsel, which will entitle the party aggrieved to a new trial, are set forth in the references given in the margin.<sup>18</sup>

4. *Misconduct of Parties*.—Any tampering with the jury by a party to the litigation is such misconduct as will warrant the court in setting aside the verdict. Indeed, the verdict may be set aside for misconduct of a party even when such misconduct occurs after the verdict has been rendered. Where it appears that a defendant in an action at law, immediately after a verdict in his favor, stated that he had never lost a case and never expected to if it was left to a jury, and gave five dollars to each of the jurors, and both he and they were fined for contempt, and he thereupon paid the fine assessed upon several of the jurors, and it also appears that he attempted to bribe an important witness for the plaintiff, the trial court should set aside the verdict rendered in

16. *Mattox v. U. S.*, 146 U. S. 140, 149.

17. *Ante*, § 296.

18. Note, 9 Am. St. Rep. 559, ff; Note 100 Am. St. Rep. 690, ff.

his favor, notwithstanding both defendant and jurors had been punished for their contempt.<sup>19</sup>

5. *Misconduct of Third Persons.*—Wherever the conduct of outsiders is such as to have unduly influenced the verdict and to have prevented a fair trial on the merits, it is the duty of the trial court to set the verdict aside. This is true in civil cases as well as criminal. In a criminal case the verdict was set aside on account of an unwarranted interruption of the argument of counsel for the prisoner before the jury. The prisoner was on trial for murder, and, while his counsel was addressing the jury, about one hundred people, being one fourth of those in the court-house, simultaneously and as if by agreement, left the room. Soon thereafter a fire alarm was given near the court-house which caused a number of others to leave. These demonstrations were for the purpose of breaking the force of counsel's argument, but the trial court was of the opinion that the jury was not influenced thereby. No exception was taken to this misconduct at the time, because counsel for the prisoner was of opinion (as stated in the petition for the writ of error) that if the verdict had been set aside the prisoner would have met violent death at once. It was held that the disorderly proceedings were such as to warrant the court in declaring that the trial was not conducted according to the law of the land as guaranteed by the constitution, and that no person ought to be deprived of his life or liberty except by the law of the land, and hence the verdict was set aside and a new trial awarded.<sup>20</sup>

6. *After-Discovered Evidence.*—After-discovered evidence means evidence discovered after the verdict has been rendered. Evidence discovered pending the trial, even towards its close cannot be said to be after-discovered, and if no motion is made to postpone the case until the evidence can be obtained, and the attention of the court is in no wise drawn to it until after verdict, it is not ground for a new trial.<sup>21</sup> Ignorance of the location of

19. *Merritt v. Bunting*, 107 Va. 174, 57 S. E. 567.

20. *State v. Wilcox* (Nell Cropsey Case), 131 N. C. 707, 42 S. E. 356. See, also, *Doyle v. Commonwealth*, 100 Va. 808, 40 S. E. 925.

21. *Norfolk v. Johnakin*, 94 Va. 285, 26 S. E. 830.

witnesses whose testimony is known to be material may be good ground for a postponement or continuance of the case, but the subsequent discovery of the whereabouts of witnesses known to be material is not such after-discovered evidence as will entitle a party to a new trial on that ground.<sup>22</sup> Applications for new trials are addressed to the sound discretion of the court, and are based on the ground that there has not been a fair trial on the merits. In order to justify a new trial for after-discovered evidence, (a) the evidence must have been discovered since the trial, (b) it must be material in its object and such as on another trial ought to produce opposite results on the merits, (c) it must not be merely cumulative, corroborative, or collateral, and (d) it must be evidence that could not have been discovered before the trial by the use of due diligence.<sup>23</sup> This is undoubtedly the general rule, but exceptional cases may arise when the courts will find it necessary to depart from it. In one case, at least, the Court of Appeals of Virginia found it necessary to depart from this general rule. It was a criminal prosecution, and the court was of opinion that the testimony of a very intelligent, disinterested witness discovered after the trial, indicated a purpose on the part of detectives engaged in getting up evidence in the case to compass the conviction of the accused upon fabricated evidence, and hence awarded a new trial.<sup>24</sup> Evidence newly discovered is said to be cumulative in its relation to the evidence on trial when it is of the same kind and character. If it is dissimilar in kind, it is not cumulative in a legal sense, though it tends to prove the same proposition.<sup>25</sup> If a fact is attempted to be proved by verbal admissions of a party evidence of another verbal admission of the same fact is cumulative, but evidence of other facts tending to establish the fact is not.<sup>26</sup>

7. *Verdict Contrary to the Evidence.*—In England, a motion for a new trial on the ground that the verdict is contrary to the evidence may be made before the trial judge, but if overruled is

22. *Adamson v. Norfolk Co.*, 111 Va. 556, 69 S. E. 1055.

23. *Nicholas v. Com.*, 91 Va. 741, 21 S. E. 364.

24. *Johnson v. Com.*, 104 Va. 881, 52 S. E. 625.

25. *Wynne v. Newman*, 75 Va. 811.

26. 1 Gr. Ev. (16 Ed.), § 2.

not the subject of a writ of error. It is said: "Where an issue in fact has been decided there is (as formerly observed) no appeal in the English law from its decision, except in the way of a motion for a new trial; and its being wrongly decided is not *error* in that technical sense to which a writ of error refers."<sup>27</sup> In other words, a motion for a new trial on this ground may be made in the trial court, but if it is overruled, that is the end of it. No writ of error lies in such case. The same rule prevails in the United States courts. It is said: "It has long been the established law in the courts of the United States that to grant or refuse a new trial rests in the sound discretion of the court, to which the motion is addressed, and that the result cannot be made the subject of review upon a writ of error."<sup>28</sup> In the case last cited in the margin a motion was made to set aside the verdict on account of misconduct of the jurors, and the affidavits of the jurors were offered in evidence to show that certain newspapers were read by the jury and influenced their verdict. The trial court refused to receive the affidavits. The Chief Justice, after referring to the fact that the allowance or refusal of a new trial rests in the sound discretion of the court, to which the application is addressed, and is not the subject of review by a writ of error, says: "But in the case at bar, the District Court excluded the affidavits, and, in passing upon the motion, did not exercise any discretion in respect to the matter stated therein. Due exception was taken to the question of admissibility thereby presented." For this refusal of the trial court to exercise its discretion the case was heard on a writ of error in the Supreme Court, the affidavits were allowed to be read, and the case was reversed and remanded. In Virginia it is provided by statute that such a motion may not only be made in the trial court, but, if overruled and a bill of exception taken, the action of the trial court may be reviewed on a writ of error, but that the case goes up as upon a demurrer to the evidence by the plaintiff in error.<sup>29</sup>

27. Stephen's Pleading, p. 247.

28. *Newcomb v. Wood*, 97 U. S. 581; *Ins. Co. v. Barton*, 13 Wall. 603; *Maddox v. U. S.*, 146 U. S. 140.

29. Section 3484 of the Code is as follows: "When a case at law, civil or criminal, is tried by a jury and a party excepts to the judg-

A verdict should not be set aside as contrary to the evidence unless it is plainly so, or is without evidence to support it, hence if the evidence is conflicting the trial court has no power to set aside the verdict. It is said that where a case has been properly submitted to a jury and a verdict fairly rendered, it ought not to be set aside unless manifest injustice has been done, or the verdict is plainly not warranted by the evidence. The fact that the verdict is contrary to the preponderance of the evidence, or that the judge, had he been on the jury, would have rendered a different verdict, will not change the result.<sup>30</sup> When it is said in the statute cited in the margin that the case is to be heard as on a demurrer to the evidence by the plaintiff in error that simply means that it is subject to the same concessions by the plaintiff in error as are required by a demurrant in case of a demurrer to the evidence. If the appellate court is of opinion that the verdict should be set aside it will set it aside and remand the case for a new trial. It will not enter up final judgment in the appellate court as is done in a case which goes up on a demurrer to the evidence. It must be understood, however, that the statement that the case goes up as on a demurrer to the evidence is applicable only when the evidence is certified and not the facts.<sup>31</sup>

ment or action of the court in granting or refusing to grant a new trial on a motion to set aside the verdict of a jury on the ground that it is contrary to the evidence, or when a case at law is decided by a court or judge without the intervention of a jury and a party excepts to the decision on the ground that it is contrary to the evidence, and the evidence (not the facts) is certified, the rule of decision in the appellate court in considering the evidence in the case shall be as on a demurrer to the evidence by the appellant, except that when there have been two trials in the lower court, in which case the rule of decision shall be for the appellate court to look first to the evidence and proceedings on the first trial, and if it discovers that the court erred in setting aside the verdict on that trial it shall set aside and annul all proceedings subsequent to said verdict and enter judgment thereon."

The latter part of this section is discussed in the chapter on Writs of Error, *post*.

30. *Jackson v. Wickham*, 112 Va. 128, 70 S. E. 539.

31. The same rules with reference to new trials above stated do not apply to issues out of chancery. A court of equity may, in a proper case, order an issue to be tried by a jury, and, except where directed

The West Virginia statute corresponding to the Virginia statute requires the trial court to certify all the evidence touching the question, and declares that when the bill of exception is signed it shall be made a part of the record in the case, and the whole of the evidence so certified shall be considered by the Court of Appeals, both upon the *application for* and hearing of the writ of error or *supersedeas*.<sup>32</sup> It has been held by the West Virginia court that "on consideration of the whole evidence, as required by legislative enactment, if it appears that the verdict of the jury is sustained by a decided preponderance thereof, the court will not set aside such verdict because the trial court may have given improper or refused proper instructions, not interfering with or affecting the preponderance of evidence, for such erroneous rulings must be deemed to be harmless error."<sup>33</sup>

8. *Accident and Surprise*.—It is said that the essential facts necessary to warrant a new trial for accident and surprise are (a) that the surprise could not have been guarded against by ordinary prudence; (b) that it was not due to ignorance of law; (c) that there will probably be a different result on a new trial; (d) that the applicant made prompt complaint of the surprise, and (e) that the misfortune could not have been averted by the introduction of other available testimony, by a continuance, or by a dismissal without prejudice. *All* of these requirements must be complied with, or the application will be denied, as it is looked upon with suspicion.<sup>34</sup>

by statute, such an issue is a mere incident to the suit in chancery. It is directed merely to satisfy the conscience of the chancellor, and if he is not satisfied with the verdict, he may set it aside, and award a new trial of the issue, or he may disregard it altogether, and proceed to decide the case without the intervention of another jury. But this discretion of the chancellor is a sound, judicial discretion, subject to review for error. Where the evidence relating to a particular fact in dispute is contradictory and evenly balanced, it is the peculiar province of a jury to weigh the evidence and decide the issue, and it is error for the chancellor to set aside the verdict. *Miller v. Wills*, 95 Va. 337, 28 S. E. 337.

32. W. Va. Code, § 3979.

33. *Bank of Huntington v. Napier*, 41 W. Va. 481, 23 S. E. 800.

34. 14 Encl. Pl. & Pr. 722, *et seq.*

9. *Damages Excessive or Too Small.*—This subject has been already treated in discussing misconduct of the jury.<sup>35</sup>

### § 304. Number of new trials—Conditions.

Both in Virginia and West Virginia it is declared by statute that not more than two new trials shall be granted to the same party in the same case.<sup>36</sup> Under this statute not more than two new trials can be granted to the same party by the court in any civil suit before it, tried by jury, although one or all of the verdicts necessitating new trials were caused by the mistakes or misdirection of the court.<sup>37</sup>

There are no exceptions to the law that not more than two new trials shall be granted to the same party in the same case. But if, on the face of the record, it appears that a verdict is void, and that at common law no judgment could be properly entered upon it, as, for instance, because it was too uncertain, ambiguous or defective, the court may declare such a verdict void, and direct a new trial without regard to the number of new trials which may have been granted the same party in the case.<sup>38</sup>

The terms upon which new trials are awarded in Virginia and West Virginia are set forth in the margin.<sup>39</sup> It will be observed

35. *Ante*, § 300. See, also, *N. & W. R. Co. v. Neeley*, 91 Va. 539, 22 S. E. 367; *Shearer v. Taylor*, 106 Va. 26, 55 S. E. 7; *So. R. Co. v. Clarke*, 106 Va. 496, 56 S. E. 274; *N. & W. R. Co. v. Carr*, 106 Va. 508, 56 S. E. 276.

36. Va. Code, § 3392; W. Va. Code, § 3985.

37. *Watterson v. Moore*, 23 W. Va. 404.

38. *Williams v. Ewart*, 29 W. Va. 659, 2 S. E. 881.

39. Section 3542 of the Va. Code is as follows:

“The party to whom a new trial is granted, shall, previous to such new trial, pay the costs of the former trial, unless the court enter that the new trial is granted for misconduct of the opposite party, who, in such case, may be ordered to pay any costs which seem to the court reasonable. If the party, who is to pay the costs of the former trial, fail to pay the same at or before the next term after the new trial is granted, the court may, on the motion of the opposite party, set aside the order granting it, and proceed to judgment on the verdict, or award execution for said costs, as may seem to it best.”

Section 4128 of the W. Va. Code is as follows:

“New trials may be granted upon the payment of costs, or with

that the party to whom the new trial is awarded is required to pay the costs of the former trial. If the costs are not paid at or before the next term, the court may set aside the order granting the new trial or award an execution for costs, but if neither is done and the parties proceed with the new trial, objection cannot thereafter be made, either in the trial court or in the appellate court, that the costs have not been paid.<sup>40</sup> Where the costs have not been paid at or before the next term of the court, and, at a subsequent term, the plaintiff, against whom the new trial had been granted, moves the court to set aside the order granting it because the defendant has not paid the costs as required, the defendant may then tender the costs of the former trial, and it is error to rescind the order for the new trial. It is sufficient if the costs are paid or tendered at any time before the order granting the new trial has been actually set aside.<sup>41</sup> After the second trial, the party deprived of his verdict cannot for the first time object that the order granting the new trial did not require as a condition precedent the payment of the costs of the former trial. This is especially true where no motion was made to set aside the order granting the new trial, nor for an execution for the costs of the former trial.<sup>42</sup> The provision of the Virginia Code requiring a party to whom a new trial is granted to pay the cost of the first trial, before the second is had, applies only to costs in the trial court, and not to costs in the Court of Appeals incurred upon writ of error. Moreover, this burden is only imposed upon the party to whom the new trial is granted, and not upon one who is forced to submit to a new trial, because a ver-

the costs to abide the event of the suit, as to the court may seem right. If the party who is to pay the costs of the former trial, fail to pay the same at or before the next term after the new trial is granted, the court may, on the motion of the opposite party, set aside the order granting it, and proceed to judgment on the verdict or award execution for said costs, as may seem to it best. Where a case is continued at the costs of a party against the consent of the opposite party, the court may, in its discretion award an execution for the costs of such continuance."

40. *Central Land Co. v. Obenchain*, 92 Va. 130, 22 S. E. 876.

41. *Haupt v. Teabault*, 94 Va. 184, 26 S. E. 406.

42. *Hudgins v. Simon*, 94 Va. 659, 27 S. E. 606.

dict in his favor has been set aside on a writ of error at the instance of his adversary.<sup>43</sup>

### § 305. Arrest of judgment.

This is a motion made verbally in the trial court (after the verdict) for the purpose of arresting or preventing the entry of a judgment on the verdict. Manifestly it can be made only in the trial court. It lies only for *material error apparent on the face of the record*. The error must be of such nature as would warrant a reversal on a writ of error from a higher court. If it is of this nature the party injured may move in arrest of judgment in the trial court, or apply to a higher court for a writ of error. Any error that is good ground for a motion in arrest of judgment is good ground for reversal on a writ of error, whether a motion in arrest of judgment was made in the trial court or not.<sup>44</sup> Most errors of a mere formal nature, and some of substance, are cured by the statute of jeofails.<sup>45</sup> It is error to unite tort and contract in different counts of the same declaration, and if a demurrer on that account is interposed the objection is good, but if no demurrer is interposed the defect is cured by verdict, and it is not a good ground for a motion in arrest of judgment, or writ of error.<sup>46</sup> As stated, a motion in arrest of judgment lies

43. *So. R. Co. v. Hansbrough*, 107 Va. 733, 60 S. E. 58.

44. *Mathews v. Com.*, 18 Gratt. 989.

45. Section 3449 of the Code is as follows: "No judgment or decree shall be stayed or reversed for the appearance of either party, being under the age of twenty-one years, by attorney, if the verdict (where there is one), or the judgment or decree, be for him and not to his prejudice; or for want of warrant of attorney; or for the want of a similiter, or any misjoining of issue; or for any informality in the entry of the judgment or decree by the clerk; or for the omission of the name of any juror; or because it may not appear that the verdict was rendered by the number of jurors required by law; or for any defect, imperfection, or omission in the pleadings, which could not be regarded on demurrer; or for any other defect, imperfection, or omission, which might have been taken advantage of on a demurrer or answer, but was not so taken advantage of."

46. *N. & W. R. Co. v. Wysor*, 82 Va. 250. The very terms of the statute declare that the judgment shall not be arrested for any "defect,

only for error apparent on the face of the record. If a declaration against master and servant for a negligent injury charges negligence on the part of both defendants, and there is a verdict against the master only, and it appears solely from the *evidence* certified that the servant alone was negligent, this is not error apparent on the face of the record, and hence a motion in arrest of judgment on this ground should be overruled.<sup>47</sup> When it is said that it must be for error apparent on the face of the record, it is meant that which is *per se* a part of the record and not introduced into the record by a bill of exception. This motion does not lie on behalf of a party not injured by the alleged error. For instance, the fact that a verdict for the defendant is for a less amount than the record on its face shows the defendant is entitled to recover is no ground for a motion in arrest of judgment by the plaintiff, as he is not injured thereby.<sup>48</sup>

When the motion in arrest of judgment is made, and the court can see that judgment cannot properly be entered on the record as it stands, but that the record can be corrected and justice administered in the same case, it will not content itself with simply arresting the judgment, but will go further and make the needed correction, and allow the case to proceed on its merits. This is well pointed out by Professor Graves, as follows: "For instance, if the *verdict is so uncertain* that the court cannot enter proper judgment upon it, and there is no other error, then the court not merely withholds judgment upon the verdict, but sets it aside, and awards a *venire facias de novo*. But suppose the error is not in the verdict but in *the pleadings*, a material error, not cured by the verdict, or by the statute of jeofails? Then the court will correct the error, and set aside the subsequent proceedings down to and including the verdict, and order new proceedings in the cause, to begin where the first error was committed, awarding a *repleader*. 4 Min. Inst. 1204. But suppose the error is fundamental, incurable, and it is manifest that the plain-

imperfection, or omission, which might have been *taken advantage of on a demurrer*, or answer, but was *not so taken advantage of.*" See *ante*, § 92.

47. *Ivanhoe Furnace Corp. v. Crowder*, 110 Va. 387, 66 S. E. 63.

48. *Newport News Co. v. Bickford*, 105 Va. 182, 52 S. E. 1011.

tiff cannot possibly succeed in the action? Then, though the plaintiff won the verdict, judgment will be entered for the defendant, and there will be no *venire facias de novo* and no repleader, for it would be useless. In such a case the judgment is not on the verdict but in spite of it—*non obstante veredicto*. See *Ross v. Milne*, 12 Leigh 277; *Davis v. Com.*, 13 Gratt. 151; *Ewing v. Ewing*, 2 Leigh 343; *Matheson v. Grant*, 2 Howard 263.<sup>49</sup> As to the procedure where *entire damages* are found, when there are one or more defective counts in the declaration, see *ante*, § 301.

### § 306. Judgment non obstante veredicto.

Where the pleadings are by way of confession and avoidance, and the matter set up in avoidance is bad, although there may be a verdict for the defendant in accordance with his plea, the plaintiff is nevertheless entitled to a judgment, notwithstanding the verdict. The plaintiff in effect says: "Upon the merits as shown by the pleadings I am entitled to a judgment without regard to the verdict. The verdict may be true and correct, but it is immaterial." The pleading confesses the adverse claim, but makes no sufficient avoidance, hence there is no necessity to set the verdict aside, and judgment is entered on the pleadings, and hence is sometimes called a judgment as *upon confession*. The plaintiff was entitled to judgment before there was any verdict, as he might have demurred to the plea and had judgment in his favor upon the demurrer, and the verdict on an immaterial issue does not take away his right to the judgment to which he was entitled. If the plea was itself substantially bad in law, the verdict which merely shows it to be true in point of fact cannot avail to entitle the defendant to judgment. It is said that, sometimes it may be expedient for the *plaintiff* to move for a judgment *non obstante*, even though the verdict be in his own favor, for if in such a case as above mentioned he takes judgment as *upon the verdict*, the judgment would be erroneous, and hence the only satisfactory course is to take it as *upon confession*.<sup>50</sup>

It seems that this motion can be made in England only by the

49. Graves' Pleading (new), p. 89.

50. Stephen's Pl., § 127.

plaintiff, but there is no good reason on principle why it may not likewise be made by the defendant in a proper case, as, for instance, where the declaration of the plaintiff states no case, and this is the constant practice in Virginia.<sup>51</sup> If the plea of the defendant is by way of a traverse, and not by way of confession and avoidance, this motion does not lie. For instance, in an action of trespass on the case against master and servant where there is a joint plea of not guilty, and there is a verdict against the master on account of the negligence of the servant, but a judgment in favor of the servant, a motion for a judgment *non obstante* on behalf of the master does not lie, as the pleading was by way of traverse, and not by way of confession and avoidance, and, furthermore the error of the jury in finding the master guilty in consequence of the negligence of the servant, and yet finding the servant not guilty, does not appear upon the face of the record, but only from the evidence, which is no part of the record.<sup>52</sup> This motion lies only for error apparent on the face of the record.<sup>53</sup>

### § 307. Repleader.

A repleader (pleading anew), when awarded, is always for some error apparent on the face of the pleadings, which are *per se* a part of the record. A motion for a repleader is made when the unsuccessful party, plaintiff or defendant, on examination of the pleadings, conceives that the issue has been joined and decided on an immaterial point, not proper to determine the action. Either of the parties may, from misapprehension of law or oversight, have passed over without demurrer a statement on the other side insufficient and immaterial in law, and an issue in fact may have been ultimately joined on such immaterial statement and the controversy made to turn upon the immaterial issue. For example, an administrator, sued upon a promise made by his decedent, pleads that *he* did not assume, on which issue was joined, and there was a verdict for the defendant. Here a

51. *Boyles v. Overby*, 11 Gratt. 206; *Ross v. Milne*, 12 Leigh 277; 4 Min. Inst. 947; 11 Encl. Pl. & Pr. 915.

52. *Ivanhoe Furnace Corp. v. Crowder*, 110 Va. 387, 66 S. E. 63.

53. 11 Encl. Pl. & Pr. 917.

repleader should be awarded on motion of the plaintiff, because it is immaterial to the merits, whether the personal representative assumed or not.<sup>54</sup> In the case of a repleader (unlike a judgment *non obstante*) the pleading is not by way of confession and avoidance, but by way of traverse on an immaterial point, and the court cannot tell what judgment to enter. Here it is necessary for the court to set aside all the pleadings back to and including the faulty one, and require the parties to plead over, so as to come to issue on some material point.<sup>55</sup>

The court will never grant a repleader except where complete justice cannot be otherwise obtained, and, although the issue may be immaterial, a repleader will not be granted if it appear from the record that even had the plea been properly pleaded the decision of the issue must have been the same.<sup>56</sup>

A repleader differs from a judgment *non obstante veredicto*, as hereinbefore pointed out, in this: a repleader is awarded upon the form and manner of the *pleading* where the court cannot tell for whom to give judgment, whereas a judgment *non obstante veredicto* is always upon the *merits* where it appears from the pleader's own showing that he has no proper defence to make to his adversary's pleading.<sup>57</sup>

### § 308. Venire facias de novo.

Here the pleadings are correct, and there is neither doubt nor difficulty about them, but by reason of some irregularity or defect in the proceedings, the proper effect of the first *venire* or trial has been frustrated, or the verdict has become void. The defect sought to be avoided by this motion is always something apparent on the face of the record, and no discretion is vested in the court.<sup>58</sup> The effect of the award of the *venire de novo* is, of course, a new trial, and it summons a new jury to decide the case. The essential differences between a *venire facias de novo* and a motion for a new trial are: (1) that the *venire de novo*

54. Stephen's Pleading, § 127.

55. Stephen, *ubi supra*.

56. *Bonsack v. Roanoke County*, 75 Va. 585.

57. 4 Min. Ins. 950.

58. Stephen's Pleading, § 127.

is granted only on matter apparent on the face of the record, while a new trial may be granted on things outside of the record, as if the verdict appear to be contrary to the evidence, or it appears that the judge has misdirected the jury; and (2) if error appears on the record for which a *venire facias de novo* may be awarded, the court has no discretion in the premises, but is obliged to award it, whereas a motion for a new trial is addressed to the sound discretion of the trial court, subject to review for manifest error.<sup>59</sup> It is said by Prof. Minor<sup>60</sup> that a *venire de novo* can occur in only three cases:

(1) Where it appears from the record that the jury has been improperly selected or returned, or that a challenge has been improperly disallowed. The motion in this instance must be before the jury is sworn and for injury occasioned by the irregularity.

(2) Where the verdict is so imperfect on its face that no judgment can be rendered. *Brown v. Ferguson*, 4 Leigh 37.

(3) Where it appears that the jury ought to have found *other facts differently*, e. g., in trover, the jury find demand by the plaintiff and refusal by defendant (mere *evidences* of conversion), but do not find conversion; or, where the verdict responds to only one of several issues, or not to the whole of the issue. (*Hite v. Wilson*, 2 H. & M. 268), or on a plea *plene administravit* the verdict is against the defendant, but fails to find amount of assets. *Gooseley v. Holmes*, 3 Call 424.

It is said that a *venire de novo* most frequently originates from a special verdict,<sup>61</sup> but it may occur also where the verdict is general.<sup>62</sup>

59. *Kinney v. Beverly*, 2 H. & M. 318, 327; 4 Min. Inst. 951.

60. 4 Min. Inst. 951.

61. *Kinney v. Beverly*, 2 H. & M. 318.

62. *Hite v. Wilson*, 2 H. & M. 268; *Gooseley v. Holmes*, 3 Call 424; 4 Min. Inst., 951.

CHAPTER XL.  
MINOR INCIDENTS OF TRIAL.

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**§ 309. Calling the docket.**

Usually cases of the commonwealth have preference, and are set first on the docket, and other cases are arranged according to the order in which they mature.<sup>1</sup> In Virginia, unlawful detainer has preference on the docket over all other civil cases,<sup>2</sup> and generally motions and attachments come next. But the order in which the trial docket of the court is arranged has been hereinbefore set forth in § 181. The disposition of a case when called is dependent on the state of the pleadings, and consequently upon the place of the case on the docket. If the case is on the

1. Code, § 3378.

2. Code, § 2717.

writ of enquiry docket, there has been no plea by the defendant, and hence he is not consulted as to whether the writ shall be executed (i. e., evidence offered and damages assessed), or the case continued. If he enters no plea he may, nevertheless, by cross examination of the plaintiff's witnesses, or by independent evidence on his own part, contest the amount of his liability, but not the right of the plaintiff to recover.<sup>3</sup> If he pleads, the plaintiff is entitled to a continuance as a matter of right, or may take issue on the plea and go to trial at the same term. The defendant, however, is not entitled to a continuance as a matter of right, but must come prepared to support his plea, and is only entitled to a continuance for good cause shown.<sup>4</sup> If the case stands on the issue docket, i. e., the issues have been made up before the term begins, neither party is entitled to a continuance as a matter of right, but must show cause therefor. If neither party is ready, the case will be continued as a matter of course, except under very exceptional circumstances. If counsel for the defendant announces himself ready, and the plaintiff is unable to show cause for a continuance, he may suffer a non-suit and thus prevent an adverse verdict upon payment of \$5 damages, and the costs. A non-suit, however, does not prevent a new action for the same cause. The defendant, on the contrary, has no such privilege. If the plaintiff is ready, but the defendant is not, and is unable to show good cause for continuance, he must go to trial anyhow and abide the results. He cannot postpone the hearing. If the case is on the office judgment docket, it is unnecessary to call it at all. No action on the part of the plaintiff is necessary, as the office judgment will automatically become final, if not set aside in the method prescribed by statute. If the defendant wishes to make defence, he is allowed to have the judgment entered against him in the office set aside, upon pleading to the merits of the case within the time prescribed by law.<sup>5</sup>

### § 310. Pleas puis darrein continuance.

At common law a defendant could plead only *one plea*, and if

3. *Ante*, § 181, note 14.

4. *Ante*, § 243, p. 462.

5. See *ante*, § 181.

anything happened between the continuances which would be a better answer to the declaration than the plea already pleaded, he was allowed to plead it by way of *substitution* for the plea pleaded, provided he alleged that it occurred *since the last continuance*. He could not plead the plea as a *matter of right*. The excuse for not pleading it sooner was that it had only happened since the last continuance, and hence could not have been pleaded sooner; and, as he could have only one plea, this one was of necessity offered as a *substitute* for the other. If offered at a later term than the first after the matter arose, it was in the *discretion* of the trial court, whether or not it should be received.

At common law, as stated above, this plea supersedes all other pleas and defences, and the pleading then begins *de novo*, and is conducted to issue as upon any other plea. The plea must specify clearly the *date of the last continuance*, and the time and place where the matter arose. The plea may be in bar or abatement, and must conform strictly to any other plea of the same nature.<sup>6</sup>

It is important, therefore, to observe when a plea is *in fact* a plea *puis darrein continuance*. To be such it must set up some matter which has *arisen* since former pleadings were filed. It is not sufficient that it was *not then known* if it in fact existed. "There is a distinction between a plea setting up matter of defence which has arisen since the commencement of the action, but before plea, and one alleging matter originating after plea pleaded. Those facts which occur after the commencement of the suit, but before plea pleaded, must be pleaded to the further maintenance of the suit."<sup>7</sup> Payment, release, and other defences arising since action commenced may be pleaded under the last mentioned plea. If such matters are pleaded *along with other defences*, (where more than one plea is allowed) then there is no waiver of the other defences, although matter so pleaded arose since the institution of the action.

Pleadings, as a rule, speak as of the time of the institution of the action, and general issues and special pleas, unless otherwise

6. See Andrews' Stephen, p. 200, and cases cited.

7. 17 Encl. Pl. & Pr. 205.

specially set forth, speak as of that date, hence matter arising after that date should be specially pleaded, though the plea would not be technically a plea *puis darrein continuance*. Neither payment, nor any other matter arising since action brought, can be shown under the general issue, but must be pleaded specially either to further maintenance of the suit (action) or *puis darrein continuance*.<sup>8</sup>

In Virginia a defendant may plead as many several matters, whether of law or fact, as he may see fit, and therefore new matters previously existing, though unknown to the defendant, may be pleaded as *additional* pleas, and not as *substitutional*, and it is not necessary to show on the face of the plea why there was delay in filing it, but if objection is made to the time of filing it, the reason may be shown *dehors* the plea. This is believed to be the rule as to matter not arising since the last continuance. But if the matter is really of the latter nature, is the plea setting it up substitutional? Judge Tucker thinks *not*, but admits he knows of no case taking his view.<sup>9</sup> He simply bases his argument on the statute allowing the defendant to file as many pleas as he desires, and this seems to be sound.

The authorities, in the absence of statute dealing with pleas, seem to hold otherwise, and to regard such a plea as a waiver of all other defences. There seems to be no Virginia case directly in point.<sup>10</sup>

Pleas in abatement *puis darrein continuance*, contrary to the general rule, may be pleaded after pleas in bar, but must be at the first term after the matter of abatement arose.<sup>11</sup>

While any proper matter may be pleaded specially *puis darrein continuance*, the student will observe that there is no such plea as a plea *puis darrein continuance*. To speak of such a plea in the sense of setting up any particular defence is simply absurd.

8. *Nichols v. Campbell*, 10 Gratt. 560.

9. *Tucker's Pleading*, p. 88.

10. See *Crawford v. Burke*, 105 U. S. 176, citing Ill. cases; 17 Encl. Pl. & Pr. 262, giving full citation of cases; *Austin v. Jones*, Gilmer, 341.

11. 4 *Minor* (3d Ed.) 729.

### § 311. Profert and oyer.

It is a rule of pleading that where a deed is alleged under which a party claims or justifies, profert of such deed must be made, that is, it must be tendered along with the pleading. This tender was made by the language in the pleading "now to the court here shown." For example, in debt on a bond, the allegation is that the defendant "made his certain writing obligatory, now to the court here shown, bearing date, etc." This formula is called making profert. The rule in general applies to deeds only. No profert, therefore, was necessary of any writing, agreement or instrument not under seal, nor of any instrument, which, though under seal, does not fall within the technical definition of a deed, as, for example, a sealed will or award. Executors and administrators, however, were required to make profert of letters testamentary and letters of administration.

The rule applies only to cases where there is occasion to mention the deed in pleading. Where the course of allegation is not such as to lead to any mention of the deed, a profert is not necessary, even though in fact it may be the foundation of the case or title pleaded. Furthermore, the rule extends only to cases where a party *claims or justifies* under a deed, and hence profert is not necessary of a deed which is mentioned only as a matter of inducement.<sup>12</sup> This profert of the deed, however, did not make it a part of the record, and if the opposite party wished to have it made a part of the record, so as to make it the basis of any pleading on his part, he asked to have it read, which was called *craving oyer* of it. In Virginia, and West Virginia it is provided by statute that it shall be unnecessary "to make profert of any deed, letters testamentary or commission of administration, but a defendant may have oyer in like manner as if profert was made."<sup>13</sup> While it is unnecessary in Virginia for the plaintiff to make formal profert of a sealed instrument which he makes the basis of his action, yet it is the practice for him to file such instrument or a copy thereof along with his declaration. If

12. Stephen on Pleading, § 256; Langhorne *v.* Rich. Ry. Co., 91 Va. 369, 22 S. E. 159.

13. Code, § 3244; W. Va. Code, § 3853.

he does so, and the defendant wishes to have oyer of it, he simply takes it in his pleading. He does that in this way. He writes out his pleading, in which he says: "The defendant comes and craves oyer of the deed in the plaintiff's declaration mentioned, which, being read to him, is in the words and figures following, to-wit: (here he copies into his plea the deed filed by the plaintiff with his declaration) and thereupon the defendant for plea says." This, it will be observed, may be done at rules as well as in term.<sup>14</sup> If the plaintiff fails to file the deed along with his declaration, and it is necessary as the basis of the defence to be made by the defendant, he may give notice in writing to the plaintiff to produce it, and, if it is a proper case, and can be produced, the court will compel its production, and when produced, oyer may be taken of it in the manner above indicated.<sup>15</sup> When oyer is thus had of the instrument it thereby becomes *per se* a matter of record as fully to all intents and purposes as if it were copied at large in the plaintiff's declaration. The method of taking advantage of defences arising upon oyer differs according to the circumstances of the case. If the object is to show a misdescription of a deed which is made the basis of the action, advantage is taken of it by a demurrer to the declaration. Thus, if a bond is misdescribed as to the date, amount, names of parties, or otherwise, the defendant comes and craves oyer of the bond, which, as seen, makes it a part of the declaration. It thereupon appears on the face of the declaration that the bond described in the declaration is different from the bond as it actually exists. This makes a variance apparent on the face of the declaration, and the course of the defendant is to demur.<sup>16</sup>

We have heretofore seen that the writ may be consulted for the purpose of amendment so as to support a judgment, but not to defeat it, and, as a general rule, it is no part of the record. But if there is a variance between the declaration and the writ, and the defendant wishes to take advantage of this variance, he may do so only by a plea in abatement. The course of the defendant in such case, therefore, would be to crave oyer of the writ and

14. *Smith v. Lloyd*, 16 Gratt. 295.

15. *Smith v. Lloyd*, *supra*.

16. *Ante*, § 205, p. 349.

plead in abatement the variance between the declaration and the writ.<sup>17</sup> If, however, the only variance is misnomer of a party, this is not the subject of a plea in abatement in Virginia, but on defendant's motion, and on affidavit of the right name, the declaration is amended by inserting the right name.<sup>18</sup>

If the object of the defendant is not to show a misdescription of the deed sued on, nor a variance between the declaration and the writ, but to base his defence on the terms of the deed, the course of the defendant is to crave oyer of the deed, and of the condition thereunder written, if there is one, and then to *plead* the substance of the matter relied upon. This generally arises in cases where the plaintiff has sued upon a deed with some condition thereunder written.

In an action of debt on a bond with collateral condition there were two modes of suing both in England and in Virginia. The plaintiff might declare upon the obligatory part of the bond, taking no notice whatever of the condition, that is, the action appeared to be for the penalty of the bond. If then the defendant, as he might, craved oyer of the bond and of the condition underwritten, and pleaded that he had performed the condition of the bond, the plaintiff must then by his replication assign particularly the breaches of the condition, or if there was no appearance for the defendant, it is said that the plaintiff must assign the breaches by a suggestion of them in writing. In either event, he might assign as many breaches as he chose. This was one remedy that the plaintiff had, or he could set out the bond with the condition underwritten and assign specifically the breaches in his declaration, and that is what was generally done. In this latter case, of course, there was no necessity for craving oyer, as the plaintiff has set out the bond with the condition thereunder written. Now it is believed that the statute in Virginia<sup>19</sup> compels a plaintiff to adopt the latter course, as the statute declares that the plaintiff shall in his declaration or *scire facias* assign the specific breaches, and this is believed to be man-

17. Code, § 3259.

18. Code, § 3258.

19. Code, § 3394.

datory. If so, a declaration which failed to assign breaches would be bad on demurrer if the defendant craved oyer of the writing obligatory and demurred.<sup>20</sup>

If the instruments sued on is *sealed*, but is misdescribed in the declaration, and the defendant wishes to take advantage of the misdescription, he may do so in either of two ways: (1) he may crave oyer and demur as hereinbefore set forth, or (2) without craving oyer, he may wait until the deed is offered in evidence, and, when offered, object to its reception for the variance. In the latter event, he in effect says to the plaintiff, "You have sued me on one obligation, and you now offer in evidence another." This cannot be done as the allegation and proof must correspond. If, however, the instrument sued on is not sealed, here there can be no oyer of it, and hence there is no method of taking advantage of the misdescription except to object to its introduction in evidence in the manner hereinbefore pointed out. If the instrument sued on is in fact a sealed instrument, but is not sued on as such, that is, the plaintiff in his declaration does not declare on it as a sealed instrument, the defendant cannot crave oyer of the instrument, but can only take advantage of the variance by objecting to its introduction when offered in evidence.<sup>21</sup>

At common law, if the plaintiff sued upon a sealed instrument, and failed to make profert of it in his declaration as he should do, it was good ground for demurrer; but, as hereinbefore pointed out, no profert is now necessary in Virginia, but in all cases where profert would be proper oyer may be had as though profert were made, and, if the instrument is not actually produced, its production may be compelled upon notice.

### § 312. Variance.

In every system of reasoning, and certainly in all modes of procedure, the allegation and the proof must correspond. A party will not be allowed to hale his adversary into court on one statement of facts, and then prove another. The variance, how-

20. 4 Min. Inst. 703-4.

21. Grubbs v. Nat. Ins. Co., 94 Va. 589, 27 S. E. 464.

ever, between the allegation and the proof must be in a material matter. Mere immaterial variances will be treated as surplusage. The cases illustrating what variances are material and what are not are so numerous that it would be impracticable to cite them. A few are mentioned in the margin.<sup>22</sup> Assuming that a variance is material, it is important to determine how the objection is to be raised, and when raised, how, if at all, it may be obviated. If the objection is that a written instrument, sealed or unsealed, varies or is different from the instrument as set forth in the pleadings, in other words there is a misdescription, the method of taking advantage of it has been pointed out in the last preceding section. So also, there was pointed out in that section the method of taking advantage of a variance between the writ and the declaration. The variance now to be discussed, and the one which most frequently arises, is a variance between the allegations in the pleadings, and the evidence, other than writings, offered to support them. The object of a declaration is to set forth the facts which constitute the cause of action so that they may be understood by the defendant who is to answer them, by the jury who are to ascertain whether such facts exist, and by the court which is to give judgment.<sup>23</sup> Supposing the declaration or other pleading to be sufficient, the proof must substantially correspond with it. If it does not, *objection should be made on that account*, but this objection should be made at the proper time. In case of variance between the evidence and the allegations, the usual and correct practice is to object to the evidence *when offered*, or if it is already in, to move to exclude it. Attention is thus called to the discrepancy and an opportunity afforded the adverse party to meet the emergency in a proper case in one of the modes prescribed by law. The objection cannot be raised for the first time in the appellate court.<sup>24</sup> It will be ob-

22. Rich. Ry. Co. v. Bowles, 92 Va. 739, 24 S. E. 388; Eckles v. N., etc., R. Co., 96 Va. 69, 25 S. E. 545; Rich. Ry. Co. v. West, 100 Va. 184, 40 S. E. 643; Moore v. B. & O. R. Co., 103 Va. 84, 48 S. E. 887. See, also, citations to § 3384 of the Code.

23. Eckles v. N. & W. R. Co., 96 Va. 69, 25 S. E. 545.

24. Portsmouth Street Ry. Co. v. Peed, 102 Va. 662, 47 S. E. 850; Moore Lime Co. v. Johnston, 103 Va. 84, 48 S. E. 557; Trump v. Tidewater, 46 W. Va. 238, 32 S. E. 1035.

Section 3384 of the Code is as follows: "If, at the trial of any

served that the method of avoiding the effect of a variance between the allegations and the proof provided by the Virginia statute is either (1) by allowing the pleadings to be amended, or (2) the court may direct the jury to find the facts, and, after such finding, if it considers the variance such as could not have prejudiced the opposite party, shall give judgment according to the right of the case. Courts, in the exercise of their general jurisdiction, may permit pleadings to be amended independently of statute, except in so far as they are prohibited by statute.<sup>25</sup> The subject is largely placed in the discretion of the trial court by the Virginia statute which allows pleadings to be amended on such terms, as to payment of costs or postponement of the trial, or both, as it may deem reasonable. Generally, the trial courts are liberal in allowance of amendments, and, unless the amendment is of such nature as would permit the introduction of evidence which might take the opposite party by surprise, no delay is occasioned, but the amendment is made at the bar, and the trial proceeds as though no variance had taken place. If the amendment would occasion surprise by permitting the introduction of evidence which would otherwise not be admissible, then the case should be continued, and the opposite party permitted to make such amendment of his pleadings in reply as may be necessary. Of course, a party is never permitted to make an entirely new case by his amendments. The Virginia Court of Appeals has made frequent reference to the provisions of section 3384 of the Code, permitting a special verdict finding the facts, and there may be cases where this method of procedure would be advantageous, but they are of rare occur-

action, there appears to be a variance between the evidence and allegations or recitals, the court, if it consider that substantial justice will be promoted and that the opposite party cannot be prejudiced thereby, may allow the pleadings to be amended, on such terms as to the payment of costs or postponement of the trial, or both, as it may deem reasonable. Or, instead of the pleadings being amended, the court may direct the jury to find the facts, and, after such finding, if it consider the variance such as could not have prejudiced the opposite party, shall give judgment according to the right of the case."

25. *Travis v. Peabody*, 28 W. Va. 583.

rence; the other provision of the statute with reference to amendments being the one usually adopted. If there is a variance between the allegation and the proof, and objection is made on that account, and the party against whom the variance is alleged neither asks to amend his pleadings, nor for a special verdict finding the facts, the trial court should exclude the offered evidence.<sup>26</sup> If, however, notwithstanding the variance, no objection was made to the admissibility of the evidence, and no motion was made to exclude on account of the supposed variance, the objection must be considered on appeal as waived, and it is said that a different rule of practice would deprive the plaintiff in such case of the benefits of § 3384 of the Code, noted in the margin.<sup>27</sup> If the party should adopt the course of a special verdict finding the facts, and it should develop from the evidence that the variance is not material, and is such as could not have prejudiced the opposite party, then of course the court will give judgment according to the right of the case, and thereby avoid a continuance. An amendment, however, of the pleadings to conform to the facts where the variance is immaterial would disclose the immateriality of the variance, and, in such case, even if the pleadings are amended, no continuance would result; and hence, as stated, the procedure by special verdict is seldom resorted to.

### § 313. Views.

At common law "in most real and mixed actions, in order to ascertain the identity of the land claimed with that in the tenant's possession, the tenant is allowed, after the demandant has counted, to *demand a view* of the land in question, or, if the subject of claim be a rent \* \* \* a view of the land out of which it issues. This, however, is confined to real or mixed actions, for, actions personal, the view does not lie."<sup>28</sup> This sort of view is not known in Virginia, as the kind of actions to which it was applicable do not exist, but provision is made by statute to give

26. *Richmond Spike Co. v. Chesterfield Coal Co.*, 102 Va. 417, 46 S. E. 397.

27. See *ante*, p. 585, note 24; *Newport News R. Co. v. McCormick*, 106 Va. 517, 56 S. E. 281.

28. *Stephen on Pleading*, § 109.

a jury a view of the premises, or place in question, or any matter, or thing, relating to the controversy between the parties, whenever it shall appear to the court that such a view is necessary to a just decision.<sup>29</sup> A motion under this statute is peculiarly within the discretion of the trial court, and its ruling refusing the view will not be disturbed, unless it is made clearly manifest that such view was necessary to a just decision, was practicable, and the request therefor denied to the probable injury of the party appealing.<sup>30</sup> It is said that the view of the grounds at the scene of an accident which is the basis of an action may better enable the jury to apply the testimony disclosed upon the trial, but does not authorize them to base their verdict on such view, nor to become silent witnesses to facts which were not testified to in court.<sup>31</sup> The theory that a view by the jury is not a means of proof, and is only had to enable the jury to understand the evidence better, is also held by other courts. But it is said by Wigmore<sup>32</sup> that: "While, as already pointed out, autoptic profference is to be distinguished from evidence, both testimonial and circumstantial, in the strict sense of the word, it is, at any rate, an additional source of belief or proof, over and above the statements of witnesses and the circumstantial evidence. Its significance in this respect has often been discussed by courts in ruling upon instructions as to the nature of jury views, and, in spite of some opposing precedents, the generally accepted and correct doctrine is that a view furnishes a distinctly additional source of

**29.** Section 3167 of the Code is as follows: "The jury may, in any case, civil or criminal, at the request of either party, be taken to view the premises or place in question, or any property, matter or thing, relating to the controversy between the parties, when it shall appear to the court that such view is necessary to a just decision: provided, that in a civil case the party making the motion shall advance a sum sufficient to defray the expenses of the jury, and the officers who attend them in taking the view, which expenses shall be afterwards taxed like other legal costs."

**30.** *Gunn v. Ohio*, 36 W. Va. 165, 14 S. E. 465; *Davis v. Tel. Co.*, 53 W. Va. 616, 45 S. E. 926; *B. & O. R. Co. v. Polly*, 14 Gratt. 447, 470.

**31.** *Kimball v. Friend*, 95 Va. 125, 27 S. E. 901; *Fox v. Balto. & O. R. Co.*, 34 W. Va. 466, 12 S. E. 757.

**32.** 1 Gr. Ev. (16 Ed.) 33-4.

proof, i. e., the thing itself as autopsically 'observed.' And it has been held in West Virginia that to instruct the jury to disregard everything they saw, and every impression they derived from the view would be to mislead them, because it is apparent that the view would be useless and would not conduce to a just decision if closed against the results naturally to be derived from an inspection of the premises.<sup>33</sup> It is impossible to deprive the jury of the impression derived from the view. They may at a mere glance get a more accurate description of the surroundings than any number of witnesses could ever give them, and it would seem impracticable to undertake to deprive them of evidence thus acquired. For example, any number of witnesses may testify as to the rotten and defective character of railroad ties, but when a jury takes a view of the premises and one juror pulls a spike out of a tie with his fingers, no amount of testimony of witnesses would make so great an impression upon the jury as to the condition of those ties. Views are allowed in criminal cases as well as civil, and may be had against the protest of the prisoner. Whether it is necessary for the prisoner to be present at the view has not been decided, but if the view be regarded as a method of proof, it would seem that his presence is necessary. If the prisoner is present, it is not indispensable that his counsel should be also.<sup>34</sup>

### § 314. Retraxit.

"A *retraxit* is an open and voluntary renunciation by the plaintiff in open court of his suit, and the cause thereof. The usual and proper order, where there is a *retraxit*, is as follows: 'This day came the plaintiff in his proper person, and here in open court acknowledges that he cannot support his action, and voluntarily withdraws the same, and renounces the cause thereof; wherefore on motion of the defendant by his attorney, it is considered by the court that the plaintiff take nothing by his bill, but for his false clamour be in mercy, etc., and that the defend-

33. Fox v. B. & O. R. Co., 34 W. Va. 466, 12 S. E. 757.

34. Williams v. Com., 93 Va. 769, 25 S. E. 659; Litton v. Com., 101 Va. 833, 44 S. E. 923.

ant go thereof without day, and recover against the plaintiff his costs by him about his defence expended.' Rob.'s Forms, p. 96.

"'It differs from a non-suit,' says the court in *Hoover v. Mitchell*, 25 Gratt. 390-91, 'in that the one (the latter) is negative, and the other (the former) is positive.'"<sup>35</sup>

A *retraxit* can only be entered by the plaintiff in person in open court, and, when entered, it not only terminates the present action, but bars all other actions for the same cause.<sup>36</sup> Where an action is "dismissed agreed," it stands on the same footing as a *retraxit*.<sup>37</sup> But, as hereinbefore pointed out, the mere discontinuance of a case is not a *retraxit*, but stands on the same footing as a non-suit, and does not bar another action for the same cause.<sup>38</sup>

"Where a plaintiff sued two defendants in another State, and subsequently filed an amended complaint in which, after setting out his reasons therefor, he states that he makes no personal claims against one of the defendants, and will take such steps as are necessary to discontinue his action as to that defendant, this does not amount to a *retraxit*, but to a mere discontinuance or dismissal of his action as to that defendant, and does not bar a future action against that defendant for the same cause, and hence cannot be pleaded as an estoppel."<sup>39</sup>

### § 315. Loss or destruction of notes or bonds.

Where the destruction of choses in action, whether negotiable or non negotiable, has been distinctly proved by clear and satisfactory evidence, there is not and never was any good reason why an action at law might not be maintained thereon. The rule is different, however, where the proof is not of the destruction of the paper, but of its loss, and here a distinction is drawn between sealed instruments and unsealed, and those which are negotiable and those which are not negotiable.

35. *Tate v. Bank*, 96 Va. 765, 771, 32 S. E. 476.

36. *Muse v. Farmers' Bank*, 27 Gratt. 252.

37. *Hoover v. Mitchell*, 25 Gratt. 387.

38. *Cahoon v. McCulloch*, 92 Va. 177, 22 S. E. 225.

39. *Portsmouth Oil Co. v. Oliver Ref. Co.*, 111 Va. 745, 69 S. E. 958.

*Scaled Instruments.*—It was a rule of the common law that whenever a plaintiff based his right of action upon a sealed instrument, he was required to make profert of it, but if it was lost he could not do this. Equity then took jurisdiction of the matter on account of the inadequacy of the remedy at law, and not only undertook to set up the lost instrument, but, having all the parties before it, to enforce it. Many reasons have been assigned by the courts for the jurisdiction in equity and for the want of jurisdiction at law, amongst others, the inability to make profert, avoidance of the effect of an accident, the inability of a court of law to require indemnity, and the like.<sup>40</sup> It is said: "It was at one time doubted whether the loss of a deed was a good excuse for not making profert, and the jurisdiction of equity in such cases was founded on the idea which formerly existed, that there was no remedy at law, but in *Read v. Brookman*, 3 T. R. 151, it was held by the Court of King's Bench that it was a sufficient excuse for not making profert of a deed that it was 'lost and destroyed by time and accident.' This is a leading case on the subject, and placed it on the true ground, which is that the law compels no one to do an impossibility."<sup>41</sup> It has been held from an early date in Virginia that an action at law will lie on a lost bond,<sup>42</sup> and such jurisdiction has continued to be exercised.

*Negotiable Paper.*—If the paper, however, be negotiable, whether lost before or after maturity, no action at law would lie thereon, because upon payment the party had a right to demand the surrender of the paper, and this the plaintiff could not do, nor could a court of law require proper indemnity for his protection.<sup>43</sup> It is said, however, in the case cited in the margin, that the action might be maintained if the note had been destroyed, or if, at the time of trial, a recovery upon the lost note would be barred by the statute of limitations, and it has been held in Maine that an action at law may be maintained

40. 13 Encl. Pl. & Pr. 356, ff; 25 Cyc. 1610.

41. *Smith v. Lloyd*, 16 Gratt. 305, 306.

42. *Shields v. Com.*, 4 Rand. 541.

43. *Moses v. Trice*, 21 Gratt. 556; note 94 Am. St. Rep. 468.

against the maker of a lost note, but the plaintiff may, in the discretion of the court, be required to furnish a reasonable kind of indemnity, *or the case may be continued from term to term until the note is barred by the statute of limitations.*<sup>44</sup> It will be observed that both the case in Virginia and the one in Maine seem to authorize an action at law on the lost note, if at the *time of trial* the action on the lost note is barred by the statute of limitations. This would seem to be a somewhat doubtful proposition, and that the statement should be that the action should lie if at the time when the action was brought, and not at the time of trial, it would be barred by the statute of limitations. In an action on a negotiable note, the note is a necessary part of the plaintiff's evidence, and there can be no judgment for the plaintiff without the production of the note.<sup>45</sup> The result is that in Virginia and other states, which hold that a court of law has not the necessary machinery to require proper indemnity, no action at law will lie on lost negotiable paper. The rule is otherwise in some States.<sup>46</sup>

*Non-Negotiable Paper.*—If the paper was not negotiable, the finder could not transfer good title to any party, and the party bound could always make his defences as well against the finder or party holding under him as against the true owner. No indemnity was necessary there, and consequently the right to maintain an action at law seems to be clear.<sup>47</sup>

*Summary.*—Prior to the recent Virginia statute, now to be considered, an action at law could be maintained on lost bonds, and lost choses in action of any kind, provided they were not negotiable. If the paper was negotiable, and there was clear and satisfactory proof that it was destroyed, an action at law could likewise be maintained, but upon negotiable paper which was simply lost or mislaid and not destroyed, no action at law would lie. Such was the state of the law in Virginia when the present statute was enacted.

<sup>44</sup> *Mathews v. Mathews*, 97 Me. 40, 53 Atl. 831, 94 Am. St. Rep. 464, and note.

<sup>45</sup> *Davis v. Poland*, 92 Va. 225, 23 S. E. 292.

<sup>46</sup> Note, 94 Am. St. Rep. 471.

<sup>47</sup> Note, 94 Am. St. Rep. 469, and cases cited.

*Present State of the Law in Virginia.*<sup>48</sup>—By the present statute in Virginia it is declared that an action at law or motion may be maintained on *any* past-due *lost* bond, note, or other evidence of debt, but the party in whose favor judgment is rendered is not to have the benefit of the judgment, nor be allowed to issue any execution upon it, unless and until he has executed a proper indemnifying bond as set forth in the statute. It will be observed from an examination of this statute (1) that it allows an action at law on *lost negotiable paper*, which was not allowed prior to the enactment of the statute; (2) that an indemnifying bond is required in *all cases* of actions on lost bonds, notes, or other written evidences of debt. Prior to the statute an action at law lay on lost bonds and other non negotiable paper without requiring any indemnifying bond. (3) It is not necessary to give the indemnifying bond required by the statute before or at the time that the action is brought, but only *after judgment*. Giving the indemnifying bond is not a prerequisite to the right to obtain judgment, but is to the right to enjoy the benefit of the judgment, or have an execution thereon. (4) It should be further noted that formerly no bonds were negotiable, but the fact that an instrument is under seal does not now destroy its negotiability, and, since the adoption of the negotiable instruments act, the law applicable to other negotiable instruments is likewise applicable to negotiable bonds, so far as affects the right to sue. (5) The statute leaves the former law unchanged as to paper which has been *destroyed*, and not simply *lost*.

### § 316. Costs.

The subject of costs in actions at law is generally regulated

48. Section 3377a of the Code is as follows: "Hereafter an action at law or motion may be maintained on any past-due lost bond, note, or other written evidence of debt: provided, however, that the party in whose favor judgment may be rendered shall not have the benefit of the same, nor shall execution issue upon it until he, or someone for him, shall have executed bond in such penalty as the court may deem just, requiring him to refund such amount of principal, interest and costs, as may fully indemnify the person against whom said judgment has been rendered, in case the said past-due lost bond, note, or other evidence of debt should afterwards be discovered in the hands of an innocent holder."

by statute. In suits in equity, costs are largely in the discretion of the trial court.<sup>49</sup> As a general rule, a party for whom final judgment is given, is entitled to recover his costs against the opposite party.<sup>50</sup> Usually, poor persons who are unable to sue or defend, and yet have a meritorious cause of action, have counsel assigned them by the court, and are given the services of the officers of the court without compensation.<sup>51</sup>

It is the policy of the law not to encumber the courts of record with the trial of trivial cases. Consequently, it is provided in Virginia that, as a rule, if the plaintiff in an action of contract recovers less than \$20, exclusive of interest, judgment shall be given for the defendant, unless the court will enter of record that the matter in controversy was of greater value than \$20, exclusive of interest, in which case it may give judgment for the plaintiff for what is ascertained to be due him, with or without costs as it may seem right.<sup>52</sup> If the action be not upon contract, and the verdict found for the plaintiff be for less than \$10, he is not permitted to recover any costs, unless the court will enter of record that the object was to try a right, irrespective of damages, or that the trespass or grievance was wilful or malicious.<sup>53</sup> If the court renders a judgment for costs in violation of this statute, it is in excess of the legitimate power of the court, and a writ of prohibition will lie to arrest the execution of the judgment so far as it is entered for costs.<sup>54</sup>

If the plaintiff is a non-resident of the State, upon suggestion of that fact by the defendant, the plaintiff may be required to give security for the costs. The Virginia statute on this subject is copied in the margin.<sup>55</sup> West Virginia has a correspond-

49. Code, chapter 173.

50. Code, § 3545.

51. Code, § 3538.

52. Code, § 3544.

53. Code, § 3543.

54. *Wilkinson v. Hoke*, 39 W. Va. 403, 19 S. E. 520.

55. Section 3539 of the Code is as follows: "In any suit (except where such poor person is plaintiff), there may be a suggestion on the record in court, or (if the case be at rules) on the rule docket, by a defendant, or any officer of the court, that the plaintiff is not a resident of this state, and that security is re-

ing statute.<sup>56</sup> Where the suggestion of the non-residence of the plaintiff has been made, no other notice to him is required, as he has submitted to the jurisdiction of the court by bringing his action and must take notice of the proceedings therein.<sup>57</sup> An order that the suit be dismissed unless security for costs be given within sixty days, however, does not of itself operate a dismissal, but, after the expiration of the sixty days, an order must be made dismissing the action for want of security, and until such order has been made the plaintiff may give the security, and if the defendant proceeds to trial without objection before the security is given, he will be deemed to have waived it.<sup>58</sup> The security, when given, applies only to costs in the trial court and not to costs in the appellate court.<sup>59</sup> After an order has been made, requiring the plaintiff to give security, for costs within sixty days, and he has failed to give it, and there has been a motion to dismiss for his failure, he should be allowed then to give the security, if he offers to do so, and it is error to sustain a motion to dismiss.<sup>60</sup> If the plaintiff has failed to give the security within the sixty days, but does give it at the next succeeding term thereafter, he cannot then compel the defendant to go to trial, if the latter moves for a continuance.<sup>61</sup> If, when a case is called for trial on the docket, the defendant, for the first

quired of him. After sixty days from such suggestion, the suit shall, by order of the court, be dismissed, unless, before the dismissal, the plaintiff be proved to be a resident of the state, or security be given before said court, or the clerk thereof, for the payment of the costs and damages which may be awarded to the defendant, and of the fees due, or to become due, in such suit, to the officers of the court. The security shall be by bond, payable to the commonwealth, but there need only be one obligor therein, if he be sufficient and a resident of the state. The court before whom, or before whose clerk, such bond is given, may, on motion by a defendant or officer, give judgment for so much as he is entitled to by virtue of said bond."

56. W. Va. Code, § 4125.

57. *Dean v. Cannon*, 37 W. Va. 123, 16 S. E. 444.

58. *Enos v. Stansbury*, 18 W. Va. 477.

59. *Bailey v. McCormick*, 22 W. Va. 95.

60. *Goodtitle v. See*, 1 Va. Cas. 123.

61. *Jacobs v. Sale*, Gilmer 123.

time, makes a motion to require security for costs, it is not clear that he is entitled to a continuance at that term, if the security be not then given. If he has had an opportunity to make the suggestion of the non-residence of the plaintiff at an earlier date and demand security for costs, but has failed to do so, it would seem that he should not be allowed to take advantage of his own remissness in order to obtain a continuance. There may be cases, however, where he has not had this opportunity, as in case of proceedings under a fifteen day notice, and if he has not been negligent in this respect, he ought not to be required to go to trial. So, also, if a rule has been previously made upon the plaintiff to give security, the defendant should not be forced into a trial until the security has been given.

*Cost of New Trial.*—The subject of costs when a new trial has been granted a party has already been discussed, ante, § 304.

### § 317. Non-suit.

Non-suit, as generally used, applies only to a failure on the part of the *plaintiff* to prosecute his suit from any cause whatever, and may occur at any time during the progress of the trial before the jury has retired to consider of their verdict, or, if the case is tried by the court without the intervention of the jury, before the case has been submitted to the court.<sup>62</sup> The term as used in Virginia includes also what is elsewhere embraced under the term *non prosequitur* (*non pros*), and *nolle prosequi* (*nol pros*). The latter term, however, is generally applied to criminal cases dismissed by the commonwealth. The effect of a non-suit is simply to put an end to the present action, but is no bar to a subsequent action for the same cause. It is generally resorted to when the plaintiff finds himself unprepared with evidence to maintain his case, either in consequence of being ruled into trial when not ready, or when surprised by the testimony of a witness, or some ruling of the court, or other similar reason.<sup>63</sup> The object and purpose of suffering a non-suit is to avoid an adverse verdict, for if the pleadings be correct, and the evidence

62. *Harrison v. Clemens*, 112 Va. 371, 71 S. E. 538.

63. *Cahoon v. McCulloch*, 92 Va. 177, 180, 22 S. E. 225.

does not support the allegation of the pleadings, a verdict would be conclusive against the plaintiff and bar another action for the same cause. The matter would then be *res judicata*. For instance, if negligence be adequately charged in an action of tort, and the plaintiff, on account of the absence of some witness, or for any other cause, is unable to prove the case stated in his declaration, a verdict against him would be conclusive, and he could not thereafter bring a new action for the same cause. In order to avoid this consequence, he suffers a non-suit, or voluntarily dismisses his action. The same result would not follow if a verdict were found against the plaintiff on one state of pleadings and a new cause of action is brought, setting out a different case. For example, if an action were brought against the endorser of a draft, and the declaration charged that the draft was drawn by John Crouch, but the evidence showed that the draft was in fact drawn by John Couch, and there was no amendment of the pleadings, a verdict adverse to the plaintiff, on account of the variance, would not bar a new action by him charging the draft to have been drawn by John Couch.<sup>64</sup>

It is provided by statute in Virginia that a party shall not be allowed to suffer a non-suit unless he does so before the jury retire from the bar.<sup>65</sup> Nor can a plaintiff dismiss his action without the defendant's consent, where the defendant has set up a counter claim against him.<sup>66</sup> But if no such counter claim has been set up, and the dismissal will not prejudice or oppress the defendant nor deprive him of any just defense or substantive right not available in a second action he may, ordinarily, upon payment of costs and the damages given by statute suffer a non-suit at any time before the case has been submitted to the jury, and they have retired from the court room, or, if heard by the court, before the case is submitted to the court hearing it as a common law case in lieu of a jury.<sup>67</sup>

64. 7 Rob. Pr. 189; Graves Pleading (new), § 38.

65. Code, § 3387.

66. Code, § 3303.

67. Harrison *v.* Clemens, 112 Va. 371, 71 S. E. 538; Kemper *v.* Calhoun, 111 Va. 428, 69 S. E. 358. As to non-suit at Rules for failure to file a declaration, see *ante*, § 181.

There is another instance not generally technically called a non-suit, but which is in effect a non-suit. It is the case of a *discontinuance*. If the defendant offers a plea which purports to answer only a part of the plaintiff's demand, the plaintiff should take issue on the plea and sign judgment for the residue, and if he fails to sign judgment for the residue, the case is *discontinued* and dismissed for failure to follow up the part unnoticed in the plea. At least, this was the rule at common law, and formerly the rule in Virginia, but little attention has been paid to this in actual practice where the case is pending on the court docket, and the case is generally disposed of as if the plea had purported to answer the whole of the adverse allegation. If such an error, however, occurs at rules, and the case is there discontinued, the court at the next term may correct the proceedings at the rules, and have the pleadings properly amended in court or remand the case to rules for that purpose; but if the proceedings are corrected in court without remanding to rules, it is said that the defendant is entitled to a continuance as a matter of right if he asks it.<sup>69</sup> It is the practice in some of the states to direct the plaintiff to suffer a non-suit where the plaintiff has failed to make out even a *prima facie* case, or where, if a verdict were rendered for him, the court would feel compelled to set it aside.<sup>70</sup> This is called a compulsory non-suit. A compulsory non-suit, however, does not bar another action for the same cause, though the rule is otherwise in South Carolina.<sup>71</sup> The grounds for compulsory non-suit in most cases seem to be practically the same as those for directing a verdict, and where they are the same, no reason is perceived why the latter, which would generally be conclusive, should not always be adopted. We have no such practice in Virginia as granting a compulsory non-suit for insufficiency of the evidence. The court may advise the plain-

69. *Southall v. Exchange Bank*, 12 Gratt. 315, 16; Code, § 3293, *ante*, § 184.

70. Note 24 Am. Dec. 620-4; *Hill v. Rucker*, 14 Ark. 706; *Ringgold v. Haron*, 1 Cal. 108; *Stuart v. Simpson*, 1 Wend. (N. Y.) 376; *Walker v. Supple*, 54 Ga. 178.

71. *Cartin v. South Bound R. Co.*, 43 S. C. 221, 20 S. E. 979, 49 Am. St. Rep. 829, and note.

tiff to suffer a non-suit, but cannot compel him to do so.<sup>72</sup> A defendant, however, may move to dismiss an action for the failure of the plaintiff to prosecute it, but before doing so he must first have a rule against the plaintiff to speed his cause, and if in answer to such rule the plaintiff appears in court ready for trial, this is a conclusive answer to the rule.<sup>73</sup>

*Withdrawing a Juror.*—The antiquated practice of withdrawing juror, and thus breaking the panel, has already been referred to.<sup>74</sup> It formerly occurred only in criminal cases, but was subsequently applied to civil cases. It was usually adopted where the plaintiff was taken by surprise and could not go on with the prosecution, but was subsequently applied to a like case on the part of the defendant. The modern method of disposing of the action in case of genuine surprise at the trial which would work injustice if the trial were permitted to go on, is simply to discharge the jury and continue the case without resorting to the obsolete method of getting rid of the jury, though, as a matter of fact, it is common even now in the trial courts to make the entry that a designated juror was withdrawn and the residue of the jury from rendering a verdict discharged.<sup>75</sup>

### § 318. Bill of particulars.<sup>76</sup>

*Object of the Statute.*—The object of the statute is to give the opposing party more definite information of the character of the claim or defence than is generally disclosed by the declaration, notice, or plea, and to prevent surprise.<sup>77</sup> If the decla-

72. *Ross v. Gill*, 1 Wash. 89.

73. *Carter v. Cooper*, 111 Va. 602, 69 S. E. 944.

74. *Ante*, § 252, p. 475.

75. Probably the best discussion of this subject to be found in any modern case is in *Usborne v. Stevenson*, 36 Oregon 328, 58 Pac. 1103, 78 Am. St. Rep. 778.

76. Section 3249 of the Code is as follows: "In any action or motion, the court may order a statement to be filed of the particulars of the claim, or of the ground of defence; and, if a party fail to comply with such order, may, when the case is tried or heard, exclude evidence of any matter not described in the notice, declaration, or other pleading of such party, so plainly as to give the adverse party notice of its character."

77. The bill of particulars itself, however, may be so lengthy as

ration or other pleading does not present distinctly the grounds of action or defence the opposing party may be required to file such a statement of the particulars as will put the applicant for the bill in possession of the needed information.<sup>78</sup> When furnished by a defendant, it is generally intended to limit the scope and operation of the general issue, and to confine the introduction of evidence to the particular defence which the defendant has disclosed.<sup>79</sup> If the pleadings of either party already sufficiently set forth the grounds of action or defence, no bill of particulars is necessary. If the bill, when filed, does not furnish the necessary information, the mode of procedure is to object to the bill and ask the court to require a more specific statement. If a defendant pleads the general issue, but fails or refuses to state his ground of defence, when called for, he may, nevertheless, offer evidence to disprove the case sought to be proved by the plaintiff. Section 3249 of the Code Va., was not intended to deprive the defendant of this right. His evidence, however, will be restricted to the point covered by his plea, to wit, a denial of what the plaintiff would be obliged to prove in order to maintain his action, and does not extend to matters of confession and avoidance. The bill of particulars is no part of a declaration or plea, and if not sufficient is not the subject of demurrer.<sup>80</sup>

*In What Cases Required.*—It is said that there is no inflexible rule as to the class of cases in which a statement of particulars of the plaintiff's claim or of the defendant's grounds of defence are required, but it rests in the sound discretion of the trial

to give little information as to what the real ground of action or defence is (for example, in *Ches. & O. R. Co. v. Hoffman*, 109 Va. 44, 63 S. E. 432, the defendant specified twenty-five grounds of demurrer to the evidence) but the statute seems to have made no provision against a multiplicity of particulars.

78. *Richmond v. Leaker*, 99 Va. 6, 37 S. E. 348; *Tidewater Quarry Co. v. Scott*, 105 Va. 160, 52 S. E. 835; *Richmond v. Wood*, 109 Va. 75, 63 S. E. 449.

79. *Oeters v. Knights of Honor*, 98 Va. 201, 35 S. E. 356.

80. *Geo. Campbell Co. v. Angus*, 91 Va. 438, 22 S. E. 167; *City Gas Co. of Norfolk v. Poudre*, 113 Va. —, 74 S. E. 158; *Whitley v. Booker Brick Co.*, 113 Va. —, 74 S. E. 160; *Williams v. Simpson*, 113 Va. —, 74 S. E. 162.

court, subject to review if plainly erroneous.<sup>81</sup> As already pointed out, no bill of particulars is necessary to be filed by a plaintiff where the declaration gives the defendant complete notice of the nature and character of the plaintiff's claim.<sup>82</sup> In an action to recover damages for a personal injury, where the declaration avers that it was the duty of the defendant to furnish suitable and reasonable tools, etc., with which to do the work, it is unnecessary to aver what the tools were, or to furnish any bill of particulars thereof.<sup>83</sup> But in a suit for damages, if a more specific statement of the element of damages be desired, it may be demanded under this statute.<sup>84</sup>

Whether a defendant in ejectment can be required to state the particulars of his defence is not settled in Virginia. Usually a plaintiff in ejectment must recover, if at all, upon the strength of his own title and not on the weakness of that of his adversary, and it would seem doubtful, therefore, whether such defendant can be required to state the grounds of his defence. The question has been left open in Virginia.<sup>85</sup> But if the defendant in ejectment, when called upon for such bill, objects to filing it, his objection must be seasonably made. It comes too late after verdict, and in no event could the objection be raised by a motion in arrest of judgment.<sup>86</sup> There appears to be no good reason why a plaintiff in ejectment may not be required to file a bill of particulars, if the needed information is not adequately set forth in the declaration.<sup>87</sup>

*Formality of the Bill.*—The statement of particulars does not constitute the issue to be tried, and need not be as formal or precise as a declaration or plea. If it is not sufficient, the court should require a sufficient statement, and if it is not furnished, exclude evidence of any matter not described in the notice, declaration, or other pleading, so plainly as to give the adverse par-

81. *Driver v. So. R. Co.*, 103 Va. 650, 48 S. E. 1000.

82. *Richmond v. Leaker*, 99 Va. 6, 37 S. E. 348.

83. *Richmond Loco. Works v. Ford*, 94 Va. 627, 27 S. E. 509.

84. *Wood v. Amer. Nat'l Bank*, 100 Va. 306, 40 S. E. 931.

85. *Carter v. Wood*, 103 Va. 68, 72, 48 S. E. 553.

86. *Va.-Tenn. Coal Co. v. Fields*, 94 Va. 116, 26 S. E. 426.

87. *King v. N. & W. R. Co.*, 99 Va. 625, 39 S. E. 701.

ties notice of its character.<sup>88</sup> It is sufficient if the particulars are set forth in such manner as will fairly and plainly give notice to the adverse party of its character, when the same was not so described in the pleading.<sup>89</sup>

*Insufficient Bill.*—Where the bill of particulars filed is insufficient, the party should be required to file a new or additional bill that is sufficient, and upon failure to do so, his evidence should be excluded on matters not otherwise sufficiently described in his pleadings. The objection to the bill should be made before the trial begins.<sup>90</sup> If the objection is overruled, and it is intended to be relied upon in the appellate court, a proper bill of exception should be taken, but if the orders of the court show that the plaintiff moved the court to require the defendant to file a statement of his grounds of defence, but that the motion was overruled and the plaintiff excepted, this is sufficient without any bill of exception.<sup>91</sup>

If a defendant, in an action of trespass on the case, has simply pleaded the general issue of not guilty, and fails to comply with an order requiring him to specify his grounds of defence, it seems that he may still be allowed to introduce evidence controverting the plaintiff's claim, as his plea gives notice thereof.<sup>92</sup>

### § 319. Second trial.

Where a trial has been had of an action at law and a verdict rendered in favor of the plaintiff, which is set aside on the motion of the defendant on the ground that it is contrary to the evidence, the plaintiff should take a proper bill of exception to the action of the court in setting aside the verdict, in which all the evidence should be set out, the ruling of the court on the motion, and the objection thereto. Afterwards when the new (second) trial is to be had, two courses are open to the plaintiff: (1) he may go on and produce his evidence, and go through the

88. *Columbia Accident Ass'n v. Rockey*, 93 Va. 678, 25 S. E. 1009. See, also, *ante*, § 73, p. 100.

89. *Tidewater Quarry Co. v. Scott*, 105 Va. 160, 52 S. E. 835.

90. *N. & W. R. Co. v. Carter*, 91 Va. 587, 22 S. E. 517.

91. *Driver v. So. R. Co.*, 103 Va. 650, 49 S. E. 1000.

92. See cases cited in note 80 to this section.

trial from start to finish just as he did on the first trial, or (2) if he thinks that on the first trial he has made as strong a case as he could possibly make by his evidence on the second trial, he may simply decline to introduce any evidence at the second trial, and allow a verdict to be rendered for the defendant, which verdict he should move to set aside because contrary to the evidence, and take a bill of exception to the opinion of the court overruling his latter motion. The object and purpose of this proceeding is to avoid the trouble and expense of a second trial, and also probably to cut off any new evidence which the defendant may in the meantime have gotten to defeat his cause. It is provided by statute in Virginia that if there have been two trials at law, and proper bills of exception have been taken, the appellate court shall, on a writ of error, review the proceedings on the *first trial first*, and if it finds that error was committed in setting aside the first verdict, it shall set aside all the proceedings subsequent to that verdict, and enter up judgment on the verdict.<sup>93</sup> This is a practice frequently resorted to.

93. Code, § 3484.

## CHAPTER XLI.

### JUDGMENTS.

- § 320. Scope of chapter.
- § 321. Judgments as liens.
- § 322. Commencement of the lien.
  - Date of commencement.
  - Time for docketing.
  - Order of satisfaction.
- § 323. Duration of lien.
- § 324. Docketing.
- § 325. Judgments against executors, administrators and trustees.
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- § 327. Instruments having force of judgments.
- § 328. Death of debtor.
- § 329. Priority of judgments inter se.
- § 330. Judgments of federal courts.
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- § 332. Collateral attack.
- § 333. Void judgments.
- § 334. Satisfaction of judgments.
- § 335. Order of liability of lands between different alienees.
- § 336. Enforcement of judgments.

#### § 320. Scope of chapter.

Judgments may be either interlocutory or final. Final judgments may be for specific property, real or personal, or for money. As damages are measured by a money standard, judgments for money, as used in this chapter, will include damages. The following treatment will be limited to final judgments for money. A "judgment," as used in this chapter, denotes the final award and determination by any court of competent jurisdiction, law or equity, directing the payment of money. By statute in Virginia, it is immaterial whether the money be directed to be paid to an individual or into a court, or a bank, or other place of deposit.<sup>1</sup>

1. Code, §§ 3557, 3558.

### § 321. Judgments as liens.

Judgments were not liens on land at common law, except upon debts due the King. By statute in England, substantially adopted in Virginia, a new execution was provided, the writ of *elegit*, by which a moiety of the lands of the debtor could be subjected to the satisfaction of the judgment. "The statute, however, did not in *express* terms give a lien on the land. It provided for the writ and prescribed the form for it. By its terms the officer was required to deliver to the creditor all the goods and chattels of the debtor, saving the oxen and beasts of his plow, and also a moiety of all the lands and tenements whereof the debtor, at the day of obtaining his judgment, was seized, or at any time afterwards, by reasonable price and extent, to have and to hold the said goods and chattels to the creditor as his own proper goods and chattels, and the said moiety as his freehold, to him and his assigns until thereof the judgment be satisfied ('until he shall have levied thereof the debt and damages aforesaid').

"It was by judicial construction given to this writ that the judgment was said to be a *lien* on the land. The *lien* resulted from the mandate of the writ to *deliver* to the creditor, by reasonable price and extent, a moiety of all the lands and tenements of the debtor whereof he was *seized at the date of the judgment, or at any time afterwards*. The *lien* was an incident of the writ and depended for its existence and continuance upon the capacity to sue out the writ. As long as this capacity lasted, even although revived after being temporarily suspended, the *lien* continued, and whenever it finally ceased the *lien* which was dependent upon it was extinguished.

"As the mandate of the writ extended to all the lands and tenements of which the debtor was *seized at the date of the judgment, or at any time afterwards*, it was by force of this mandate also that the *lien* of the judgment over-reached all subsequent conveyances, although made to purchasers for valuable consideration without notice of the judgment, and extended to all the lands of the debtor within the jurisdiction of the state."<sup>2</sup>

2. Borst *v.* Nalle, 28 Gratt. 423, 428; Coombs *v.* Jordan, 3 Bland's Ch. 284, 22 Am. Dec. 236; 1 Black on Judgments, §§ 397, 398. . .

In 1843 the legislature passed an act for the protection of subsequent purchasers for value and without notice, requiring judgments to be docketed in order to affect such purchasers. With this exception, the lien of the judgment continued in all respects as has been hereinbefore stated until the Revisal of 1849. Up to that time the *lien* was a mere incident of the writ of *elegit*; but, by the Revisal of 1849, judgments were made a direct, specific, legal lien on lands, and equity was given jurisdiction for the enforcement thereof. The remedy in equity was thereafter preferred in practice, and the *elegit* fell into disuse and was finally abolished. Now, in Virginia, the judgment is, by the terms of the statute, a fixed, definite, statutory, legal lien, "on all the real estate of, or to which such person is, or becomes, possessed or entitled, at or after the date of such judgment."<sup>3</sup> The estate of the judgment debtor may be legal or equitable, in fee or for life. An equity of redemption is an estate in land and subject to the lien of a judgment,<sup>4</sup> and, of course, when a contingent remainder becomes vested it is bound by judgments against the owner,<sup>5</sup> but a term of years is a chattel real, liable to the lien of a *fi. fa.* and is not such an estate in land as is bound by a judgment. Where the recording acts do not interfere, the judgment creditor can never subject any greater interest than the judgment debtor has.<sup>6</sup> If, however, there should be an exchange of land, and one of the parties should fail to record his deed, a judgment against the other, who had recorded his deed, will bind both tracts.<sup>7</sup> A mere transitory seizin of land, however, where the land is reconveyed to secure the purchase price does not vest in the grantee such interest in the land as will be liable to judgments against him in preference to the debt secured; for example, if land be conveyed to Smith and, at the same time, and as part and parcel of the same transaction the land is reconveyed by Smith to a trustee to secure the purchase money, the trust creditor has the preference, and the mere transitory seizin of Smith is not of

3. Code, § 3567.

4. *Michaux v. Brown*, 10 Gratt. 612, 619.

5. *Wilson v. Langhorne*, 102 Va. 631, 47 S. E. 871.

6. *Dingus v. Minn. Imp. Co.*, 98 Va. 737, 37 S. E. 353.

7. *Price v. Wall*, 97 Va. 334, 33 S. E. 599.

such nature as to give a judgment against him priority over the trust deed.<sup>8</sup>

A judgment creditor, whose judgment is duly docketed, has the right to subject the land of the judgment debtor to the payment of his judgment in the condition in which he finds the land at the time of enforcement, without diminution or allowance for betterments placed upon it subsequent to the docketing of the judgment. The statute on the subject of improvements has no application to such case. If, after the judgment is docketed, the debtor sells the land to a purchaser for value, who puts valuable improvements on it, the creditor is entitled to subject the land and the improvements to the payment of his judgment, as the purchaser has constructive notice of the existence of the lien.<sup>9</sup>

### § 322. Commencement of the lien.

At common law, a judgment rendered in court related back to the first moment of the day on which the court actually began its term, and this, until comparatively recently, continued to be the law in Virginia. There have been many changes in the law in Virginia, both as to the time of the commencement of the lien, and the time of docketing, *as against subsequent purchasers for value without notice*, since from July 1, 1850. These changes may be briefly tabulated as follows:

#### DATE OF COMMENCEMENT OF LIEN.

##### I. *Judgments Rendered in Court:*

1850, July 1, to 1902, March 29:

The lien dates from the first day of term at which it is rendered, if there could have been a judgment on that day; otherwise from the date of rendition.<sup>10</sup>

1902, March 29, to date:

The lien dates from the date of judgment. The lien of a judgment shall in no case relate back to a day or time prior to

8. *Straus v. Bodeker*, 86 Va. 543, 10 S. E. 570.

9. *Nixdorf v. Blount*, 111 Va. 127, 68 S. E. 258.

10. Code 1849, Ch. 186, § 6; *Withers v. Carter*, 4 Gratt. 407, made statutory May 1, 1888. Code, §§ 3567, 3568.

that on which the judgment was rendered. It would seem that judgments in court relate to first moment of day of rendition.<sup>11</sup>

2. *Judgments or Decrees in Vacation:*

1850, July 1, to 1898, July 1:

The lien dates from the first moment of the day of rendition.<sup>12</sup>

1898, July 1, to date:

The lien dates from the *time of day* of rendition. If more than one judgment is rendered on the same day, they take priority according to time of day each is rendered, unless all are rendered at once, and then they date from the time of day the first judgment is rendered. The lien does not relate back to any earlier time.<sup>13</sup>

11. Code, § 3567.

12. *Hockman v. Hockman*, 93 Va. 455, 25 S. E. 534.

13. Acts 1897-'8, pp. 507, 508, amending Code, §§ 3567 and 3283. Acts 1901-'2, p. 427, amending § 3567. These sections, as amended, are as follows:

Sec. 3567: "Every judgment for money rendered in this State heretofore or hereafter against any person shall be a lien on all the real estate of or to which such person is or becomes possessed or entitled at or after the date of such judgment. When more than one judgment or decree is confessed or entered in vacation on the same day, they shall have priority as among themselves in the order with respect to the time when they are respectively confessed or received for record in the clerk's office of the court entering the same; provided, that when several judgments are confessed together they shall all be deemed to have been confessed as of the time the first was confessed, and the clerk shall enter such time on the margin of his order book. The lien of a judgment shall in no case relate back to a day or other time prior to that on or at which the judgment was rendered. This section is qualified by section 3649 and the three following sections."

Sec. 3283: "In any suit a defendant may, in vacation of the court, and whether the suit be on the court docket or not, confess a judgment in the clerk's office, for so much principal and interest as the plaintiff may be willing to accept a judgment or decree for. The same shall be entered of record by the clerk in the order or minute book, and be as final and as valid as if entered in court on the day of such confession, except merely that the court shall have such control over it as is given by § 3293. *And the said clerk shall enter*

TIME FOR DOCKETING AS AGAINST SUBSEQUENT PURCHASERS FOR  
VALUE AND WITHOUT NOTICE.

1850, July 1, to 1872, March 13.—Within one year after date of judgment, or 90 days before the conveyance.<sup>14</sup>

1872, March 13, to 1873, March 28.—Within 90 days after date of judgment, or 30 days before conveyance.<sup>15</sup>

1873, March 28, to 1888, May 1.—Within 60 days after date of judgment, or within 15 days before conveyance.<sup>16</sup>

1888, May 1, to 1902, March 29.—Within 20 days after date of judgment, or within 15 days before conveyance.<sup>17</sup>

1902, March 29, to date (1912).—Not a lien at all “until and except from the time it is duly docketed in the clerk’s office of the county or corporation wherein such real estate may be.”<sup>18</sup>

ORDER OF SATISFACTION OF LIENS.

Generally judgments are to be satisfied according to their respective priorities, but if several judgments are rendered against the same person at one term all will stand *pari passu* if ready for hearing and on the docket at the commencement of the term. Such judgments shall take priority over judgments by confession entered at the same term, and over judgments rendered at the

*upon the margin of such book opposite where the said judgment or decree is entered, the date and time of the day at which the same was confessed; and the lien of the said judgment or decree shall run only from the time of day of the confession.”*

The object of these amendments was to overrule *Hockman v. Hockman*, *supra*.

14. Code 1849, Ch. 186, § 8.

15. Acts 1871-'2, p. 237.

16. Acts 1872-'3, p. 242.

17. Code 1887, § 3570.

18. Acts 1901-'2, p. 427, Code (1904), § 3570, as follows:

“No judgment shall be a lien on real estate as against a purchaser thereof for valuable consideration without notice, until and except from the time that it is duly docketed in the clerk’s office of the county or corporation wherein such real estate may be.

same term in any proceeding by motion instituted during the term.<sup>19</sup>

Under the provisions of § 3567 of the Code every judgment is made a lien from the *date* of such judgment, which means the first moment of the day on which the judgment is rendered; but this section must be read in connection with § 3283 of the Code, declaring that the lien of a judgment or decree rendered in *vacation* upon confession, shall run only from the *time of day* of the confession. If, therefore, a judgment be confessed on the day that a court convenes, but before the actual session of the court, and a judgment be rendered in court on the same day, the judgment rendered in court has priority, as judgments by confession "run only from *time of day* of confession," while judgments rendered in court are liens from the first moment of the day of rendition. Under § 3576, judgments rendered in court are given priority over judgments by confession entered at the same term, and over judgments rendered at the same term in any proceeding by motion *instituted during the term*. As a proceeding by motion under § 3211 of the Code is not deemed to have been instituted until the notice, duly executed, is returned to the clerk's office,<sup>20</sup> a judgment rendered on a notice given before the term began, but not returned until after the term had commenced, would be sub-

19. Acts 1901-'2, p. 427, Code (1904), § 3576, as follows:

"The liens of judgments against the same person shall attach to all his real estate liable thereto under § 3567 in the order of the dates respectively of said judgments, and the judgments shall be made payable thereout in the same order; and where there are rendered at the same term of court two or more judgments against the same person in suits or in proceedings by motion, both or all of which were matured, at the rules or otherwise, and were upon the docket at the commencement of the term, there shall be no priority between or among them, but said judgments shall be paid ratably out of the real estate upon which they are liens. Such judgments shall take priority over judgments by confession entered at the same term, and over judgments rendered at the same term in any proceeding by motion instituted during the term. An extract of any judgment shall, upon motion, be granted to any party interested immediately upon its rendition, subject to the future action of the court rendering the same."

20. *Furst v. Banks*, 101 Va. 208, 43 S. E. 360.

ordinate to judgments rendered during the term. Under the old law in Virginia, the fraction of a day rule was so far modified as to give validity to a judgment confessed on the day the court began but before the actual session of the court. It was held to be a judgment in vacation. It was not necessary to decide, nor was it decided, whether it would have priority over, or stand *pari passu* with, judgments rendered during the term.<sup>21</sup> The common law fiction of relation back to the first day of the term was restricted, however, to cases in which the judgment might have been rendered on that day.<sup>22</sup> This was made statutory in Virginia May 1, 1888, by § 3568 of the Code, which has been recently repealed. One of the chief reasons for making judgments relate back to the first day of the term was to put all suitors on the same footing. Inasmuch as all cases ready for hearing might not be tried on the first day of the court, through no fault of the suitor, it was deemed proper that all should stand on the same footing.

The time of the commencement of the lien of a judgment is regulated, of course, by statute in each State.<sup>23</sup>

### § 323. Duration of lien.

This, of course, is statutory, and to be determined by the law of the particular State. In Virginia the judgment is a lien and may be enforced as such as long as you can issue a *fi. fa.* thereon, or revive by *scire facias*, or sue on it. This is ten years at the least from the date of the judgment, and, if a *fi. fa.* has been issued and no return has been made thereon by an officer, the lien continues for ten years from the *return* day of the *fi. fa.*<sup>24</sup> If any return by an officer has been made upon the *fi. fa.* the lien continues for twenty years from the return day of the *fi. fa.*, except that, if the judgment debtor dies, the judgment must be revived,

21. *Brown v. Hume*, 16 Gratt. 456.

22. *Withers v. Carter*, 4 Gratt. 407; 1 Black on Judgments, § 442.

23. See 1 Black on Judgments, § 443, for summary of statutes.

24. If a *fi. fa.* be *made out* and simply marked "to lie," and kept in the clerk's office, this is sufficient to extend the life of the judgment to ten years from the *return day* of that *fi. fa.* *Davis v. Roller*, 106 Va. 46, 55 S. E. 4.

or a suit be brought to enforce it, within five years from the qualification of his personal representative.<sup>25</sup> The judgment may be thus kept alive perpetually by the issue of successive executions within the statutory period.<sup>26</sup> If an execution has been issued in contravention of the express agreement of the parties and has been returned, it will, nevertheless, extend the life of the judgment, unless set aside in a direct proceeding for that purpose. The execution is not a void execution, and cannot be collaterally assailed. The agreement is personal between the parties and their privies, and cannot be enforced by third persons.<sup>27</sup>

If the *scire facias* to revive the judgment is not sued out until after the judgment has become barred by the statute of limitations, and the debtor refuses to plead the statute and permits the judgment to be revived, the creditor would probably not be permitted under the Virginia holding to override the rights of purchasers and judgment creditors whose rights had become fixed prior to such revival. The question, however, is not free from difficulty.<sup>28</sup>

### § 324. Docketing.

The object and purpose of docketing judgments is to give notice to *subsequent purchasers* for value and without notice. The Virginia statute has no application to creditors, but applies solely to *subsequent purchasers*, and hence docketing is only required for protection against such purchasers.<sup>29</sup> Another important provision of the Virginia statute is, that a judgment shall not be deemed to be docketed unless it is indexed.<sup>30</sup> The rule is otherwise as to deeds. Generally, initials are allowed to be used instead of the full names. Whether the omission of a middle name, or

25. Code, § 3577; *Spencer v. Flanary*, 104 Va. 395, 51 S. E. 849; *Ackiss v. Satchell*, 104 Va. 700, 52 S. E. 378; 5 Va. Law Reg. 672. As to what is a sufficient return on a *fi. fa.*, see *post*, § 346.

26. *Ackiss v. Satchell*, *supra*.

27. *Baer v. Ingram*, 99 Va. 200, 37 S. E. 905; *Fulkerson v. Taylor*, 100 Va. 426, 41 S. E. 863.

28. See, *ante*, § 223.

29. Code, § 3570.

30. Code, § 3561.

initial, or a mistake therein, will vitiate the docketing is largely dependent upon whether what is actually used is sufficient to give notice to a reasonable man.<sup>31</sup> In Virginia, it has been held that docketing and indexing a judgment against Mrs. John Smith is not notice of a judgment against Mary Smith, though she be in fact the wife of John Smith.<sup>32</sup> It has been made a question whether judgments in favor of the Commonwealth must be docketed, as the general rule is that statutes do not embrace the State unless expressly named.<sup>33</sup> The statute in Virginia requires attorneys representing the commonwealth to cause such judgments to be docketed, but does not declare the effect of failure to docket. It is probably necessary.<sup>34</sup>

Docketing judgments in a county out of which a city is subsequently carved is not constructive notice of such judgment to a purchaser for value of land acquired by the judgment debtor several years after the incorporation of the city. In order to affect such purchaser the judgment must be docketed in the city either within twenty days after the date of the judgment, or fifteen days before the conveyance of such real estate to the purchaser.<sup>35</sup>

The proceeding by *scire facias* to revive a judgment is not a new suit but a continuation of the old one. Its object is to obtain execution of a judgment which has become dormant by lapse of time, and the order of revival when made is simply that the plaintiff may have execution for the debt and the costs. Such order is frequently spoken of as a judgment on a *scire facias*, but

31. See interesting discussion, 8 Va. Law Reg. 714.

32. Bankers' Loan & Investment Co. v. Blair, 99 Va. 606, 39 S. E. 231. In Fulkerson v. Taylor, 100 Va. 426, 41 S. E. 863, it was held that the production of an abstract of a judgment which says nothing as to docketing is no proof of the docketing, if that fact be an issue in the case. It was also held that "same," written under the judgment debtor's name in the index and giving reference to another page of the judgment docket, was a sufficient indexing of the judgment found on that page.

33. For a discussion of this subject, see 7 Va. Law Reg. 817, in which the writer arrives at the conclusion that such judgments must be docketed.

34. Code, § 3565.

35. Wicks v. Scull, 102 Va. 690, 46 S. E. 297. Since this case was decided the statute as to docketing has been materially changed, as pointed out; ante, § 322.

such order of revival is not a judgment which can be docketed, and the docketing of such order, frequently called a judgment on the *scire facias*, is not constructive notice of the original judgment.<sup>36</sup>

### § 325. Judgments against executors, administrators and trustees.

The judgment docket frequently contains judgments against defendants with the words "administrator," "executor," or "trustee," following. Whether or not such judgments are personal judgments against the fiduciary can only be ascertained by an examination of the order book of the court rendering the judgment or decree. If the judgment or decree simply adjudges that the plaintiff recover against A. B., executor, administrator, trustee, or the like, it is a personal judgment binding the real estate of A. B., and the added words are simply *descriptio personæ*.<sup>37</sup> If it is intended that a judgment or decree shall be against a defendant in a representative capacity, then the judgment should be that the defendant do, *out of the estate of his intestate, or testator*, as the case may be, if so much he hath, pay the amount. Such a judgment, however, cannot create as a *lien* on the estate of the *decedent*. All liens on his estate must be created in his lifetime, or by operation of some statute. No judgment against his representative after his death can create any lien on his estate.

### § 326. Claim of homestead against judgments.

Although a right to claim a homestead accrues after judgment, if the homestead has not been waived, it prevails over the judgment under the homestead laws of Virginia.<sup>38</sup> The lien of a judgment, where homestead has not been waived, does not attach to the homestead at all until the expiration of the homestead period, at which time the judgments attach (in Virginia) to such of the real estate claimed as a homestead as remains, if any, in

36. *Lavell v. McCurdy*, 77 Va. 763; *White v. Palmer*, 110 Va. 490, 66 S. E. 44.

37. 1 Black Judgments, § 214; *Lincoln v. Stern*, 23 Gratt. 816, 822; *Fulkerson v. Taylor*, 100 Va. 426, 41 S. E. 863.

38. *Oppenheim v. Myers*, 99 Va. 582, 39 S. E. 218.

the order of the priority of their dates.<sup>39</sup> The claim of a homestead, however, does not suspend the running of the statute of limitations as to the judgment, and the creditor must keep his judgment alive in the method prescribed by law, else, if it is barred by the act of limitations when the homestead period ceases, it cannot be asserted against any of the property set apart as a homestead.<sup>40</sup>

### § 327. Instruments having the force of judgments.

Delivery bonds in Virginia have the force of judgments when duly returned and recorded. The same is true of recognizances, but each must be docketed as required by law, as against subsequent purchasers for value and without notice.<sup>41</sup>

### § 328. Death of debtor.

In Virginia, West Virginia, Massachusetts, Florida, Alabama, Texas, Kentucky and other States, a judgment rendered against the defendant, who dies after service of process but before judgment, and whose death has not been suggested on the record, is not void but voidable only. It is valid unless and until set aside in a *direct* proceeding for that purpose. It cannot be assailed collaterally.<sup>42</sup> The same is true in Virginia of a decree in a suit in chancery to subject lands of the defendant to the lien of a judgment, although the *death of the defendant has been suggested* on the record and the suit not revived against his heirs.<sup>43</sup>

### § 329. Priority of judgments inter se.

As among judgment creditors themselves, the priorities are determined solely by the dates of the judgments, or the times at which they are recovered, *regardless of docketing*. Judgments

39. Code, §§ 3649, 3576; *Williams v. Watkins*, 92 Va. 680, 685, 24 S. E. 223.

40. *Ackiss v. Satchell*, 104 Va. 700, 52 S. E. 378.

41. Code, §§ 3580, 3626.

42. *Robinett v. Mitchell*, 101 Va. 762, 45 S. E. 287; *Kink v. Burdett*, 28 W. Va. 601; *Black on Judgments*, §§ 199, 200.

43. *Alvis v. Saunders*, 113 Va. 208, 74 S. E. 153.

recovered at the same time stand *pari passu*, but if confessed at different times on the same day in vacation, priority is determined by the *time of day* at which they are confessed. The order in which the judgments are docketed is wholly immaterial. It is not necessary to docket a judgment as against another judgment in order to preserve its priority. It is to be particularly observed that docketing of judgments is only required against *subsequent purchasers* for value and without notice. If there has been no alienation of the land by the debtor, who owns land in Rockbridge County, a judgment in the City of Richmond, on May 1, 1912, has priority over a judgment in Rockbridge on June 1, 1912, although the Richmond judgment is never docketed in Rockbridge County, and the judgment in Rockbridge is duly docketed. If a judgment debtor acquires real estate years after a number of judgments have been recovered against him, they are still to be satisfied in the order of priority of the judgments.<sup>44</sup> The lien of the judgment is not merged nor destroyed by another judgment thereon, nor by a forfeited forthcoming bond. This is now statutory in Virginia, though prior to May 1, 1888, it had been made a question.<sup>45</sup> Where there have been successive judgments against a common debtor who has aliened a part of his land after the first judgment but before the other judgments were recovered, the first judgment creditor is entitled to priority of satisfaction out of the land still held by the judgment debtor, although he released his lien on the land so aliened after the recovery of the other judgment. There can be no marshalling to his prejudice.<sup>46</sup> Lands are to be subjected to the payment of judgments in the inverse order of alienation.

### § 330. Judgments of federal courts.

Judgments and decrees rendered in the circuit and district courts of the United States are liens on property throughout the State in which they are rendered in the same manner, and to the same extent, and under the same conditions only, as if such

44. Code, § 3576; Judge Burks' Address, p. 29.

45. Code, § 3574; *Bank of Old Dom. v. Allen*, 76 Va. 203, 204; *Barksdale v. Fitzgerald*, 76 Va. 895, 896.

46. *Blakemore v. Wise*, 95 Va. 269, 28 S. E. 332.

judgments and decrees had been rendered by a court of general jurisdiction of such State, and they cease to be liens thereon in the same manner and in like periods as judgments and decrees of the courts of such State.<sup>47</sup> Formerly, it was not necessary to docket judgments obtained in Federal courts in order to bind subsequent purchasers for value without notice. This was a great hardship on such purchasers, and subjected them to serious hazards. It was changed by Act of Congress August 1, 1888, declaring that, whenever the laws of any State require a judgment or a decree of a State court to be registered, recorded, docketed, indexed, or any other thing to be done in any particular manner, or in a certain office or county, or parish in the State of Louisiana, before liens shall attach, this Act shall be applicable therein *whenever, and only whenever*, the laws of such State shall authorize the judgments and decrees of the United States courts to be registered, recorded, docketed, indexed, or otherwise conform to the rules and requirements relating to the judgments and decrees of courts of the State.<sup>48</sup> By the third section of the Act, however, it is provided that "Nothing herein shall be construed to require the docketing of a judgment or decree of a United States court, or the filing of a transcript thereof, in any State office within the same county, or the same parish in the State of Louisiana, in which the judgment or decree is rendered, in order that such judgment or decree may be a lien on any property within such county, if the clerk of the United States court be required by law to have a permanent office and a judgment record open at all times for public inspection in such county or parish." The word "corporation" does not appear in this section. There are many cities in the State which lie within the territorial limits of counties and yet which have separate and distinct organizations. It is not clear as to what construction may be put upon this section as to the necessity of docketing such a judgment within the corporation, but it is presumed that, if the clerk of the Federal court located in the city keeps the indices and records required by § 2 of the Act, no docketing in the city is required—for example, a judgment of the Federal court sitting in the City of

47. 4 Fed. Stat. Anno. 4, 5. U. S. Circuits Courts have now been abolished.

48. 4 Fed. Stat. Anno. 5; 25 Stat. L. 357.

Lynchburg is not required by the Act to be docketed in the Corporation Court of the City of Lynchburg. It will be observed further that no provision has been made for docketing judgments or decrees of the United States Circuit Court of Appeals which sits in Richmond.

Soon after the above Act of Congress was adopted, an act was passed by the Legislature of Virginia providing that judgments and decrees rendered in the circuit and district courts of the United States within this State may be docketed and indexed in the clerks' offices of courts of this State in the same manner, and under the same rules and requirements of law, as judgments and decrees of courts of this State.<sup>49</sup>

### § 331. Foreign judgments.

Judgments of sister states and foreign countries have no force and effect *as judgments* outside of the territorial limits of the states or countries in which they are rendered, and, consequently, cannot be docketed and do not constitute liens in another jurisdiction where the land is situated. They may be the foundation of actions upon which judgments may be rendered, and full faith and credit will be given to the records of sister states of the Union, as provided by the Constitution, but that does not mean that they constitute liens outside of the State in which they are rendered, or can be enforced by execution or other process until a domestic judgment has been obtained.

A judgment, as has been seen, is a lien on all the lands of the debtor throughout the territorial limits of the State in which it is rendered; and hence a judgment rendered in the State of Virginia, before West Virginia was cut off, was a lien throughout that portion of the State which now constitutes the State of West Virginia, and the lien thus acquired was neither lost nor impaired by reason of the division of the State of Virginia into two States and the falling into the State of West Virginia of a county in which a judgment debtor owned land. The judgment is still a lien on the land in West Virginia, if not barred by the statute of limitations.<sup>50</sup>

49. Acts 1889-'90, p. 22, in effect Jan. 24, 1890; Code, § 3559a.

50. Gatewood v. Goode, 23 Gratt. 880, 891.

### § 332. Collateral attack.

A domestic judgment cannot be assailed except in a proceeding instituted for the express purpose of annulling, correcting, or modifying it. If it be sought to enforce the judgment by a bill in chancery, the defendant debtor cannot by answer assail its validity, as his would be a collateral attack.<sup>51</sup> One of the most common ways of directly assailing a judgment is a motion to quash an execution issued thereon, which may be made even after the execution has been returned.<sup>52</sup> If, however, the judgment is not merely voidable, but is absolutely void, as where there has been no sufficient process upon which to found it, then it may be treated as a nullity and may be assailed in any way whatever.<sup>53</sup>

### § 333. Void judgments.

Judgments without personal service of process within the State issuing it, or its equivalent, or upon a service of process in a manner not authorized by law,<sup>54</sup> or judgments by default which have become final within two weeks (formerly one month) after the service of process,<sup>55</sup> are void judgments, and may be so treated in any proceeding, direct or collateral. A judgment rendered by a judge disqualified by reason of interest, is voidable only and not void, and hence cannot be collaterally assailed.<sup>56</sup>

### § 334. Satisfaction of judgments.

A judgment once satisfied by a party *primarily* bound for it is extinguished as a lien. If however, it be satisfied by a party

51. *Fulkerson v. Taylor*, 102 Va. 314, 46 S. E. 309; *King v. Burdett*, 28 W. Va. 601.

52. *Slingluff v. Collins*, 109 Va. 717, 64 S. E. 1055.

53. *Staunton Bldg. Ass'n v. Haden*, 92 Va. 201, 23 S. E. 285; *Crockett v. Etter*, 105 Va. 679, 54 S. E. 864.

54. *Staunton Bldg. Ass'n v. Haden*, 92 Va. 201, 23 S. E. 285; *Jones v. Crim*, 66 W. Va. 301, 66 S. E. 367; *Tennant v. Fretts*, 67 W. Va. 569, 68 S. E. 387; *Pennoyer v. Neff*, 95 U. S. 714.

55. Code, § 3287; *Dillard v. Thornton*, 29 Gratt. 392; *Turnbull v. Thompson*, 27 Gratt. 396.

56. *Butcher v. Kunst*, 65 W. Va. 384, 64 S. E. 967.

*secondarily* liable, it will be kept alive as against his principal and may be enforced as a lien against the principal's real estate, notwithstanding it has been paid by a surety, in this respect differing entirely from an execution at law.<sup>57</sup> Provision is made by statute in Virginia for having judgments marked satisfied on the judgment docket, whether such satisfaction be in whole or in part, and if there is more than one defendant the entry must show by whom the satisfaction is made.<sup>58</sup> If payment or satisfaction of a judgment, in whole or in part, appears by the return of an execution, or the certificate of the clerk of the court from which the execution issued, or if the judgment creditor or his attorney direct, it is made the duty of the clerk in whose office the judgment is docketed to enter such satisfaction, in whole or in part, as the case may be, on the lien docket. In other cases, it is made the duty of the judgment creditor, in person or by his attorney, to cause such satisfaction, in whole or in part, to be entered on the judgment docket within ninety days after it is made,—such entry to be signed by the creditor, his duly authorized agent or attorney, and be attested by the clerk in whose office the judgment is docketed. A penalty of twenty dollars is put upon the creditor for failure to comply with its provisions. It is also provided that the judgment debtor may, after notice to the creditor, have the judgment marked satisfied, upon proof that it has been paid off or discharged.<sup>59</sup>

### § 335. Order of liability of lands between different alienees.

Lands are to be subjected to the lien of judgments in the inverse order of their alienation by the judgment debtor. The statute in Virginia<sup>60</sup> provides as follows:

“Where the real estate liable to the lien of a judgment is more

57. Code, § 3574. It seems that a suit to be subrogated must be brought within five years from the time the right accrues. See *Callaway v. Saunders*, 99 Va. at p. 351, 38 S. E. 182; Judge Burks' address, p. 29; compare *Hawpe v. Bumgardner*, 103 Va. 91, 48 S. E. 554.

58. Code, §§ 3562, 3563, 3564. As to satisfaction of other liens, see Code, §§ 2498, 2498a.

59. Code, §§ 3562, 3563, 3564.

60. Code, § 3575.

than sufficient to satisfy the same, and it, or any part of it, has been aliened, as among the alienees for value, that which was aliened last, shall, in equity, be first liable, and so on with other successive alienations, until the whole judgment is satisfied. And as among alienees who are volunteers under such judgment debtor, the same rule as to the order of liability shall prevail; but as among alienees for value and volunteers, the lands aliened to the latter shall be subjected before the lands aliened to the former are resorted to; and, in either case, any part of such real estate retained by the debtor, shall be first liable to the satisfaction of the judgment.”

Under this statute it has been held that, where several lots are sold at the same time, or on the same day, the several purchasers stand on the same footing, and the lots held by them should be charged ratably, and further that the fact that they were conveyed to the purchasers at different times makes no difference.<sup>61</sup>

The former statute did not determine the order of liability as between alienees for value and volunteers. The present statute makes a material alteration in this respect. Of this alteration Judge Burks says:

“It has been decided by the Court of Appeals that lands bound by the liens of judgments, and aliened after the liens attached, should be subjected to the satisfaction of the liens in the inverse order of alienation, without distinction between alienees for value and volunteers.<sup>62</sup> It is now provided that, ‘as among alienees for value and volunteers, the lands aliened to the latter shall be subjected before the lands aliened to the former are resorted to.’ ”<sup>63</sup>

It would seem, under this statute, that no matter what disposition the volunteer makes of his land, it will be liable before lands aliened for value, and that the land aliened to the volunteer will be liable before any of that aliened for value, although the aliena-

61. *Alley v. Rogers*, 19 Gratt. 366; *Harman v. Oberdorfer*, 33 Gratt. 497, 507.

62. *Whitten v. Saunders*, 75 Va. 563.

63. Judge Burks' Address, p. 29.

tions for value take place after the volunteer aliens his land for a valuable consideration.

### § 336. Enforcement of judgments.

The usual method of enforcing the collection of a judgment is by a writ of *feri facias* (discussed in the next chapter) by which the amount of the judgment is collected out of the personal property of the defendant. The judgment, however, is a lien only on real estate, or some interest therein, and if it is sought to enforce this *lien*, the proceeding is by a bill in equity. It is provided by statute in Virginia, that if it appears to the court that the rents and profits of the real estate subject to the lien will not satisfy the judgment in five years, the court may direct the sale of said real estate, or any part thereof.<sup>64</sup> Of course, what is meant is the *net* rents and profits after paying cost of suit, current taxes, and other expenses incident to renting. No particular mode is prescribed for determining whether or not the rents and profits for five years will satisfy the liens thereon. The fact may be made to appear by the pleadings, or the admissions of the parties, or by evidence.<sup>65</sup> However it may appear, the court has no right to direct a sale of the land, or any part thereof, if the rents and profits for five years will discharge the liens aforesaid. This statute, however, applies only to suits to enforce the lien of judgments. It has no application to a suit to enforce a vendor's lien.<sup>66</sup>

If the judgment is not barred by act of limitations at the time of the death of the judgment debtor, a bill in equity may be maintained against his personal representatives and heirs to subject the real estate of the decedent to the payment of the judgment, without first reviving the judgment.<sup>67</sup>

If the amount of the judgment does not exceed \$20.00, exclusive of interest and cost, no bill to enforce the lien thereof can be maintained in Virginia, unless it appears that sixty days before the institution of the suit the judgment debtor, or his personal

64. Code, § 3571.

65. *Ewart v. Saunders*, 25 Gratt. 203; *Horton v. Bond*, 28 Gratt. 815.

66. *Neff v. Wooding*, 83 Va. 432, 2 S. E. 731.

67. *James v. Life*, 92 Va. 702, 24 S. E. 275.

representative, and the owner of the real estate on which the judgment is a lien, or, in case of a non-resident, his agent or attorney (if he have one in this State), had notice that the suit would be instituted if the judgment was not paid within that time.<sup>68</sup> Nor can any suit be brought to enforce the lien of a judgment upon which the right to issue an execution, or bring a *scire facias*, or an action, is barred.<sup>69</sup>

68. Code, § 3572.

69. Code, § 3573.

## CHAPTER XLII.

### EXECUTIONS.

- § 337. Execution must follow judgment.
- § 338. Issuance of execution.
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§ 354. Property undisclosed.

§ 355. Non-resident debtor.

§ 356. Motion to quash.

§ 357. Venditioni exponas.

### § 337. Execution must follow judgment.

There are various forms of executions, but that to which attention is now specially directed is the writ of *feri facias*, which is the ordinary judicial process for enforcing the collection of a money judgment by the sale of the property of the defendant. The writ is addressed to the sheriff of the county or sergeant of the corporation, and directs him of the goods and chattels of the defendant "you cause to be made" (*feri facias*) the amount of the judgment. As its purpose is to enforce the collection of a money judgment, it must follow the judgment as to the amount, time from which it bears interest, names of parties, and in every other material aspect, and any variance between the judgment and the execution is good ground to quash the execution.<sup>1</sup> If the judgment be a joint judgment against several, the execution must be joint also, though some of the parties be dead;<sup>2</sup> but if the action be against several jointly bound, and the judgment be rendered against several defendants at different dates, there may be one joint execution.<sup>3</sup>

### § 338. Issuance of executions.

The method of obtaining an execution is generally regulated by statute. In Virginia it is made the duty of the clerk *ex officio* to issue the writ as soon as practicable after the adjournment of the court, and place it in the hands of the proper officer for execution, unless otherwise directed, by a writing, by the beneficiary, his agent or attorney.<sup>4</sup> If the judgment and the claim on which it was based has been assigned, the assignor has no control over an execution issued by direction of the assignee.<sup>5</sup> Usually, an

1. *Snavely v. Harkrader*, 30 Gratt. 487; *Taney v. Woodmansee*, 23 W. Va. 709.

2. *Holt v. Lynch*, 18 W. Va. 567.

3. *Walker v. Com.*, 18 Gratt. 13.

4. Code, § 3581.

5. *Clark v. Hogeman*, 13 W. Va. 718.

execution can only issue on a *final* judgment, but it is provided by statute in Virginia that any court, after the fifteenth day of its term, may make a general order allowing executions to issue on judgments and decrees after ten days from their date, although the term at which they are rendered be not ended, and that for special cause it may in any particular case, except the same from such order, or allow an execution thereon at an earlier period.<sup>6</sup> But this provision was not intended to, and does not, impart to such judgment the quality of finality so as to deprive the court during the term of the power to correct, or, if need be, annul an erroneous judgment.<sup>7</sup> This statute, however, has no application to *office judgments* which, we have seen,<sup>8</sup> become final on the adjournment of the court, or the fifteenth day thereof, whichever shall happen first. Office judgments after the time above stated have all the properties of final judgments, and executions may be issued upon them forthwith, without any order of the court, general or special, for that purpose. No matter how long the court remains in session, it has no power to re-open or otherwise set aside an office judgment after the fifteenth day of the term. The rule that the record remains in the breast of the court during the term has no application to an office judgment after it has become final.<sup>9</sup> Usually a court will not direct an execution to issue immediately upon the rendition of the judgment, but if it is shown to the court that a defendant is about to remove his effects out of the jurisdiction of the court, or if any other good cause is shown, the court will direct an execution to issue forthwith. The plaintiff may have as many executions as he chooses, but he can have but one satisfaction. The executions may all be in force at the same time or successively, but if at the same time, the defendant, as a rule, only pays the cost of one.<sup>10</sup> But the

6. Code, § 3600.

7. *Baker v. Swineford*, 97 Va. 112, 33 S. E. 542.

8. Ante, § 185.

9. *Enders v. Burch*, 15 Gratt. 64.

10. Section 3597 of the Code is as follows:

“Subject to the limitations prescribed by chapter one hundred and seventy-four, a party obtaining an execution may sue out other executions at his own costs, though the return day of a former execution has not arrived; and may sue out other executions at the de-

issuing of numerous executions for the purpose of unnecessarily oppressing or injuring a defendant will not be permitted.<sup>11</sup> When the execution comes into the hands of the officer, he must endorse on it the year, month, day and *time of day* he receives it, and a penalty is put upon him for failure to do so,<sup>12</sup> for the lien dates from the *time* (not the day) it is delivered to the officer to be executed.<sup>13</sup> It is returnable within ninety days after its date, to the court on the first day of a term, or in the clerk's office to the first or third Monday in the month, or to the first day of any rules.<sup>14</sup>

An execution may be issued within a year after the date of the judgment, and, if so issued, and there is no return thereon, other executions may be issued within ten years from the return day thereof, and, if there is a return, other executions may be sued out within twenty years from such return day. But if no execution issues within a year, none can properly thereafter issue unless within ten years the judgment be revived by *scire facias*.<sup>15</sup> If, however, the first execution on a judgment is issued after a year, it is not a void process, but voidable only, and cannot be collaterally assailed. It is valid, and may be enforced unless

defendant's costs, where on a former execution there is a return by which it appears that the writ has not been executed, or that it or any part of the amount thereof is not levied, or that property levied on has been discharged by legal process which does not prevent a new execution on the judgment. In no case shall there be more than one satisfaction for the same money or thing."

11. *Sutton v. Marye*, 81 Va. 329, 334.

12. Section 3589 of the Code is as follows:

"Every officer shall endorse on each writ of *feri facias* the year, month, day, and time of day, he receives the same. If he fail to do so, the judgment creditor may, by motion, recover against him and his sureties, jointly and severally, in the court in which the judgment was rendered, a sum not exceeding fifteen *per cent.* upon the amount of the execution."

13. Code, § 3587.

14. Code, § 3220; see this section, ante, § 186, note 4.

15. Code, § 3577. In West Virginia an execution may issue within two years, and thereafter if none has been so issued, instead of a *scire facias* or action, the procedure is by motion after ten days' notice, within ten years from the date of the judgment to obtain a new execution. Code, W. Va., § 4150.

quashed, or otherwise vacated by a direct proceeding for that purpose, and has the same effect by way of creating a lien as a regular execution.<sup>16</sup> In order to give an execution this additional vitality, that is, the right to sue out additional executions within ten years without reviving by *scire facias*, it is not necessary for the first execution to go into the hands of an officer to be executed. It is sufficient if it is simply filled out by the clerk, marked "to lie," and stuck in a pigeon hole. A new execution may then be issued at any time within ten years from the return day of that execution. An execution is *issued* within the meaning of the statute when it is made out and signed by the clerk ready for the officer, although it has not been placed in the hands of the officer to be levied. Other executions may then be issued within ten years from the return day of that execution.<sup>17</sup>

A *scire facias*, however, against a personal representative to revive a judgment against a decedent, must be brought within five years from the date of his qualification. If a sole plaintiff or defendant dies after judgment, but before *fi. fa.*, is issued there must be a *scire facias* in either case to revive the judgment, as there can be no process for or against one who is dead; but if there be several plaintiffs or defendants, and one of them dies there may still be a *fi. fa.*, without revival, but, as the execution must follow the judgment, it must run in the names of all of the plaintiffs against all of the defendants, although one or more plaintiffs or defendants be dead. As to the plaintiffs, the execution survives to the survivor, and there is no need of revival, but the funds will be paid to the survivors. As to the defendants, the *fi. fa.* likewise survives against the surviving defendants, and, although all of the defendants in the judgment must likewise be defendants in the execution, it can only be levied on the goods and chattels of survivors.<sup>18</sup>

An execution issued in contravention of an agreement of parties is not void, but voidable only, and cannot be collaterally assailed. It has all the effect of a valid execution until annulled.

16. *Beale v. Botetourt Justices*, 10 Gratt. 278; *Fulkerson v. Taylor*, 102 Va. 314, 318, 46 S. E. 309.

17. *Davis v. Roller*, 106 Va. 46, 55 S. E. 4.

18. *Holt v. Lynch*, 18 W. Va. 567; 1 Rob. Pr. (old) 575; 11 Am. & Eng. Encl. Law (2nd Ed.) 612.

It is sufficient, till vacated, to create a lien on the choses in action of the execution debtor.<sup>19</sup>

### § 339. Property not subject to levy.

The duration of the life of a judgment is dependent upon the issuance of execution thereon, and hence, to preserve or extend the life of a judgment, an execution may be issued on any valid judgment, but there are some executions which cannot be levied on any property at all, and so also there is some property upon which no execution can be levied.

*Executions Which Cannot Be Levied on Any Property.*—Executions may probably issue on judgments against a State or the United States merely for the purpose of preserving the life of the judgment, but they cannot be levied on any property of the defendant. For manifest reasons of public policy, the public property cannot be levied on, nor the orderly conduct of the government interfered with. The State cannot be sued by a private person except with its consent, and then only in such courts as it may select. In Virginia the Circuit Court of the city of Richmond is designated by the legislature as the court in which the State may be sued.<sup>20</sup> The effect, however, of the judgment is simply to establish the demand. No execution can be levied under the judgment, and no compulsory course taken to enforce its collection, nor can an execution be levied on the property of *quasi* public corporations, such as insane hospitals, the University of Virginia, and the like. In all such cases, application must be made to the legislature to make an appropriation to pay the judgment.

*Executions against Executors and Administrators.*—An execution against an executor or administrator as such, to be levied *de bonis testatoris*, cannot be levied on assets of the decedent, for this would destroy the order of payment of debts fixed by statute.<sup>21</sup> No lien can be fixed on the estate of a man after he is

19. *Fulkerson v. Taylor*, 102 Va. 314, 46 S. E. 309.

20. Code, § 746.

21. Code, § 2660. See also, and compare, *Brewer v. Hutton*, 45 W. Va. 107, 30 S. E. 81; *Park v. McCauley*, 67 W. Va. 104, 67 S. E. 174.

dead. The judgment simply establishes the plaintiff's demand and stops the running of the statute of limitations thereon. The rule was otherwise at common law.<sup>22</sup>

**22.** The following discussion of this subject, written by the author, appears in 5 Va. Law Reg. pp. 876-878:

In a recent communication you ask two questions: (1) Can there be a judgment against a personal representative, within twelve months of his qualification? And (2) Can the execution on such a judgment, if rendered, be levied on the assets of the decedent in the hands of his representative to be administered?

1. I have no trouble in my own mind in saying that there *can* be such judgment within twelve months. I think this is sufficiently covered by §§ 2654 and 2677 of the Code. No restriction is placed by either section upon the time within which such a suit may be brought, and the action might be necessary in order to prevent the bar of the statute of limitations. (Though as to the latter suggestion, see Code, § 2919, amended by Acts 1895-6, p. 331.)

2. I have always been strongly inclined to the opinion that an execution on such a judgment could *not* be levied on the personal property of the decedent in the hands of his representative. As I understand it, the common law made provision for priorities among the creditors of the decedent, preferring first, debts due to the crown; second, those under special statutes; third, debts of record, and fourth, specialty debts. The common law, however, accorded priority among debts of a particular class to the creditor who first obtained judgment against the decedent's representative. If the creditor sued the personal representative, the latter might plead *plene administravit*, *nulla bona*, and other pleas which would prevent judgment going against him. If he pleaded *plene administravit*, this did not protect him merely because there were other debts in existence which were entitled to priority over the debts in suit. To be protected by such a plea he must have paid the debts, but he might plead specially that there were not sufficient assets to pay the debt of the plaintiff after paying those who were entitled to priority over him, and this would be an answer to the plaintiff's action. If the pleadings or proof showed that there was enough in the hands of the personal representative after paying the debts entitled to preference, to pay a part only of the plaintiff's debt, he had judgment for that amount, and possibly for the residue to be paid out of assets which might thereafter come into the hands of the representative ("quando acciderint"). See *Gardner v. Vidal*, 6 Rand. 106. If, however, the representative failed to enter a proper plea, and judgment was recovered against him, he became *personally* bound for the debt. He could apply so much of the estate of his intestate as was in his

*Executions against a Defendant Who Is Dead.*—There is much conflict of authority as to whether a judgment against a dead man (having died after service of process and before judgment) is void or voidable. In Virginia it is held to be voidable only, and not assailable collaterally, but only in a direct proceeding for that purpose. Notwithstanding this fact, however, no execution issued after death could be levied on his personal property for the rea-

hands after satisfying debts entitled to priority, but the residue he must make up out of his own estate. Williams' Ex'ors, 999-1000; Schouler's Ex'ors and Adm'rs, 426. The judgment, and the execution in pursuance thereof, were *de bonis testatoris*. Upon a return of *nulla bona* on such an execution, the creditor was put to a suit to establish a *devastavit*; and, having established this, he proceeded by another suit on the bond of the representative against him and his sureties. This suit to establish the *devastavit* was dispensed with by statute in 1813 (see *Bush v. Beall*, 1 Gratt. 229, and the statutes there cited), which statute is continued in force and now constitutes § 2658 of the Virginia Code.

The rule of the common law, as stated above, accorded priority to the creditor first obtaining a judgment against the administrator, over other debts of the same class. This rule the Revisors of the Code of 1849 undertook to abolish by § 34 of Ch. 130, which now constitutes § 2661 of the Code. In a note to this section, the Revisors in speaking of their intention to do away with this preference say: "We think the measures proposed by us will effect an improvement in this state of things. We do not propose to take from any creditor who prefers to bring an action at law, the right of bringing it if he pleases. But we take away what is now the chief inducement to such suits, when we abolish the preference now given to the first among several judgments for debts of equal dignity." This, of itself, seems to me an indication that the Revisors intended the judgment to have the effect of merely *establishing the claim* of the creditor. In addition to this, they continued in force the act found in 1 Rev. Code, pp. 364 and 390—now found in the present Code as § 2659—providing that no personal representative or any surety of his shall be chargeable beyond the assets received, by reason of any omission or mistake in pleading, etc., and allowed the same defense to be made on an action on the representative's bond as could have been made in the suit to establish the *devastavit*. These statutes, I say, tend to show that the legislature merely intended the judgment against the personal representative to have the effect of *establishing the debt*.

Section 2660 of the Code establishes the *order* in which debts are to be paid, and they cannot be paid in any other order. It is the

sons hereinbefore stated. As to personal property, the execution could stand on no higher ground than if he had died after judgment and before the execution issued.<sup>23</sup> If an execution debtor is alive when the execution goes into the hands of the officer to be executed, but dies before the return day, the execution may still be levied on the property of the defendant as the lien attached in his lifetime, and the proceeding is a mere enforcement of that lien, but it would be otherwise if he had died before the execution issued, that is, before it was made out ready to be delivered to the

right and the duty of the *personal representative* to sell the personal property, reduce it to money and pay the debts of the decedent in the order required. It is fixed by law what he shall sell and what he shall not sell, for the purpose of paying debts and legacies. Code, §§ 2650, 2651 and 2652. He holds the legal title to the property in trust for the creditors and distributees. The time is fixed when he shall settle his account, penalties are imposed for failure to settle, and ample remedy given to compel such settlements. Code, §§ 2678, 2679 and 2680.

All of these provisions look to the sale of the personal property by the personal representative, *and by him alone*. He is compelled to account for it, and if he fails to do so may be charged with it. The Code is to be construed as a whole. It is one act of assembly, and the whole is to be construed together so as to give effect to every part of it, if possible. So construing it, it seems to me that it is necessary to hold that the personal representative, and he alone, is authorized to sell the property of the decedent; and that the general provisions with reference to sales of property under *fi. fa.* do not apply to a personal representative who holds property in trust to be applied in a particular way. To hold otherwise would be to allow one creditor to acquire priority over others of the same class, or even of a superior class, which could never have been the intention of the legislature. Ample power is given the creditor to make his debt if the assets of the estate are sufficient for the purpose, but no power is conferred anywhere, expressly or impliedly, to destroy the order of payment of debts established by § 2660; and all idea of such preference is expressly negatived, and in fact forbidden, by § 2661; so that it seems to me, looking at the Code as a whole, that *no power exists in an officer to levy on the personal property of a decedent in the hands of the personal representative to be administered*. But even if I am wrong in this, I take it that there can be no question that the representative could enjoin a sale under such execution, and have the estate administered according to law.

23. *Robinett v. Mitchell*, 101 Va. 762, 45 S. E. 287.

officer. The same effect would follow if a plaintiff died after issue and before the return day of the execution.<sup>24</sup>

*Receivers.*—Upon a judgment against a receiver under statutes allowing actions against them, no execution can issue so as to have the effect of disturbing the order of distribution of the trust fund. The effect of the judgment is simply to establish the demand, and stop the running of the statute of limitations thereon and questions of priority, time, and mode of payment are left to the control and disposition of the court appointing the receiver.<sup>25</sup> In Virginia no execution can issue on such a judgment.<sup>26</sup>

*Property Not Liable to Levy for Any Execution.*—As a general rule, all personal property of the defendant is liable to the levy of an execution against the defendant, but for reasons of public policy, certain exceptions have been made to this general rule, and it has been provided by statute in Virginia that certain designated articles, usually necessary for the well-being of any family shall be exempt from levy for the debts of such party. Such, for example, is what is designated as the poor debtor's law.<sup>27</sup> A lien or deed of trust upon property exempt under § 3650 is declared to be void. So, also, property claimed as a homestead is exempt from levy for most debts unless the homestead is waived, or the debt is paramount to the homestead. So, also, *municipal corporations and counties* are regarded as arms of the state for many purposes, and no execution can be levied on their personal property used for public purposes, nor can taxes due them be garnished. The appeal must be to the council or board of supervisors to make a levy to pay the debt, and if this proves unavailing, *mandamus* lies to compel a proper levy for the purpose.<sup>28</sup>

*Railroads and Quasi Public Corporations.*—It is said: "The property of a public corporation, such as a railroad or bridge company, which is essential to the exercise of its corporate franchise, and a discharge of the duties it has assumed towards the general public, cannot, without statutory authority, be sold to

24. *Hatcher v. Lord*, 115 Ga. 619, 41 S. E. 1007.

25. Ante, § 53; *Texas, etc., R. Co. v. Johnson*, 151 U. S. 81.

26. Code, § 3415a.

27. Code, §§ 3650, 3651, 3652.

28. *2 Dillon Mun. Corp.*, §§ 576, 577; *Brown v. Gates*, 15 W. Va. 131.

satisfy a common law judgment, either on execution or in pursuance of an order or decree of court. The only remedy of the judgment creditor in such case is to obtain the appointment of a receiver, and a sequestration of the company's earnings."<sup>29</sup> Another statement of the law is as follows: "In the case of corporations such as railroads or bridge companies, which, though not strictly public corporations, are created to serve public purposes, and are charged with public duties, such property as is necessary to enable them to discharge their duties to the public and effectuate the objects of their incorporation, is not, according to the weight of authority, apart from statutory provision, subject to execution at law. But the property of a quasi-public corporation not necessary, or not used for the purposes which called the corporation into being, is not exempt from seizure and sale under execution."<sup>30</sup>

Just what is "essential to the exercise of its corporate franchises, and a discharge of its duties to the public" is not altogether clear, but it would seem on principle that the roadbed and rolling stock of a railroad company were within this designation, and hence not subject to levy in jurisdictions holding this view. The ground of the exemption is the interest that the public has in the exercise of the corporate franchise, and the duty which the company owes to the public; and on principle it would seem that in the absence of statute, these are sufficient to exempt such property from levy. In some jurisdictions this doctrine is repudiated, but if the property is actually employed in interstate commerce, it is exempt from levy on that account only. On this whole subject there is much conflict of authority.<sup>31</sup> In Virginia, it is believed to be the practice to levy on the personal property of railroad companies, *including rolling stock*.

29. *Overton Bridge Co. v. Means*, 33 Neb. 857, 29 Am. St. Rep. 514.

30. 11 Am. & Eng. Encl. Law (2nd Ed.) 620.

31. *Reynolds v. Lumber Co.*, 169 Pa. St. 626, 47 Am. St. Rep. 935; *Gardner v. Mobile, etc., R. Co.*, 102 Ala. 635, 48 Am. St. Rep. 84; *Wall v. N. & W. R. Co.*, 52 W. Va. 485, 44 S. E. 294, 94 Am. St. Rep. 948, 64 L. R. A. 501, 11 Am. & Eng. Encl. Law (2nd Ed.) 620, and cases cited; *Brady v. Johnson*, 75 Md. 445, 26 Atl. 49, 20 L. R. A. 737; *Connery v. R. Co.*, 92 Minn. 20, 99 N. W. 365, 104 Am. St. Rep. 659, and note. See further, on this subject, what is said in § 363 *post*, in treating attachments, which is equally applicable to executions.

*Choses in Action.*—No mention is here made of property which, from its very nature, cannot be levied on, as choses in action, which is treated of elsewhere. It is sufficient to say that if an execution goes into the hands of an officer to be levied it creates a lien on such property which may be enforced as well after the death of the debtor as before. It may be also mentioned in this connection that an execution creates no lien on property in which the debtor has a mere contingent interest which may never be of any value, such, for example, as the interest of an assured in a policy on his life, which is dependent for its existence on voluntary payments to be made by him in the future. It is immaterial that the assured, in a given contingency, is allowed to surrender his policy and take in lieu thereof a paid up policy for a different amount. This would involve the making of a new contract, and ordinarily a creditor can only subject the interest of his debtor in existing contracts. A debt which has a present existence, although payable in the future, may be subjected to the lien of an execution, but not a debt which rests upon a contingency which may or may not happen, and over which the court has no control.<sup>32</sup>

### § 340. Executions against principal and surety.

An execution may be levied on the property of any one or more of the execution debtors, regardless of their relation of principal and surety. So far as the creditor is concerned, all of the debtors are equally bound and there is no priority among them, and the whole execution may be levied and made out of the property of a surety, although the principal has abundant property out of which it might be made. The surety is powerless to prevent this. The creditor is under no obligation to look to the principal or his property, nor to exhaust his remedies against the principal before resorting to the surety. He may collect his debt out of either.<sup>33</sup> The rule is otherwise in equity.

Moreover, when the execution is satisfied by *any defendant*, it

32. *Boisseau v. Bass*, 100 Va. 207, 40 S. E. 647; *Hicks v. Roanoke Brick Co.*, 94 Va. 741, 27 S. E. 596.

33. *Humphrey v. Hitt*, 6 Gratt. 509; *Manson v. Rawlings*, 112 Va. 384, 71 S. E. 564; *Knight v. Charter*, 22 W. Va. 422.

is *functus officio*. It has served its purpose, and though paid by a surety, there can be no substitution or subrogation, at law, of the surety to the rights of the creditor, so as to levy the execution thus satisfied, or any other execution issued on that judgment, on the property of the principal to reimburse the surety.<sup>34</sup>

Subrogation is a creature of equity, and is wholly unknown to the law. The *judgment*, however, is not deemed satisfied in equity, and the surety will, in equity, be subrogated to the rights of the creditor, so as to enforce the lien of the judgment against the real estate of the principal to the exoneration of the surety. "When the surety pays the debt, the lien of the execution is gone, but a court of equity keeps alive the lien of the judgment on the real estate for the benefit of the surety."<sup>35</sup> At law the surety's remedy is by an independent action against the principal, so as to acquire the right to sue out an execution in his favor. In many States there are statutes for determining the relation (of principal and surety) of the parties in the original action when it does not otherwise appear, and allowing subrogation to the benefit of the execution.<sup>36</sup>

If there is more than one defendant in an execution, the officer is required in Virginia to show by his return by which one the execution was satisfied. This is a valuable aid in disclosing whether the judgment has been really satisfied by the party primarily liable, or to what extent, if any, the *judgment* is still a subsisting lien on the real estate of any one or more of the judgment debtors.<sup>37</sup>

### § 341. Duty of officer.

The first duty of an officer who receives a writ of *feri facias* for execution, is to endorse on it the year, month, day, and *time of day* he receives the same.<sup>38</sup> He is next to levy it on the personal property of the debtor liable to levy, and where the writ so requires on his real estate also. Having made the levy, he is

34. 11 Am. & Eng. Encl. Law (2nd Ed.) 715, and notes.

35. *Simmons v. Lyles*, 32 Gratt. 763.

36. Note, *Nelson v. Webster*, 68 L. R. A. 513.

37. Code, § 3591.

38. Code, § 3589.

next required to endorse the levy on the *fi. fa.*, and proceed to make the money, pay it over to the plaintiff and make due return of the process at the return-day thereof.<sup>39</sup>

### § 342. The levy.

The mandate of the writ is the officer's direction and authority for what he is to do. This requires that "of the goods and chattels of—(defendant) you cause to be made," etc.,<sup>40</sup> and a day is named in the writ when the sheriff is to report what he has done—how he has executed the writ. This is called the return-day of the writ, and must be the first or third Monday of a month (rule day), or to the first day of any rules, or the first day of some term of the court from which the writ issues, not more than ninety days from its date.<sup>41</sup> The sheriff, having received the writ and endorsed thereon the *time* of its receipt, is required, as his next duty, to make the money, and the first step in this direction is to levy it.

What, then, constitutes a levy? A manucaption of property in pursuance of the writ and an endorsement of that fact on the writ is generally sufficient, but is that necessary? By no means.

39. Section 3591 of the Code is as follows:

"Upon a writ of *feri facias*, the officer shall return whether the money therein mentioned is or cannot be made; or if there be only part thereof which is or cannot be made, he shall return the amount of such part. With every execution under which money is recovered, he shall return a statement of the amount received, including his fees and other charges, and such amount, except the said fees and charges, he shall pay to the person entitled. In his return upon every such execution, the officer shall also state whether or not he made a levy of the same, the date of such levy, and the date when he received such payment or obtained such satisfaction upon the said execution; and if there be more than one defendant, from which defendant he received the same. Upon the return of said writ of *feri facias* by the officer to the clerk's office or to the court to which it is returnable, it shall be the duty of the clerk thereof to enter the return of said officer on the execution book."

40. In Virginia the only executions which can be levied on real estate of the debtor are those in favor of the Commonwealth. Code, § 687.

41. Code, § 3220.

"It is not essential that the officer make an actual seizure. If he have the goods in his *view* and *power*, and note on the writ the fact of his levy thereon, this will in general suffice."<sup>42</sup> It is not sufficient to have them in his *view*, as cattle on distant hills, or goods behind bars securely locked, or possibly goods in the custody of an officer of the court, he must also have *power* to take them.<sup>43</sup> In *Davis v. Bonney*, cited in the margin, it was held that property in the hands of a receiver was property not capable of being levied on, and therefore that the lien of the execution attached without an actual levy. It is doubtful if this is a proper construction of § 3601 of the Code. It would seem that the statute referred to property which was not in its nature physically capable of being levied on, such as choses in action, and hence that, in order to preserve the lien arising by the issuance of the execution and placing it in the hands of the officer, it is necessary to make an actual levy. This probably could not be done except by consent of the court appointing the receiver, and while this consent might be given merely for the purpose of preserving the lien, it would not be for any other purpose. If it was refused, then the lien would cease with the return-day of the execution.<sup>44</sup>

As to tangible property not in the custody of the law, it is not sufficient for the officer to take a mere constructive possession, or to declare that he has taken possession and levied upon goods when he is physically unable to exercise dominion over the goods, hence if a debtor has his goods locked in his storehouse and holds the key thereto and refuses to admit the officers, he cannot be said to have had the goods in his view and power, and therefore cannot make a levy. Although he may stand on the outside and declare a levy, and endorse it on the writ, it is wholly ineffectual as a levy, and if the owner subsequently admits another officer into his store-room, who makes a levy on the goods, it is superior to the supposed levy made by the first officer on a prior writ.<sup>45</sup>

42. *Dorrier v. Masters*, 83 Va. 459, 2 S. E. 927; *Bullitt v. Winston*, 1 Munf. 269.

43. *Dorrier v. Masters*, *supra*; *Davis v. Bonney*, 89 Va. 755, 17 S. E. 229, 2 Va. Law Reg. 704.

44. 3 Va. Law Reg. 23.

45. *Meyer v. Mo. Glass Co.*, 65 Ark. 286, 45 S. W. 1062; 4 Va. Law Reg. 253.

Nor is a mere paper levy generally sufficient against other creditors or third persons.

In case of unwieldy goods which the officer cannot well transport with him, and likewise growing crops, where they are subject to levy, the officer should go to the place where the goods are, and *assume control over them*, and endorse the levy on the writ. If any one is present to whom notice can be given, he ought to give notice of the fact that he makes the levy. If neither the owner nor any one else is present, while probably not necessary, it is the safer course to give notice of the levy to the owner.<sup>46</sup>

If the debtor waives an actual levy, and furnishes the officer with a list of his property subject to levy, and the sheriff endorses a levy thereof on the writ, this would probably be good as against the debtor himself, but there is serious conflict as to the rights of third persons (creditors and purchasers), affected thereby.<sup>47</sup>

If after levy the officer permits the goods to remain in the possession of the debtor, he does so at his own risk, and is liable for resulting loss. It would be a punishable offense if the debtor fraudulently removed them. In Virginia he would be deemed guilty of larceny, and might be prosecuted therefor.<sup>48</sup>

In making the levy the officer may enter upon the premises of the debtor without being a trespasser. He cannot break open the outer doors of the debtor's dwelling *in order to make the levy*, but he may break open the inner doors of the dwelling, or outer doors of any other building for that purpose, and after levy it is probable that the outer doors of the dwelling may be broken in order to obtain the property for the purpose of removal or sale.<sup>49</sup> Unlike distress, property in the personal possession of the debtor, as a horse that he is riding, or a watch on his person, may probably be levied on.<sup>50</sup>

46. 11 Am. & Eng. Encl. Law (2nd Ed.) 659.

47. See cases cited in note 11 Am. & Eng. Encl. Law (2nd Ed.) 655.

48. Code, § 3712; *Duff v. Com.*, 92 Va. 769, 23 S. E. 643.

49. 11 Am. & Eng. Encl. Law (2nd Ed.) 655; 4 Min. Inst. 1024. As to powers of officer levying a distress warrant for rent, see *ante*, § 7.

50. 2 Tucker's Com. 362; *Green v. Palmer* (Cal.), 76 Am. Dec. 492; but see 11 Am. & Eng. Encl. Law (2nd Ed.) 658.

The levy must be made on the *goods and chattels* of the *debtor*. Chattels real, though not susceptible of levy, are subject to the lien of a *fi. fa.* as well as personal chattels, and growing corn may be levied on after October fifteenth of any year. At common law emblements were liable to levy, but in Virginia it is provided that: "No growing crop of any kind (not severed) shall be liable to distress or levy except India corn, which may be taken at any time after the fifteenth day of October in any year, and also except sweet potatoes and Irish potatoes over five barrels of each variety may be distrained or levied upon for rent after the same have been matured sufficiently to sever, or to market."<sup>51</sup> Fixtures are not subject to levy.<sup>52</sup>

An execution cannot be levied on Sunday.<sup>53</sup> A creditor may pursue his debtor by execution at law and by bill in chancery, to subject his real estate at the same time.<sup>54</sup>

51. Code, § 904. Cotton may be levied on in the fields in the counties of Greenville and Sussex on and after the 15th day of September in any year to satisfy any debt collectible under the law. Acts 1897-8, p. 76. The levy on potatoes, not dug, must be for *rent*, nothing else.

52. It is said that the true rule in determining what are fixtures in a manufacturing establishment, where the land and buildings are owned by the manufacturer, is that where the machinery is permanent in its character and essential to the purpose for which the building is occupied, it must be regarded as realty and passes with the building, and whatever is essential to the purpose for which the building is used will be considered as a fixture, although the connection between them be such that it may be severed without physical or lasting injury to either; and that if an engine and boiler have been bought by the owner of a mill and hauled upon his grounds into the mill yard, with the *bona fide* intention of attaching them to the mill, though not yet actually attached thereto, and they are necessary for the purpose for which they are to be used, they must be regarded as part of the realty, and not liable to the levy of an execution as personal property. Furthermore, if a flood washes out from a mill the engine, boiler, burners and mill irons, which were fixtures in the mill, they are not converted into personalty, and when thus washed out, they are not subject to the levy of an execution. *Patton v. Moore*, 16 W. Va. 428; *Haskin Wood Co. v. Cleveland Co.*, 94 Va. 439, 26 S. E. 878.

53. Code, § 898.

54. *Price v. Thrash*, 30 Gratt. 519, 527.

*Money.*—If the levy be upon gold or silver coin it is to be accounted for at its par value, but if on bank notes and the creditor will not accept them, they are to be sold as other chattels.<sup>55</sup>

*Partnership Property.*—There is one species of property about which some difficulty may arise as to the mode of making levy and sale, and that is the interest of a partner in the partnership effects where the execution is against a single partner. It is said that, in the absence of any statute on the subject, the decided weight of authority is that the sheriff may take *exclusive* possession of the chattels of the firm and retain them at least until the day of sale. The levy, however, must be only on the interest of the execution debtor, and nothing but his interest therein can be sold, and the purchaser can acquire no greater interest than the debtor had, which would be his net interest after settlement of partnership liabilities and the adjustment of accounts between the partners. The purchaser would not become a partner in the concern, but a mere co-tenant of the goods. The sale would *ex proprio vigore* dissolve the firm, but the purchaser would have a right to demand an accounting, and the payment to him of the debtor's share of the assets. Upon sale, the officer should probably deliver possession of the goods to the purchaser and the other members of the firm jointly, the rights of the purchaser to be subject to the rights of the other members of the firm as above stated. Whether the levy must be on *all* of the partnership effects, or may be on a part only, is a subject about which the authorities are not in harmony.<sup>56</sup> The Virginia cases accord with the above statement as to a levy and sale of the partner's interest in the partnership effects.<sup>57</sup>

55. Code, § 3588. It is presumed that the gold and silver coin referred to in the text must be such as are legal tenders. U. S. treasury notes are legal tender, and a creditor cannot refuse to accept them. As to what money is a legal tender, see *ante*, § 213, note 2. See also, *Steele & Co. v. Brown*, 2 Va. Cas. 246 as to the right to levy on money in possession of defendant, and also as to the right of the court to direct money in hands of sheriff to be applied by him to a *fi. fa.* in his hands against the plaintiff in the *fi. fa.* upon which the money was made.

56. Note, 57 Am. St. Rep. 435.

57. *Shaver v. White*, 6 Munf. 110; *Wayt v. Peck*, 9 Leigh 440, 441.

*Mortgaged Property.*—At common law, mortgaged personal property could not be taken on an execution against the mortgagor, because, as was said, the legal title was not in him and the creditor was drawn to equity for relief. The same rule prevails in West Virginia, and probably generally.<sup>58</sup> In Virginia it has been held that if, after a fair application of the property conveyed to the trust debt any surplus remains, it constitutes a fund to which other creditors may resort, but that it cannot be reached by execution before a sale under the deed of trust “for it is an equitable and contingent interest,” and the remedy is in equity to have the deed of trust enforced, and the residue of the purchase price applied to the payment of the execution.<sup>59</sup> Professor Minor, relying upon these cases, says: “If the deed of trust is not avoided by any fraud or illegality, no surplus which may be likely to remain to the debtor after satisfying the object of the trust can be reached by the *fi. fa.*, because such interest is not only a mere equitable subject, which of itself would not prevent its being levied on (Code, § 2428), but because it is contingent and could not be sold under execution without sacrifice.”<sup>60</sup> A like view seems to be maintained by Professor Lile and Mr. Freeman.<sup>61</sup> In a late case, however, it has been held in Virginia that the personal property covered by a deed of trust is subject to the levy of a *fi. fa.*, and if not levied on or before the return day, the lien thereon is gone.<sup>62</sup> The latter case, however, simply announces the proposition without discussion, or citation of authority.<sup>63</sup> A chattel mortgage on per-

58. 11 Am. & Eng. Encl. Law (2nd Ed.) 624; *Doheny v. Atl. Dynamite Co.*, 41 W. Va. 1, 23 S. E. 525.

59. *Claytor v. Anthony*, 6 Rand. 285; *Coutts v. Walker*, 2 Leigh 268, 280.

60. 4 Min. Inst. 1018.

61. 4 Va. Law Reg. 255, 256.

62. *Spence v. Repass*, 94 Va. 716, 27 S. E. 583.

63. Section 2428 of the Code is as follows:

“Estates of every kind, holden or possessed in trust, shall be subject to debts and charges of the persons to whose use or to whose benefit they are holden or possessed, as they would be if those persons owned the like interest in the things holden or possessed, as in the uses or trusts thereof.”

This section of the Code was in effect at the time both *Claytor*

sonal property thereafter to be acquired to secure advances made and to be made is good as to property acquired after the date of the mortgage against a subsequent *fi. fa.* levied thereon,

*v. Anthony, supra*, and *Coutts v. Walker, supra*, were decided. Mr. Minor, in the quotation given above, referring to this section, says that the fact that the subject is equitable would not prevent its being levied on, but bases his conclusion upon the ground that the interest sought to be recovered is contingent. Notwithstanding the weight justly due to the authorities which have been hereinbefore cited, it is not perceived why the interest may not be levied on. It is expressly declared that the equitable interest shall be "subject to debts \* \* \* as they would be if these persons owned a like interest in the things holden or possessed as in the uses or trust thereof." If equitable interests are made liable to debts by this statute it would seem that the liability might be enforced in the usual and ordinary way, that is by levy of a *fi. fa.*, unless there is something else to forbid it. It is difficult to understand what *contingency* there is about the interest which would forbid the levy. The property is charged with a definite, specific debt—not with all the debts which would have to be ascertained by some outside inquiry—and if the trust debt is due, there is no reason why the property may not be sold, the trust debt paid, and the residue paid over to the execution creditor. There is no contingency about it except as to what the property will bring. That fact would be contingent if there was no deed of trust on it. Certainly nothing could be more contingent than the interest of a partner in the partnership assets, and if this can be subjected by the levy of a *fi. fa.*, which we have seen can be done, it is difficult to see why the trust property may not be levied on, which is not subject to any contingency except that there is a prior lien on it for a definite and specific amount. The property conveyed and in the possession of the grantor is still his property, though charged with a lien, and the character of the property, as such, has not been changed by giving the deed of trust. If the trust debt is not due, the trust creditor cannot be compelled to collect it until it is due, but that affords no good reason why the property may not be sold subject to the lien of the deed of trust. The rights of the parties are all well ascertained, and all the creditors and the owner of the property know what these rights are, and can intelligently bid on the property so as to protect their rights, and whether the property be sold subject to the deed of trust, or be sold free of the deed of trust and the trust debt paid, the rights of the parties in interest could be amply protected. Of course, it is possible that the property might not bring sufficient to pay the trust debt, and it would appear somewhat anomalous to enforce the trust lien by virtue of the execution, yet as nobody can be hurt

to the extent that advances were made prior to the issuance of the *fi. fa.*<sup>64</sup>

The subject of the landlord's lien for one year's rent and the right to levy an execution on property removed from the leased premises has already been discussed.<sup>65</sup>

*Shares of Stock.*—The shares of stock in a joint stock company are generally supposed to be not subject to the lien of an execution or attachment, in consequence of the inability to reach them; and this is especially true where the owner is a non-resident; but it has been held that such shares in a company incorporated and conducting its operations in whole or in part in this state, although owned by a non-resident, are the subject of an attachment. It is said that such estate may be considered, for the purpose of the proceeding, as in the possession of the corporation in which the shares are held, and such corporation may be summoned as garnishee in the case. Such shares are also liable to the lien of an execution.<sup>66</sup>

The execution must be levied, if at all, *on or before* the return day. It cannot be levied afterwards. It is then a dead process. But if levied on or before the return day, the property levied on may be sold afterwards.

If a plaintiff dies after the *fi. fa.* is received by the officer to be levied, the lien is fixed by such delivery, and the officer may proceed to levy and sell, indeed, must levy, or the lien will be lost. The same rule applies where the defendant dies under similar circumstances. If a *fi. fa.* issues (that is, is made out ready

by such an arrangement, it would seem that there is no good reason for not enforcing the lien in this way. The delay and expense of resorting to a court of equity in a case of this kind would in many cases amount to a denial of justice, and the courts, looking to the substance of things rather than to mere form, should afford to creditors this easy and speedy method of enforcing the collection of the execution. The reasonableness of this view is offered as an apology for the presumption of differing from such able authorities on the other side. It follows necessarily that the conclusion in *Spence v. Repass*, *supra*, is approved.

64. *First Nat'l Bank v. Turnbull*, 32 Gratt. 695.

65. *Ante*, § 13.

66. *Ches. & O. R. Co. v. Paine & Co.*, 29 Gratt. 502; *Lipscomb v. Condon*, 56 W. Va. 416, 49 S. E. 392.

for delivery) in the lifetime of the defendant, but is not actually delivered to the officer to be executed until after the defendant's death, the officer may probably, as against the defendant or his personal representative (if neither creditors or purchasers are affected thereby) proceed to levy. The language of the statute relating to tangible personal property is that the *fi. fa.* "as against *purchasers* for valuable consideration without notice, and *creditors*, shall bind what is capable of being levied on only from the time it is delivered to the officer to be executed."<sup>67</sup>

If, after property has been levied on, it is lost in consequence of the misconduct or neglect of the officer making the levy, the *fi. fa.* is to that extent satisfied, and the plaintiff must look to the officer and his sureties for the loss thereby sustained.<sup>68</sup>

*Several Executions.*—If several writs be delivered to the officer at the same time, they are to be satisfied ratably, if at different times, they are to be satisfied in the order of delivery,<sup>69</sup> regardless of the order of levy. If a levy be made of several *fi. fas.*, and a third person claims the property, or a doubt arises as to the liability of the property to levy, the officer may require of the creditors an indemnifying bond for his protection, and if it be not given in a reasonable time, he may release the levy,<sup>70</sup> but if some of the creditors give the bond and others refuse, and the officer sells under the protection guaranteed by such bond, the proceeds are to be paid to the indemnifying creditors in the order of dates of receipt by him of their several *fi. fas.*, and no part of the money is to be paid to the other creditors, although their executions may have been first received. The officer, however, is not obliged to require such bond. He may, in his own name, institute interpleader proceedings and have the title to the property tried, and if decided against the claimant of the property, the officer will proceed to sell the property and pay off the executions in the order in which they were received by him.<sup>71</sup>

67. *Turnbull v. Claiborne*, 3 Leigh 392; 4 Min. Inst. 1025.

68. *Walker v. Com.*, 18 Gratt. 13.

69. Code, § 3590.

70. Code, §§ 3001, 3002.

71. *Edmunds v. Hobbie Piano Co.*, 97 Va. 588, 34 S. E. 472.

**§ 343. Payments to and disbursements by officer.**

So long as the execution is alive, that is, on or before the return day, or after the return day *if previously levied*, the officer charged with the collection of the *fi. fa.* may receive payment from the execution debtor, but if not so levied the officer has no right to receive payment after the return day, and if made and not accounted for, the sureties of the officer are not bound for the money, and the rights of the creditor are unaffected. The right of the officer to receive payment results from his right to levy and sell the debtor's property, and the consequent right of the debtor to relieve his property from sale. So long as the right to sell continues, the right to receive payment remains, but no longer.<sup>72</sup>

When the officer receives money under an execution, it is his duty to pay it over to the execution creditor, but if the creditor lives in another county or corporation, the officer is not bound to go out of his county to pay the money to the creditor, nor can any action be maintained against the officer and his sureties for the money so collected until demand therefor has been made upon the officer in his county or corporation and been refused by him.<sup>73</sup>

**§ 344. Payment by officer for debtor.**

At common law the payment of a *fi. fa.* utterly extinguished the debt and every security for it,<sup>74</sup> and equity could not prevent this unless there were some other equitable ground for interference, and if an officer paid an execution without assignment or agreement to assign, the execution was dead as a security for the debt.<sup>75</sup>

The officer, however, may purchase a debt in his hands for collection by execution if he acts *bona fide*. The creditor holds

72. *Grandstaff v. Ridgely*, 30 Gratt. 1; *Cockerell v. Nichols*, 8 W. Va. 159.

73. Code, § 3596; *Grandstaff v. Ridgely*, 30 Gratt. 1.

74. *Clevinger v. Miller*, 27 Gratt. 740, 741.

75. *Clevinger v. Miller*, *supra*; *Hall v. Taylor*, 18 W. Va. 544. See also, *Sherman v. Shaver*, 75 Va. 1. But see, *Feamster v. Withrow*, 12 W. Va. 611; *Beard v. Arbuckle*, 19 W. Va. 135; *Neely v. Jones*, 16 W. Va. 625.

the title and may transfer it to whom he will, and it makes no difference that the advance is made at the instance of the debtor, provided there is no intention to extinguish the debt and the execution is assigned as a continuing security.<sup>76</sup>

### § 345. Sale of property.

Supposing the property levied on to be the property of the execution debtor, if not replevied, as it generally may be, it is the officer's duty to sell it. But before making sale it is the duty of the officer to advertise the time and place of sale by notice posted near the residence of the owner and at two or more public places in the officer's county or corporation at least ten days before the sale. While the officer may remove the property and sell it at any place in the neighborhood, or at the court house, yet the practice is, in Virginia, to permit it to remain on the premises of the debtor until the day of sale, and then sell it there, in order to save expense. The officer may deduct expenses of removing, or the keep of property from the proceeds of sale. If the property levied on be horses, mules, or work oxen, they must be advertised for thirty days by hand bills posted at the front door of the court house, and at five or more public places in the county or corporation of such officer, and if it be in the county, these places must be at least two miles apart. But the parties may, at or before the time for advertising the sale, in writing authorize the officer to dispense with the provision for the thirty days' notice and also with the provision that the posting must be at least two miles apart.<sup>77</sup> If the property levied on be perishable, or expensive to keep, the court from whose clerk's office the *fi. fa.* issued, or the judge thereof in vacation, may, upon the application of any party, on reasonable notice to the adverse party, his agent or attorney, order a sale to be made upon such notice less than ten days as to such court or judge may seem proper.

The sale is for cash. When made, the officer should pay the creditor the amount of his execution, and make return of the writ to the clerk's office from which it issued, in the manner pointed out in the next section.

76. *Rhea v. Preston*, 75 Va. 757; *Hill v. McCullough*, 20 Ga. 637.

77. Code, §§ 906, 907.

The officer cannot purchase at a sale made by him under *fi. fa.*, but the plaintiff in the execution may purchase, and is regarded as a *bona fide* purchaser if other requisites therefor exist.<sup>78</sup>

### § 346. The return.

Formerly some doubt existed in Virginia as to what constituted a sufficient return of the execution to keep the judgment alive, but the Code now provides that "any return by an officer on an execution, showing that the same has not been satisfied, shall be a sufficient return within the meaning of the statute."<sup>79</sup> A return on the process is defined as "a short official statement of the officer endorsed thereon of what he has done in obedience to the mandate of the writ, or why he has done nothing." In the absence of the date or other evidence showing when the return of an officer on a writ was made it is presumed to have been made at a time when he had a right to make it and in due time, as the *prima facie* presumption is that the officer has done his duty. The validity of the return, however, of the officer on a writ of *feri facias* is not affected by the fact that the writ is not returned by the officer until after the return day. While the record is incomplete until the writ is returned, yet, when made, the return is competent evidence of the facts therein stated, and the parties are entitled to the benefit of their legal effect. The return should be made at the return day, but may be made before or afterwards. A return upon an execution which the officer has a right to make is conclusive between the parties, and they have the right to compel the officer to make it, but neither of the parties can be deprived of the benefit of the return by the failure of the officer to make it at the return day.<sup>80</sup> The statute in Virginia declares what the return of an officer on an execution shall be.<sup>81</sup> The signature of the officer, however, to the return is merely intended to authenticate it, but is no part of the return, and may be added at any time.<sup>82</sup>

78. Note, 79 Am. St. Rep. 948.

79. Code, § 3577.

80. *Rowe v. Hardy*, 97 Va. 674, 34 S. E. 625; *Bullitt v. Winston*, 1 Munf. 269.

81. See § 3591 of the Code, copied in note 39, page 637, *ante*.

82. *Slingluff v. Collins*, 109 Va. 717, 64 S. E. 1055.

*Amendment of Returns.*—A return which has been made by an officer cannot thereafter be amended by him except upon motion to the court from which it issued, and after notice to the parties interested.<sup>83</sup> But courts are liberal in allowing amendments of returns in proper cases so as to conform to the truth, and the amendment, when made, has the same effect as though it were the original return, where the rights of third persons have not intervened, and it does not appear that injustice can result to any one. There is no specific time within which the return *must* be amended, but after a great lapse of time an amendment should be permitted with caution, and in no case should it be allowed unless the court can see that it is in furtherance of justice.<sup>84</sup> An amendment may be permitted, even after an action has been commenced founded on the original return,<sup>85</sup> although the proposed amendment be inconsistent with the original return and takes away the foundation of the suit or motion. The return may be amended by a different deputy from the one who made the original return.<sup>86</sup> The amendment may be made in vacation as well as in term time, as the right to amend is incidental to the right expressly given to hear in vacation a motion to quash an execution.<sup>87</sup> It seems that a return may be made before the return day, and that a return of no effects before the regular return day of the writ against a defendant who is notoriously insolvent may be made.<sup>88</sup>

*Title of Purchaser.*—The rule *caveat emptor* generally applies to all sales under executions. The sale by the officer simply passes the title of the execution debtor. By virtue of the execution the officer has authority to sell, but no greater title is conferred on the purchaser than the defendant himself had when no indemnifying bond has been given. Where property has been levied on which is claimed by a third party, provision is made for

83. *Hammen v. Minnick*, 32 Gratt. 249, 251.

84. *Slingluff v. Collins*, 109 Va. 717, 64 S. E. 1055.

85. *Smith v. Triplett*, 4 Leigh 590; *Wardsworth v. Miller*, 4 Gratt. 99; *Stone v. Wilson*, 10 Gratt. 529, 533.

86. *Stone v. Wilson*, *supra*; but see *Carr v. Meade*, 77 Va. 142.

87. *Walker v. Com.*, 18 Gratt. 13.

88. *Slingluff v. Collins*, *supra*; *Findley v. Smith*, 42 W. Va. 299, 26 S. E. 370.

requiring the plaintiff in the execution to execute an indemnifying bond with condition, among other things, "to warrant and defend to any purchaser of the property such estate or interest therein as is sold."<sup>89</sup> and where a sale is made under such an indemnifying bond and the property is afterwards recovered from the purchaser, he may maintain an action on the bond in the name of the officer for his benefit to recover such damages as he has sustained in consequence of the property being taken from him by title paramount.<sup>90</sup>

### § 347. Delivery bond.

If for *any* reason the debtor desires to retain possession of his property which has been levied on, and to prevent an immediate sale thereof, he is permitted to do so upon delivering to the officer a forthcoming or delivery bond with good security, the effect of which is to suspend all further proceedings on the *fi. fa.* The language of the statute is that the officer "*may* take from the debtor a bond," but *may* in this connection means *must*, and the officer is obliged to accept a proper bond if tendered. When accepted, the property remains "in the possession and at the risk of the debtor."<sup>91</sup> The amount of the bond is not fixed by statute, but it is usually in a penalty double the amount of the *fi. fa.* (principal, interest and costs, including the officer's commissions) though logically it should be in a penalty double the value of the property levied on, and is payable to the creditor. It recites the issuing of the *fi. fa.*, the amount thereof (including the officer's fee for taking the bond, his commissions and other lawful charges, if any) the levy, and an enumeration of the property on which levied, and must be with *sufficient* surety. The bond further recites the agreement of the debtor (to *deliver* or) to have the property levied on forthcoming (hence the designation forthcoming bond or delivery bond), at a certain time and place named in the bond, to be sold to satisfy the *fi. fa.*, and contains a condition that if the property is forthcoming at the time and place mentioned, the bond shall be void, else remain in full force and

89. Code, § 3001.

90. Code, § 3003.

91. Code, § 3617.

virtue. If *any* of the property levied on is not forthcoming at the time and place mentioned, the bond is said to be forfeited, unless the failure to deliver was occasioned by act of God, or probably inevitably accident.

“With respect to the parties to the forthcoming bond, the property is at their risk, and they undertake, that it shall be delivered. In case of a non-delivery of any part of such property, the bond is considered forfeited; it is to have the force of a judgment by the terms of the act, and an execution is to go for the whole. It is true indeed, that the sheriff may sell the part delivered, and credit the amount thereof on the execution. (1 Wash. 274, *Pleasants v. Lewis*.) But subject to that exception, the parties to the bond are to submit to the judgment, unless there be some particular circumstances in their case, to be relied on, for their relief, other than that of the mere non-delivery of the property. To go into the circumstances, which prevented the delivery of the property, would throw upon the creditor an inquiry to which he is an utter stranger, and repeal that provision of the act which says the property restored under the forthcoming bond is to be at the risk of the seller.”<sup>92</sup>

If on the day for delivery of the property, the parties are unable to deliver a part of the property, and such inability is occasioned by the act of God, or probably by the destruction of the property by inevitable accident, but the parties deliver the residue of the property, then there is no forfeiture of the bond, but the officer should sell what is delivered and apply it to the execution. If the residue of the property is not delivered, the whole bond is forfeited for failure to deliver that. If all the property is delivered, of course there is no forfeiture. If part of it is delivered, and there is a failure to deliver a part for some cause other than the act of God or inevitable accident, the officer should sell what is delivered and apply the proceeds to the execution, and return the bond as forfeited for non-delivery of the residue.<sup>93</sup>

When a bond is forfeited, the lien of the execution on the

92. *Roane*, Judge, in *Cole v. Fenwick*, Gilmer 138, 139; *Pleasants v. Lewis*, 1 Wash. 273.

93. *Cole v. Fenwick*, *supra*.

property levied on is extinguished,<sup>94</sup> and it is the duty of the officer within thirty days to return it, with the execution, to the clerk's office of the court from which the execution issued, and as against such of the obligors as are alive when it is forfeited and so returned "*it shall have the force of a judgment,*" but no execution can issue thereon.<sup>95</sup> The plaintiff may sue on the bond, but the general practice is for the creditor to give (as he may do) ten days' notice in writing to all of the obligors that on a certain day of the next term of the court he will move the court for an award of execution thereon.

It is said that the following defences may be made to this motion:<sup>96</sup>

1. *Non est factum.*
2. Satisfaction of original judgment and costs since accrued.
3. Tender of property as stipulated in bond.
4. Property levied on was exempt.
5. Impossibility of performance, without fault of obligor.<sup>97</sup>
6. Seizure of property by title paramount, as where the property levied on is taken out of the possession of the debtor by legal process and neither he nor his surety are able to deliver it in conformity with the terms of the bond.<sup>98</sup>
7. Waiver of performance.
8. Fraud in procurement of bond.
9. Where before the time fixed for the delivery of the property a supersedeas is granted to the original judgment. This would not be a valid defence, if the supersedeas were awarded after the bond had been forfeited.<sup>99</sup>

"A forfeited forthcoming bond stands as a security for the debt, and though while in force no execution can be taken out or other proceeding be had at law to enforce the original judgment, yet the bond is not an absolute satisfaction. For if it be faulty on its face, or the security when taken be insufficient, or

94. *Lusk v. Ramsay*, 3 Munf. 417.

95. Code, § 3619.

96. 13 Am. & Eng. Encl. Law (2nd Ed.) 1151-2.

97. *Lusk v. Ramsay*, *supra*.

98. *Lusk v. Ramsay*, *supra*.

99. *Rucker v. Harrison*, 6 Munf. 181; *Spencer v. Pilcher*, 10 Leigh 490.

the obligors, though solvent when the bond is taken, become insolvent afterwards, the plaintiff may, for these or other good reasons, on his motion, have the bond quashed, and be restored to his original judgment. And though the bond be not quashed, if it appear that it may properly be, a court of equity, which looks to substance rather than to form, and when occasion requires it treats that as done which ought to be done, will regard the bond as a nullity, and the original judgment as in full force."<sup>1</sup>

When a *fi. fa.* is issued on this bond, it is provided<sup>2</sup> that it shall be endorsed "no security is to be taken," which means that the officer is to go on and make the money without further delay.

### § 348. Interpleader proceedings.

The officer may levy the *fi. fa.* on property claimed by a third person, and the method of procedure is somewhat different when the property is in the possession of the execution debtor and when it is not. If the property is in the possession of the execution debtor and is claimed by a third person, or is claimed to belong to a third person, the officer is required to proceed to execute the same, notwithstanding such claim, unless the claimant of the property will give a suspending bond with good security and shall *within thirty days* after such bond is given proceed to have the title to said property settled and determined in the manner pointed out in the chapter on Interpleader. If the claimant fails to give the suspending bond, or, having given it, fails to institute proceedings to try the title to the property within the time prescribed by law, it is conclusively presumed that the property is the property of the party in possession, and the officer is to go on and execute the writ. Here no indemnifying bond is required of the plaintiff. Pending the trial of the title to the property, if the claimant wishes the property to remain in the same possession as before, this may be accomplished by giving a delivery bond.<sup>3</sup>

When the property is not in the possession of the execution debtor and is claimed by a third party, the officer may either

1. *Rhea v. Preston*, 75 Va. 757, 758.
2. Code, § 3624.
3. Code, § 3001.

himself institute interpleader proceedings to try the title<sup>4</sup> to the property or require of the plaintiff an indemnifying bond. If the indemnifying bond is not given, the officer may release the levy if it has already been made, or refuse to make the levy if one has not been previously made.<sup>5</sup> If the indemnifying bond is given, the officer may proceed with the sale and is protected by the bond, but if the claimant of the property desires to have the title thereto tested, he may give to the officer a bond with good security in a penalty equal to double the value thereof, payable to the officer with condition to pay all persons who may be injured by suspending the sale thereof until the claim thereto can be adjusted, such damage as they may sustain by such suspension.<sup>6</sup> Thereafter either the claimant of the property, or the party issuing the process, may institute interpleader proceedings to determine the title to the property,<sup>7</sup> the proceedings in which are hereinbefore set forth in Chapter XVI.

If the plaintiff should indemnify the officer and he should sell the property and pay the money over to the plaintiff and return the *fi. fa.* satisfied, and the property sold under the execution or its value, should be recovered from the obligors in the indemnifying bond given before such sale, or from a purchaser having a right of action on such bond, the plaintiff's execution would be satisfied, at least to the extent of the value of the property sold, and yet he would be liable to the same extent by virtue of the terms of the indemnifying bond. It is now provided by statute that "the person having such execution, or his personal representative, may by motion, after reasonable notice to the person or the personal representative of the person against whom the execution was, obtain a new execution against him without credit for the amount for which the property was sold upon the former execution," but such motion must be made within five years after the right to make the same has accrued.<sup>8</sup>

4. Code, § 2999.

5. Code, § 3001.

6. Code, § 3003.

7. Code, §§ 2999, 3000.

8. Code, § 3598.

### § 349. The lien and its commencement.

A judgment is a lien on real estate only or some interest therein, legal or equitable, and is enforceable only by a bill in equity. An execution is a lien on personal property only, except as hereinbefore stated and the methods of its enforcement are pointed out in this chapter. In Virginia a writ of *fiery facias* is a lien on every species of personal property, tangible and intangible, and whether capable of being levied on or not.

At common law, the lien of the *fi. fa.* attached from the *teste* of the writ, which was always some day during the term at which the judgment was rendered, but this was changed by the statute of frauds<sup>9</sup> so as to make it attach from the time the writ was delivered to the officer. The common law rule still prevails in Tennessee, but it has been changed more or less in all the other states.<sup>10</sup> At common law an execution was not a lien on choses in action at all, nor was it in Virginia until the enactment of the Code of 1849, taking effect July 1, 1850; nor was any provision made for reaching this most valuable species of property save by garnishment. It is now provided by statute in Virginia that the writ of *fiery facias* may be levied as well on current money and banknotes as on the goods and chattels of the execution debtor (except what is exempt from levy under Chapter 178), and as against purchasers for valuable consideration without notice, and creditors, shall bind what is capable of being levied on only from the time it is delivered to the officer to be executed,<sup>11</sup> and, furthermore, that every writ of *fiery facias* shall, in addition to the lien just mentioned on what is capable of being levied on, "be a lien from the time it is delivered to a sheriff or other officer to be executed, on all the personal estate of or to which the judgment debtor is or may afterwards and before the return day of said writ, become possessed or entitled, and which is not capable of being levied on under the said section [just above referred to] except such as is exempt under the provisions of Chapter 178, and except that, as against an assignee of any such estate for valuable consideration, or a person making a payment

9. 29 Car. II. Ch. 3, § 16.

10. 11 Am. & Eng. Encl. Law (2nd Ed.) 669-670.

11. Code, § 3587.

to the judgment debtor, the lien by virtue of this section shall not affect him, unless he had notice thereof at the time of the assignment, or payment, as the case may be."<sup>12</sup> In Virginia, as seen, the *lien* of a *fi. fa.* as to *all kinds* of personal property, whether capable of being levied on or not, commences from the *time* the *fi. fa.* is delivered to the office to be executed. It is to be observed that it is the *time*, not the date, and in order to fix this time definitely and officially the first thing an officer is directed to do after receiving a *fi. fa.* is to endorse on it the year, month, day and *time of day* he receives it. Furthermore, it must be received *to be executed*, not to be held, nor for any other purpose, and delivery with a direction *not to levy* would not create any lien. While the lien commences at the same time as to both tangible and intangible property, yet in other respects the rights of the creditor are not the same as to both species of property.

It will be observed from the above statutes that the *fi. fa.* is not only a lien on all the personal property of the execution debtor in being at the time the *fi. fa.* goes into the hands of the officer to be executed, but that the lien also attaches to all personal property which the execution debtor acquires during the life of that execution. As to tangible property, the execution may be levied on or before the return day, and hence the lien attaches to the tangible property acquired on the return day, as well as that acquired before, provided the *fi. fa.* be levied on that day;<sup>13</sup> but as to intangible property, in order that the lien may attach, the property must be acquired *before* (not on) the return day.<sup>14</sup>

### § 350. Territorial extent of lien.

*Tangible Property.*—"The general rule as to the territorial extent of the lien of an execution is that it is coextensive with the jurisdiction of the officer to whom the writ is delivered, and attaches to all the defendant's goods and chattels within such territory, and as the writ is in most cases delivered to the sheriff

12. Code, § 3601.

13. Code, § 3587.

14. Code, § 3601.

or some other officer whose jurisdiction has the same limits, its lien usually extends throughout the county in which it is issued. In some states, however, the rule that the lien of an execution extends to the defendant's property throughout the state is established."<sup>15</sup>

We have no case on the subject in Virginia, but inasmuch as the lien on tangible property must be perfected, if at all, by a levy of the *fi. fa.* on or before the return day thereof, and as the officer charged with the collection has no power to make such levy outside of his bailiwick, it would seem on principle that as to tangible personal property, the lien of a *fi. fa.* should be restricted to the jurisdiction of the officer charged with its collection. There might be a *fi. fa.* in the hands of every sheriff in the commonwealth, and it would probably reach each one at a different time, and the date of the lien would consequently vary in each county according to the time at which the *fi. fa.* was received by the sheriff of that county. If issued in one county and placed in the hands of the sheriff of that county, it would be a lien in that county from the time it was received by the sheriff of that county; and even if the same *fi. fa.* is sent to a second county, it would seem that the lien, as to property in the second county, should date only from the time that the *fi. fa.* was received by the sheriff of that county. In any case the lien is only an inchoate, imperfect lien, and can only be perfected by a levy by an officer who has power to make such a levy on or before the return day of the writ.

*Intangible Property.*—As to choses in action, the same rule does not apply. Here the lien is not a levy lien at all, but is created by merely placing a *fi. fa.* in the hands of an officer to be executed, and the common practice has been to issue a *fi. fa.* in the county in which the judgment was obtained, and to send a summons to any county in which the garnishee resides. It has never been thought necessary to send a writ of *feri facias* to the county in which the garnishee resides. The lien extends throughout the limits of the state. The statute creating the lien places no limit upon its territorial extent, and there is nothing in-

15. 11 Am. & Eng. Encl. Law (2nd Ed.) 677.

herent in the nature of the property upon which the *fi. fa.* is a lien, or in the methods of enforcing the *fi. fa.* which necessitates any such restriction.

### § 351. Duration of lien.

*Tangible Property.*—As to *tangible* property, the lien continues only till the *return day* of the writ, if not levied on or before that day; but if so levied, it continues thereafter till sale, even though the defendant dies after levy but before the sale, provided the sale be not postponed so long as to manifest an intention to abandon the levy. If the levy be abandoned, the lien is gone, and the property becomes liable as before to levy for any other *fi. fa.*<sup>16</sup>

*Intangible Property.*—As to *intangible* property, or any property not capable of being levied on, the lien continues during the life of the judgment, that is, for ten years from the return day of the *fi. fa.* upon which there has been no return, or twenty years from the return day of any *fi. fa.* upon which there has been a return, and there may be successive executions during these periods so as to make the lien perpetual.<sup>17</sup> Thus if a *fi. fa.* issued returnable to First January Rules, 1901 (say January 5, 1901) and there was a return on it, the lien created by the *fi. fa.* would extend to January 5, 1921, and if before that day another *fi. fa.* was issued, it would extend the lien of the first *fi. fa.* ten years from the return day of the latter *fi. fa.* if there was no return thereon or twenty years if there was a return and so on indefinitely. The lien, though not enforced in the debtor's lifetime, continues after his death.<sup>18</sup> The lien continues after the return day of the execution and has priority over a subsequent execution lien under the same law, even though there has been a proceeding by a suggestion under the junior sooner than under the senior execution.<sup>19</sup> The lien acquired on a

16. *Rhea v. Preston*, 75 Va. 757.

17. Report of Revisors (1849), p. 920; 5 Va. Law Reg. 673; *Ackiss v. Satchell*, 104 Va. 700, 52 S. E. 378.

18. *Trevillian v. Guerrant*, 31 Gratt. 525; *Brown v. Campbell*, 33 Gratt. 402.

19. *Charron v. Boswell*, 18 Gratt. 216, 229.

debtor's chose in action by reason of the *fi. fa.* issued on a judgment against a defendant in his lifetime is lost, however, unless the judgment be revived or some action be instituted for its enforcement within five years from the qualification of his personal representative.<sup>20</sup> The lien ceases when the right to enforce the judgment ceases, or is suspended by a forthcoming bond being given and forfeited, by supersedeas, or by other legal process.<sup>21</sup> Any return which shows that the *fi. fa.* has not been satisfied is sufficient to thus extend the life of the lien. Indeed, if the judgment was confessed under an agreement that no *fi. fa.* should be issued, and afterwards, contrary to the agreement, a *fi. fa.* was issued, it would create a lien and extend the life of the judgment as against third persons. The agreement is personal to the parties to the agreement, and can only be enforced by them. Third persons cannot take advantage of it, nor can the execution be attacked except by a direct proceeding for that purpose.<sup>22</sup>

### § 352. Rights of purchaser.

*Tangible Property.*—If the property is *capable of being levied on*, the lien of the *fi. fa.* is superior to the rights of purchasers with or without notice of the *fi. fa.*, provided a levy is actually made on or before the return day of the writ. If the levy is not so made, the lien is gone, and the purchaser gets good title.<sup>23</sup> The lien, however, is not *created* by the levy, but by placing the writ in the hands of the officer to be executed. Its duration as to tangible property is simply *extended* by the levy. We sometimes speak of it as a levy lien, but this is misleading. The *fi. fa.* is a lien by virtue of the terms of the statute, and this lien lasts in any event till the return day of the writ be passed, but may be extended by a levy on or before the return day.

*Intangible Property.*—If the property is *not capable of being levied on*, the lien of the creditor gives way to an assignee for

20. Code, § 3577; *Spencer v. Flanary*, 104 Va. 395, 51 S. E. 849.

21. Code, § 3602.

22. *Baer v. Ingram*, 99 Va. 200, 37 S. E. 905. See also, *Lowenbach v. Kelly*, 111 Va. 439, 69 S. E. 352.

23. *Evans v. Greenhow*, 15 Gratt. 153, 161.

value without notice, and the latter has priority over the execution creditor. A deed of trust on choses in action is an assignment, and an antecedent debt is a valuable consideration within the meaning of this statute, and although the beneficiary in the deed may not know of its existence when made, yet he may accept when it comes to his knowledge, and this acceptance will relate back to the delivery of the deed.<sup>24</sup> If an assignee for value of a chose in action has no notice of the existence of a *fi. fa.* against his assignor, nor of any fraudulent intent on the part of his assignor, it is immaterial that the assignor was insolvent and intended to commit a fraud in making the assignment.<sup>25</sup> Whether or not an antecedent debt is a valuable consideration is the subject of much conflict of opinion outside of Virginia.<sup>26</sup> A debtor of the execution debtor cannot make a valid payment to his creditor if he knows of the existence of the execution, but he is protected if he has no notice.<sup>27</sup>

Here again it must be observed that the lien is *created* by placing the *fi. fa.* in the hands of the officer to be executed, and not by the notice. The lack of notice to the assignee or to the debtor of the execution debtor will avoid the lien, but the notice does not create it. Hence, if a liability to the execution debtor arises after a person has been summoned as garnishee, or has notice of the *fi. fa.*, and *before* the return day of the writ (although no liability existed at the time the notice of the *fi. fa.* was acquired) the lien of the *fi. fa.* attaches to it, and neither the assignee of the debt having such notice nor the garnishee making payment to his creditor is protected. A summons in garnishment does not create a lien, but is only a means of enforcing the lien already existing by reason of the *fi. fa.*<sup>28</sup> No particular form of notice is required, nor need it be in writing.

24. *Evans, Trustee, v. Greenhow*, 15 Gratt. 153; *Rhea v. Preston*, 75 Va. 757.

25. *Shields v. Mahoney*, 94 Va. 487, 27 S. E. 23.

26. 23 Am. & Eng. Encl. Law (2nd Ed.) 490; 1 Devlin on Deeds, § 276 et seq., § 291 et seq.; *Parmalee v. Simpson*, 5 Wall. 81.

27. Code, § 3601; *Park v. McCalley*, 67 W. Va. 104, 67 S. E. 174.

28. *Park v. McCalley*, 67 W. Va. 104, 67 S. E. 174.

### § 353. Mode of enforcing the lien.

*Tangible Property.*—The officer advertises tangible property in the manner prescribed by law, sells the same for cash, and pays the execution creditor the amount of his execution, principal, interest and costs. If there should turn out to be any surplus, he is required to pay this to the execution debtor. The officer has no right to make an excessive levy, nor to sell more property than is necessary to satisfy the execution, but of course this cannot always be calculated with exactness. If the excess amounts to any considerable sum, the officer would be liable to the execution debtor for making an excessive sale, but if the officer pays such excess to the debtor who accepts it without protest, this is a ratification of the officer's act in making the excessive sale and a waiver of the right of action against him.<sup>29</sup>

*Intangible Property.*—The clerk of the court from whose office the execution issues is requested (verbally or in writing, but usually by a memorandum on the memorandum book) to issue a summons in garnishment against the party indebted to the defendant in the execution. The clerk issues the garnishment as of course, directing the officer to summon the party owing the money to some day of the existing or next term of the court to answer whether or not he is indebted to the defendant in the execution. A summons in garnishment may be returnable more than ninety days after its date.<sup>30</sup> If such person, after being served with the summons twenty days, fails to appear, or if it be suggested that he has not fully disclosed his liability, the court may either compel him to appear, or hear proof of any debt owing by him, and make such orders in relation thereto as if what is so proved had appeared on his examination.<sup>31</sup> If a controversy arises as to the amount due by the garnishee, the court without formal pleading may inquire into the matter, or, if either party demand it, summon a jury to ascertain the amount due.<sup>32</sup> If the garnishee appears in answer to the summons, he is examined on oath, and if it appear on such

29. *Manchester Loan Co. v. Porter*, 106 Va. 528, 56 S. E. 337.

30. Code, § 3609.

31. Code, §§ 3611, 2977.

32. Code, § 2978.

examination that there is a liability on him on account of his indebtedness to the execution debtor, the court may order him to pay the same to any officer whom it may designate,<sup>33</sup> or more generally give a judgment directly against him for the amount he admits to be due in favor of the execution creditor. If the property is tangible, there is no occasion for a summons in garnishment, and the sheriff may levy on it where found, no matter in whose possession it may be, and if a controversy arises as to its liability for the execution, this controversy may be settled either by interpleader proceedings, or by proceedings on an indemnifying bond, as hereinbefore set forth. Tangible property which the execution debtor has fraudulently conveyed to another cannot be garnished. The garnishment statute does not contemplate or operate upon an estate in the possession of the garnishee to which he has title. Section 3604 of the Code furnishes an efficient remedy by action at law or suit in equity for reaching such property, or the execution creditor may ignore the fraudulent transfer and levy on the property as that of the execution debtor, and, upon proper proceedings had, have it sold, or the title thereto tried.<sup>34</sup>

If the garnishee's answer admits a liability, but the amount is not sufficient to pay the entire execution and cost, the cost of the garnishment will be first paid and the net balance applied to the payment of the execution, usually paying the cost first. If the garnishee fail to appear, or, having appeared, fail to disclose any indebtedness, the plaintiff may, if he can, show an indebtedness on the part of the garnishee by any other competent evidence. He is not concluded by the statements of the garnishee as to the amount of his indebtedness.<sup>35</sup> A copy of the summons in garnishment is required to be served on the execution debtor as well as on the garnishee, and such debtor may make defence. If the debtor be a non-resident there must be an order of publication against him, except upon executions issued by a justice.<sup>36</sup> If the garnishee admits liability, but the debt is

33. Code, § 3610.

34. *Freitas v. Griffith*, 112 Va. 343, 71 S. E. 531.

35. Code, § 2977.

36. Code, § 3609.

not due, the proceeding must be continued until the debt becomes due, unless the garnishee will consent to a present judgment against him, with a suspension of execution until the debt becomes due. This is sometimes done, and it is very desirable for the creditor to get this if he can, as it cuts off all possibility of thereafter assigning the debt by the defendant in the original execution. If the evidence of the garnishee's debt is negotiable paper it should be produced for surrender to him, or other proper steps be taken for his protection.

While a *fi. fa.* is a lien on a legacy, or distributive share of an estate, the process of garnishment at law will not lie against executors and administrators to recover such legacy or distributive share, but other remedies must be resorted to.<sup>37</sup> Where a corporation is summoned as garnishee, the usual practice is to designate some officer of the corporation who has knowledge of the facts upon whom the garnishment is to be served, as the corporation, as such, can only answer under its corporate seal.<sup>38</sup>

As to property acquired after the officer receives the writ, and before the return day, the lien attaches to both species of property, but as to property of either kind acquired after the return day, the lien does not attach. The lien attaches, however, to tangible personal property acquired on the return day, provided it is levied on that day. As the lien is fixed by the *fi. fa.* and not by the garnishment, the garnishee is required to answer whether or not he was indebted not only at the time of the service, but *thereafter* during the life of the *fi. fa.*<sup>39</sup>

*Situs of a Debt for Purpose of Garnishment.*—What is the situs of a debt for the purpose of garnishment or attachment is a subject of much conflict of authority. While the situs of a debt for the purpose of taxation, distribution, and the like, is the residence of the owner, or creditor (and a few courts give the same situs for the purpose of garnishment), it is generally held that the residence of the debtor, rather than that of the creditor, is the situs of the debt for the purpose of garnishment and attach-

37. *Bickle v. Crisman*, 76 Va. 678, 692; *Swann v. Summers*, 19 W. Va. 125.

38. *B. & O. R. Co. v. Gallahue*, 12 Gratt. 655.

39. *Park v. McCauley*, 67 W. Va. 104, 67 S. E. 174.

ment. "The rule announced in a number of late and well-considered cases, and which seems to be the doctrine which will best protect the interests of commerce, is that a debtor may be charged as garnishee of his creditor, without regard to the illusive theories as to the situs of a debt, in any jurisdiction in which an action could have been brought by such creditor against the debtor for the recovery of the debt."<sup>40</sup>

The legislature of Virginia has practically determined that the situs of a debt, both for purposes of attachment and garnishment, is the residence of the debtor;<sup>41</sup> and this, on principle, seems to be the correct rule.<sup>42</sup> The legislature of Virginia, however, has imposed very severe penalties on any person who shall directly or indirectly send a claim out of the State for the purpose of attachment or garnishment in another state of the wages of a laboring man and householder, with intent to deprive him of the exemption of fifty dollars a month given to him by § 3652 of the Code.<sup>43</sup>

The conflict of decisions on the subject of the situs of debts for the purpose of garnishment or attachment has worked great hardship and injustice to garnishees,<sup>44</sup> but it has been held in Virginia that a garnishee, who, without fault or negligence on his part, has been compelled by a court of competent jurisdiction, to pay the debt to his debtor, cannot be compelled to pay the same indebtedness, or any part thereof, to the person suing out the garnishment.<sup>45</sup>

### § 354. Property undisclosed.

There may be property of either kind (capable of being levied on, or not capable of being levied on) upon which the *fi. fa.* is a lien, or even upon which it is not a lien, and of which the creditor

40. 14 Am. & Eng. Encl. Law (2nd Ed.) 805.

41. Code, § 2959, Cl. 1; § 3609.

42. 4 Va. Law Reg. 471-472.

43. Code, § 3652a.

44. See discussion, 1 Va. Law Reg. 241; 14 Am. & Eng. Encl. Law, 805.

45. Va. F. & M. Ins. Co. v. New York, etc., Co., 95 Va. 515, 28 S. E. 888.

does not know, and yet which may be made available for the payment of the debt due the creditor. If the debtor owns property outside of the state, real or personal, the process of the state cannot run into another state and there reach the property, but the courts of this state, having jurisdiction of his person, may by process of contempt compel him to surrender the property for the payment of his execution creditors. This is accomplished by interrogatories. Upon application of the execution creditor, the judge of the court from which the execution issued, in term time or vacation, may issue a summons requiring the execution debtor to appear before a commissioner of any circuit or corporation court at a time and place to be designated in the summons, to answer such interrogatories as shall be propounded to him by counsel for the execution creditor, or by the commissioner, except that the summons shall not be served out of the county or corporation in which such commissioner resides. The execution debtor must appear and answer under oath. If he fails to appear and answer, or answers evasively, provision is made for compelling a proper answer by the section of the Code quoted.<sup>46</sup>

46. Section 3603 of the Code is as follows: "To ascertain the estate on which a writ of *feri facias* is a lien and to ascertain any real estate in or out of this state to which a debtor named in such *feri facias* is entitled upon the application of the execution creditor the judge of any court of record from which the *feri facias* issued may, either in term or vacation, issue a summons requiring the execution debtor or any officer of a corporation debtor having any officer in this state or any debtor or bailee of his or its, requiring him or them to appear before one of the commissioners of any circuit or corporation court at a time or place to be designated in the said summons to answer such interrogatories as shall be propounded to him or them by the counsel of the execution creditor or the commissioner; except that such summons shall not be served out of the county or corporation in which such commissioner resides. The debtor served with such summons shall appear at the time and place mentioned and make answers under oath to such interrogatories. If he fail to appear and answer or make any answers which are deemed by the commissioner to be evasive, the commissioner may by rule returnable to a future day or forthwith require the said debtor or his debtor or bailee to show cause why an attachment may not be issued against him or them to compel him or them to answer the interrogatories aforesaid or any others which he may deem

If he discloses any real estate outside the state, he is required to convey it to the officer to whom the *fi. fa.* was delivered, and money, bank notes, etc., or other personal estate he is required to deliver to the officer. If he fails to make such conveyance and delivery, the same may be compelled by taking him into custody until the conveyance is made, and when it is made,

pertinent. But the commissioner shall enter in his proceedings and report to the court mentioned in section three thousand six hundred and five any and all the objections taken by such debtor against answering such interrogatories or any or either of them, and if the court afterwards sustain any one or more of said objections the answers given to such interrogatories as to which objections are sustained shall be held for naught in that or any other cause."

The following forms are taken from Mr. Pollard's Notes to the above section of the Code:

"Virginia: In the ..... Court of the .....  
 ....., Plaintiff, }  
                   *v.* }  
 ....., Defendant. }

It appearing to the court that the plaintiff did on the ..... day of ....., 19.., obtain judgment in this court against the defendant for the sum of ....., with interest thereon from the ..... day of ....., 19.., and costs amounting to .....,

And it further appearing that an execution upon said judgment issued on the ..... day of ....., 19.., returnable to ..... rules, 19.., came to the hands of the sheriff of ..... on the ..... day of ....., 19.., and there remains unsatisfied. /

Therefore, on application of the plaintiff, it is ordered that the said defendant personally appear before ....., one of the commissioners in chancery of the ..... court of the ....., at his office situated ....., on the ..... day of ....., 19.., at .... o'clock ... M., then and there to answer such interrogatories as may be propounded to him by counsel for the plaintiff or by said commissioner, as prescribed in section 3603 of the Code of Virginia and acts amendatory thereof; and

It is ordered that a copy hereof be forthwith served on the said ..... defendant, by the sheriff of ....., who shall make his return as to such service to said commissioner.

A copy—Teste. ...., Clerk."

Under this section it would seem that a simple summons issued by the judge is all that is necessary, but the better practice is to

provision is made for his discharge.<sup>47</sup> The officer is to sell the land as he would horses, mules or work oxen. The personal property he deals with as if levied under a *fi. fa.*, i. e., advertises

issue an order as above indicated, thus preserving a full record of all the proceedings in the suit.

If a simple summons be preferred, the following form may be used:

Form of Summons.

The Commonwealth of Virginia, to the Sheriff of the County of .....

Greeting:

We command you that you summon ..... to appear before ....., a commissioner in chancery of the ..... court of ....., at his office ..... in ....., on the ..... day of ....., 19..., at .... o'clock ... M., then and there to answer such interrogatories as may be legally propounded to ....., in order to ascertain the estate of the said ..... upon which the execution in favor of ..... against the said ..... is a lien, or any real estate in or out of this state to which the said ..... is entitled; which execution was issued on the ..... day of ....., 19..., by the clerk of the circuit court of said county, upon a judgment obtained in the ..... court by said ..... against the said ..... for ..... dollars and ..... with legal interest thereon from the ..... day of ....., 19..., till paid, and \$.... costs, and made returnable to the ..... rules, 19..., and came into the hands of ..... on the ..... day of ....., 19..., at .... o'clock ... M.

Given under my hand this .....day of ....., 19...

.....,

Judge of .....

47. Section 3604 of the Code is as follows: "Any real estate out of this state to which it may appear by such answers that the debtor is entitled shall be forthwith conveyed by him to the officer to whom was delivered such *feri facias*, and any money, bank notes, securities, evidences of debt, or other personal estate which it may appear by such answers are in possession of or under the control of the debtor or his debtor or bailee shall be delivered by him or them as far as practicable to the said officer or to such other and in such manner as may be ordered by the said commissioner or the said court or the judge thereof where it is in court or before such judge; unless such conveyance and delivery be made a writ shall be issued by the court's order, or, if the answers be not in court, by the commissioner

and sells the goods and chattels, and as to choses in action, he may receive payment for sixty days after delivery to him, and afterwards return those uncollected to the clerk's office of the court from which the execution issued.<sup>48</sup> The creditor can then proceed against residents of the state by garnishment. The statute is silent as to the mode of procedure against non-residents who are liable in choses in action, but it is probable that the court from whose clerk's office the execution issued may designate some person to proceed on them in the foreign jurisdiction, or else direct a sale thereof. If an execution debtor, after being served with a summons issued by a commissioner, fails within the time prescribed therein, to file answers upon oath to said interrogatories, or files answers deemed by the commissioner to be evasive, on affidavit by the creditor that the execution debtor is about to quit the state, the commissioner may issue a writ directing the sheriff to apprehend the debtor and keep him safely until he answers the interrogatories,<sup>49</sup> but this remedy is not only slow, but of little practical value,<sup>50</sup> and resort is generally had to the more speedy and effective remedy of holding the defendant to bail discussed in the next section.

### § 355. Non-resident debtor.

If the debtor be a non-resident of the state and there is a personal judgment against him, and he has personal property in the state, it may be levied on as though he were a resident. If he himself be found within the state, the creditor, if he has a judg-

directed to the sheriff of any county or the sergeant of any corporation requiring such sheriff or sergeant to take the debtor and keep him safely until he shall make such conveyance and delivery, upon doing which he shall be discharged by the court under whose order the writ issued, or if the answers were not in the court by the court by which the commissioner was appointed, or in either case if the court be not sitting by the commissioner. He may also be discharged by the said court or the judge thereof in vacation in any case if the court or judge shall be of opinion that he was improperly committed or is improperly or unlawfully detained in custody."

48. Code, §§ 3603, 3608.

49. Code, § 3606.

50. 6 Va. L. Reg. 804.

ment, may sue on the judgment, and if no judgment, may sue on the original cause of action, and hold the defendant to bail, if he is about to quit the state. The creditor need have no other ground for this procedure than the fact that his debtor is "about to quit the state." This is a personal *attachment* against the debtor, the proceedings on which will be explained in connection with attachments, to which the subject more properly belongs. It is sufficient here to say that a *capias* issues for the arrest of the defendant, and he is actually incarcerated unless he gives bond, with good security, in such penalty as the court, judge or justice may think fit, with condition that if judgment be rendered in the action and within four months thereafter execution be issued and interrogatories be filed before a commissioner of the court wherein such judgment is, he will, at the time the commissioner issues the summons, be in the county or corporation in which the commissioner resides, and will within the time prescribed by the summons file proper answers on oath to such interrogatories and make such conveyance and delivery as is required by Ch. 176 of the Code, or in default thereof, will perform and satisfy the judgment of the court.<sup>51</sup> This is a drastic measure against non-resident debtors, but a very effectual one. If a creditor has no judgment, but a non-resident debtor has effects within the state, they may be subjected to attachment, the mode of procedure upon which will be treated later.

If the record shows that any person other than the plaintiff in a judgment is the beneficial owner thereof, in whole or in part, the clerk is required to endorse on the execution the extent of the interest.<sup>52</sup>

### § 356. Motion to quash.

A motion to quash is the proper method of determining the regularity and validity of a writ of *fi. fa.* "The motion to quash may, after reasonable notice to the adverse party, be heard and decided by the justice who issued the execution, or the circuit court of the county or the corporation court of the corporation

51. Code, § 2992.

52. Code, § 3583.

in which such justice resides, and in other cases by the court whose clerk issued the execution, or if it was from a circuit or corporation court, by the judge thereof in vacation; and such court or judge, on the application of the plaintiff in the motion, may make an order staying the proceedings on the execution until the motion be heard and determined, the order not to be effectual until bond be given in such penalty and with such condition, and either with or without surety, as the court or judge may prescribe. The clerk from whose office the execution issued, or the justice rendering the judgment, as the case may be, shall take the bond and make as many copies of the order as may be necessary and endorse thereon that the bond required has been given; and a copy shall be served on the plaintiff in the execution and on the officer in whose hands the execution is."<sup>53</sup>

As a motion to quash does not *per se* operate to suspend the enforcement of the *fi. fa.* while the motion is pending, it was formerly necessary to resort to equity for an injunction, but the statute now provides that the court or judge, on application of the plaintiff in the motion, may make an order staying the proceedings on the execution until the motion is heard and determined. The order, however, is not to be effectual until bond is given, as above stated. If the *fi. fa.* does not follow the judgment, or is issued contrary to the agreement of the parties, or is subject to credits not endorsed, or has been negligently or fraudulently issued, a motion to quash it is the proper remedy, and this is a *direct proceeding* to attack the *fi. fa.*<sup>54</sup> If a former *fi. fa.* has been satisfied, or levied on sufficient property to satisfy it, which has been lost to the execution debtor by the negligence of the officer, a motion to quash the second *fi. fa.* is the proper remedy.<sup>55</sup> If the motion to quash is based on the ground that a former *fi. fa.* (which was not returned) was levied and satisfied, the fact of the levy of the former *fi. fa.* may be shown by parol.<sup>56</sup>

53. Code, § 3599.

54. *Enders v. Burch*, 15 Gratt. 64, 72; *Snavely v. Harkrader*, 30 Gratt. 487; *Baer v. Ingram*, 99 Va. 200, 37 S. E. 905; *Lowenback v. Kelley*, 111 Va. 439, 69 S. E. 352; *Taney v. Woodmansee*, 23 W. Va. 709; *Howell v. Thomason*, 34 W. Va. 794, 12 S. E. 1088.

55. *Sutton v. Marye*, 81 Va. 329; *Walker v. Com.*, 18 Gratt. 13.

56. *Cockerell v. Nichols*, 8 W. Va. 159.

There is no time within which a motion to quash must be made,<sup>57</sup> and it may be made by the plaintiff or defendant,<sup>58</sup> and as well after the return day as before, and whether it is alive or not;<sup>59</sup> but where the *fi. fa.* issued in contravention of the agreement of the parties has been returned, and a second *fi. fa.* issued, the quashing of the second *fi. fa.* does not destroy the effect of the first *fi. fa.*, and the lien created thereby continues in effect. The effect of the first *fi. fa.* can only be destroyed by a direct proceeding for that purpose, such as a motion to quash *that fi. fa.*, and this can only be prosecuted by a party thereto or his personal representative. The agreement not to issue the *fi. fa.* is personal to the parties thereto, and cannot be taken advantage of by third persons.<sup>60</sup> On a motion to quash, the officer may be allowed to amend his return under the conditions hereinbefore set forth.<sup>61</sup> If judgment and *fi. fa.* be recovered against two persons as partners, although the process was served on only one of them, a motion to quash does not lie at the instance of the defendant who was served with process.<sup>62</sup>

If, for any reason, the judgment on which a *fi. fa.* issues is vacated or annulled, this *ipso facto* vacates any *fi. fa.* issued thereon without any order quashing the *fi. fa.*<sup>63</sup>

### § 357. Venditioni exponas.

A writ of *venditioni exponas* is a writ directed to the sheriff or other officer commanding him to *expose to sale* property which has been previously levied on. If a *fi. fa.* has been returned, showing a levy on personal property, but no sale for want of bidders, or because the sheriff did not have time to advertise and sell after levy and before the return day, or if the officer dies after levy but before sale, leaving no deputy authorized to

57. *Lowenback v. Kelley*, 111 Va. 439, 69 S. E. 352.

58. *Rinehard v. Baker*, 13 W. Va. 805.

59. *Slingluff v. Collins*, 109 Va. 717, 64 S. E. 1055; *Lowenback v. Kelley*, 111 Va. 439, 69 S. E. 352.

60. *Baer v. Ingram*, 99 Va. 200, 37 S. E. 905.

61. *Walker v. Com.*, 18 Gratt. 13; *Slingluff v. Collins*, *supra*.

62. *Lee v. Hassett*, 41 W. Va. 368, 23 S. E. 559.

63. *Ballard v. Whitlock*, 18 Gratt. 235.

make the sale, in all these cases the proper writ is a writ of *venditioni exponas*.<sup>64</sup> The sheriff may postpone a sale if he is not offered a reasonably fair price for the property, and where the writ of *venditioni exponas* is issued because of the want of bidders it must direct the officer to make the sale peremptorily. In Virginia it is provided by statute that a deputy of a sheriff or sergeant in office at the time of his death shall, notwithstanding the death of his principal, unless removed, continue in office until the qualification of a new sheriff or sergeant, and execute the same in the name of the deceased and in like manner as if the sheriff or sergeant had continued alive until such qualification.<sup>65</sup> If, however, the officer die leaving no deputy, then, upon a suggestion of that fact, a writ of *venditioni exponas* may be directed to such sheriff or other officer of the county or corporation, wherein the property was taken, as may be in office at the time the writ issues.<sup>66</sup> The writ is issued upon the mere suggestion of the execution creditor, or his attorney, as a matter of course, just as a *fi. fa.* would be issued, and generally without notice to the defendant or any order from the court, and if the clerk, upon request, refuses to issue the writ, he may be compelled to do so by a writ of *mandamus*.<sup>67</sup> The writ is frequently spoken of by the courts as a writ of execution, but it is, in fact, a mere order of sale under the levy of the original execution, and is issued, among other reasons, to prevent the loss of the lien of the original execution. The officer holding a *fi. fa.* may, if it is levied before the return day, retain the writ until after the return day and make sale under his levy, and no writ of *venditioni exponas* is then necessary, but if he dies before sale, leaving no deputy, or returns the writ showing a levy and no sale, the plaintiff would lose the lien of his *fi. fa.* if he abandoned that levy, and the rights of other creditors might intervene before he could sue out another execution, or sureties might be released in consequence of the abandonment of the

64. Code, §§ 3593, 3594.

65. Code, § 892.

66. Code, § 3594.

67. *Cummins v. Webb*, 4 Ark. 229; 22 Encl. Pl. & Pr. 647.

levy, and hence he seeks to enforce the lien of the original *fi. fa.* by a sale thereunder, and this he accomplishes by the writ of *venditioni exponas*.<sup>68</sup> There must have been a prior levy and return, but no sale, in order to justify the issuance of the writ.

68. 22 Encl. Pl. & Pr. 643, ff; 4 Min. Inst. 1039.

## CHAPTER XLIII.

### ATTACHMENTS.

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### § 358. Nature and grounds.

Attachments are wholly creatures of statute, and the grounds upon which they may be issued differ more or less in the different States. An attachment is an order or process to take into custody the person or property of another to answer a demand to be thereafter established, or to enforce obedience, or to punish for disobedience, to some lawful judicial order theretofore made. It will be observed that this definition covers three classes of attachments. The first is a civil process to answer some demand asserted against the person or property of another. The second is in the nature of a criminal process to enforce obedience to some command which has theretofore been made, as, for example, where a witness who has been summoned fails to attend, he may by proper proceeding be attached and forcibly brought into court. The third is likewise a quasi-criminal proceeding to punish a person for disobedience to some lawful order or decree, as, for example, where an injunction order has been disobeyed the party enjoined may be attached for his contempt. The first of these is the only species of attachment which will be discussed in this chapter. An attachment as a civil process is said to be an execution by anticipation. It lays hold of the property of the defendant at the beginning of the litigation for the purpose of satisfying some claim or demand of the plaintiff which is to be established in the future, but which in fact may never be established. While an execution issues only after judicial investigation and determination as to the rights of parties, an attachment issues before any such investigation or determination has been had. In this respect it is harsh towards the debtor. It is also harsh in its effect upon other creditors over whom the attaching creditor obtains priority, and is susceptible to great abuse. It is a statutory remedy, unknown to the common law, and existing only by virtue of statutes. For these reasons at-

tachment laws are strictly construed, and an attachment will never be sustained until all the requirements of the statute have been complied with.<sup>1</sup> The grounds for attachment vary more or less in the different states, but those provided by statute in Virginia are such as prevail in most of the states, and are set forth in the margin.<sup>2</sup> The language of the statute is always

1. *Claffin v. Steenbock*, 18 Gratt. 842; *Delaplain v. Armstrong*, 21 W. Va. 213; *Cosner v. Smith*, 36 W. Va. 788, 15 S. E. 977.

2. Section 2959 of the Code is as follows: "If at the time of or after the institution of any action at law for the recovery of specific personal property or a debt or damages for the breach of a contract, express or implied, or damages for a wrong the plaintiff, his agent or attorney, shall make affidavit stating that the plaintiff's claim is believed to be just, and where the action is to recover specific personal property the nature and, according to the affiant's belief, the value of such property and the probable amount of damages the plaintiff will recover for the detention thereof, and where it is to recover a debt or damages for the breach of a contract, express or implied, or damages for a wrong, a certain sum which (at least) the affiant believes the plaintiff is entitled to or ought to recover, and stating also the existence to the best of the affiant's belief of one or more of the following grounds for attachment: That the defendant or one of the defendants:

First. Is a foreign corporation or is not a resident of this state and has estate or debts owing to said defendant within the county or corporation in which the action is or is sued with a defendant residing therein, or that the defendant, being a non-resident of this state, is entitled to the benefit of any lien, legal or equitable, on property, real or personal, within the county or corporation in which the action is, and the word estate as herein used shall include all rights or interests of a pecuniary nature which can be protected, enforced, or proceeded against in courts of law or equity; but this provision as to equitable estates and interests so far as amendatory of existing laws shall not apply to attachments sued out before the passage of this act. This section as so enlarged shall come under the provisions of section twenty-nine hundred and sixty-four, concerning attachments in equity; or,

Second. Is removing or about to remove out of this State with intent to change his domicile; or,

Third. Is removing, intends to remove, or has removed the specific property sued for or his own estate or the proceeds of the sale of his property, or a material part of such estate or proceeds, out of

important and should be carefully examined whenever it is necessary to sue out an attachment. For the purpose of the present discussion, though not sufficiently specific for practical application, the grounds set forth in the statute cited in the margin may be briefly summarized as follows, to-wit: (1) that the defendant is a foreign corporation, or is not a resident of the State; (2) that the defendant is about to remove *himself* out of the State with intent to change his domicile; (3) that the defendant is about to remove his *property* out of the State, so that process of execution would be unavailing; (4) that the defendant is converting, or is about to convert, or has converted his property, or some part thereof into money, securities, or evidences of debt, with intent to hinder, delay or defraud his creditors; (5) that the defendant has assigned or disposed of, or is about to assign or dispose of his estate or some part thereof with the intent to hinder, delay or defraud his creditors. It will be observed that the fraudulent intent of the debtor is applicable only to the last two grounds of attachment. The section we have been discussing applies only to an attachment issued in an action at law, which, of course, means that the right of action has accrued. The attachment is there given for the recovery of specific personal property, or a debt, or damages for a breach of a contract, express or implied, or damages for a wrong. By another section of the Code an attachment is also given for a debt, whether it is due or not, where it appears that the *debtor* intends to remove, or is removing, or has removed his effects out of the State. This statute contemplates the existence of the relation of debtor and creditor, but the term "*debtor*" should, in the construction of

this State so that process of execution on a judgment when obtained in said action will be unavailing; or,

Fourth. Is converting or is about to convert or has converted his property of whatever kind or some part thereof into money, securities, or evidences of debt with intent to hinder, delay, or defraud his creditors; or,

Fifth. Has assigned or disposed of or is about to assign or dispose of his estate or some part thereof with intent to hinder, delay, or defraud his creditors. In any such case the clerk of the court in which the action is shall issue an attachment as the case may require."

this statute, be taken in its largest sense, as embracing every person against whom another has a claim for breach of contract even when the compensation sounds in damages.<sup>3</sup> The word "claim" is as broad a term as could have been used in this connection.<sup>4</sup> But the statute is not applicable to an action of damages for a wrong.<sup>5</sup> An attachment may also issue on the complaint of a lessor, his agent or attorney, that any person liable to him for rent intends to remove, or is removing, or has within thirty days removed his effects from the leased premises.<sup>6</sup> Un-

3. *Dunlop v. Keith*, 1 Leigh 430, 432. See also, *Peter v. Butler*, 1 Leigh 285.

4. *Myers v. McCormick*, 109 Va. 160, 63 S. E. 437.

5. Section 2961 of the Code is as follows: "On complaint by any person, his agent or attorney, whether the claim of such person is payable or not, to a justice, or to the clerk of the circuit or of any city court of the county or corporation in which the debtor against whom the claim is resides, or in which he has estates or debts owing to him, or if he has removed from the State in which he last resided, or in which he has estate or debts owing to him, or if he has never resided in the State in which he has estate or debts owing to him, or if such debtor be a corporation in which such corporation has estate or debts owing to it, that the said debtor intends to remove or is removing, or has removed his effects out of this State, so that there will probably not be therein effects of such debtor sufficient to satisfy the claim when judgment is obtained therefor, should only the ordinary process of law be issued to obtain the judgment, if such person, his agent or attorney, make oath to the truth of the complaint to the best of his belief, as well as to the amount and justice of the claim, and if the same is not payable, at what time it will be payable, the justice or clerk, as the case may be, shall issue an attachment against the estate of the debtor for the amount so stated."

6. Section 2962 of the Code is as follows: "On complaint by any lessor, his agent or attorney, to a justice or to the clerk of the circuit court of the county or of the circuit or any city court of the corporation in which the leased premises or a part thereof may be, that any person liable to him for rent intends to remove, or is removing, or has, within thirty days, removed his effects from such premises, if such lessor, his agent or attorney, make oath to the truth of such complaint to the best of his belief and to the rent which is reserved (whether in money or other thing), and will be payable within one year, and the time or times when it will be so payable, and also make oath either that there is not, or he believes, unless an

der this statute, the lessor is allowed to attach for rent that "will be payable within one year."<sup>7</sup>

*Non-Resident or Foreign Corporation.*—A person intending to remove from this State to another becomes a non-resident of this State as soon as he commences his removal and before he gets beyond the limits of the state.<sup>8</sup> For the purpose of attachment laws there is a marked distinction between "domicile" and "residence." To constitute a domicile two things must concur, first residence, second, the intention to remain there for an unlimited time. A resident has to have a permanent abode for the time being, as distinguished from a mere temporary locality of existence. Residence, within the meaning of the attachment laws, means the act of abiding or dwelling in a place for some continuance of time.<sup>9</sup> If a party domiciled in another State, comes into this State to do business, and particularly if he brings with him his means and property and engages in a business which makes his stay in the State wholly indefinite and uncertain as to duration, he is a resident of this State, and not subject to the provision of the attachment laws against non-residents.<sup>10</sup> So, also, a railroad contractor dwelling in Virginia with no intention of leaving, and engaged in work which will occupy him indefinitely, but whose family live out of the State for the convenient education of his children, is still a resident of the State.<sup>11</sup> An abscond-

attachment issues, that there will not be left on such premises property liable to distress sufficient to satisfy the rent so to become payable, such justice or clerk, as the case may be, shall issue an attachment for the said rent against such goods as might be distrained for the same if it had become payable, and against any other estate of the person so liable therefor."

7. *Other Attachments.*—Provision is also made for attachments against vessels in certain cases (Code, § 2963), and against tenants and laborers to whom advances have been made by landlords or farmers, and who are removing, or intend to remove the crops, or their share thereof, without repaying said advances. (Code, § 2496.)

8. *Clark v. Ward*, 12 Gratt. 440.

9. *Long v. Ryan*, 30 Gratt. 718.

10. *Long v. Ryan*, *supra*; *Andrews v. Mundy*, 36 W. Va. 22, 14 S. E. 414.

11. *Didier v. Patterson*, 93 Va. 534, 25 S. E. 661; *Dean v. Cannon*, 37 W. Va. 123, 16 S. E. 444.

ing debtor is not a non-resident, nor is a volunteer in the army, absent with his command, nor one serving a term of penal servitude outside the State.<sup>12</sup> A person, born and domiciled in another State, who comes to Fortress Monroe (which is within the territorial limits of this state, but under the exclusive jurisdiction of the United States) for the purpose of enlisting in the army, and who enlists and remains an enlisted soldier of the United States, does not thereby acquire a residence in Virginia so as to defeat the right of a creditor to attach his property in Virginia on the ground that he is a non-resident. The mere fact that the State has a right to serve process, civil and criminal, in the territory ceded to the United States does not affect the personal status of one who is a resident in such territory.<sup>13</sup> If only the surety in a debt is a non-resident, though the principal is not, the property of the surety may be attached.<sup>14</sup>

The mere fact that a corporation created by the laws of another State and having its principal office there, has complied with the laws of Virginia in relation to doing business in this State does not make such corporation a resident of this State within the meaning of the foreign attachment laws.<sup>15</sup>

*Removal of Goods.*—The shipping of products of an enterprise out of the State in due course of trade, where the removal is not permanent and the proceeds are brought back within the State, is not sufficient ground for an attachment. The statute does not mean to designate as a cause of attachment transitory or temporary removal. What is meant is permanent removal.<sup>16</sup> In the case of an attachment for rent, however, against a tenant removing his effects from the leased premises, the statute has been held to apply as well to removals in the regular course of business as to other removals.<sup>17</sup> It has been suggested that in the

12. *Starke v. Scott*, 78 Va. 180; *Lyon v. Vance*, 46 W. Va. 781, 34 S. E. 761; *Guarantee Co. v. Bank*, 95 Va. 480, 28 S. E. 909.

13. *Bank v. Byrum*, 110 Va. 708, 67 S. E. 349.

14. *Loop v. Summers*, 3 Rand. 511.

15. *Cowardin v. Ins. Co.*, 32 Gratt. 445; *Savage v. People*, 45 W. Va. 275, 31 S. E. 991; *Hall v. Bank*, 14 W. Va. 584; *Railroad Co. v. Koontz*, 104 U. S. 5.

16. *Clinch River Mineral Co. v. Harrison*, 91 Va. 122, 21 S. E. 660

17. *Offterdinger v. Ford*, 92 Va. 636, 24 S. E. 246.

case of landlord and tenant the landlord has a *quasi* lien on the goods of the tenant, which the general creditor has not on the goods of his debtor.<sup>18</sup> This is not an entirely satisfactory reason for the distinction between the two classes of cases, but the tenant is probably sufficiently protected against an attachment by the fact that if an attachment were sued out by the landlord, he would be compelled to show that the removal was such as would probably not leave sufficient property on the leased premises to pay the rent. If the removal were in the course of trade, that is, the proceeds were used to replenish the stock, the landlord would not be able to support his ground of attachment as the property on the leased premises is not being diminished by the removal in the course of trade.

**§ 359. Courts from which attachments may be issued.**

Under the Virginia statute, attachments may be issued either in a pending action at law, or in a pending suit in equity, or when no suit or action is pending.

*Attachment at Law.*—No action at law can be maintained, and hence no attachment as ancillary thereto can be issued, if the claim upon which it is founded be not due, or, if for specific personal property, the cause of action has not matured. If the claim be due, an action at law thereon may be instituted, and if any one of the five grounds specified in Section 2959 of the Code exist, upon proper affidavit an attachment may issue, and if the claim be for damages for a wrong, the jurisdiction at law is exclusive. Here a regular action is instituted as if no attachment were to issue, and when the affidavit is made, either at the time or after the institution of the action, the attachment issues as ancillary thereto. The attachment in this case is a regular formal attachment issued by the clerk and directed to the officer who is to execute it. The attachment is a separate and distinct paper from the declaration, the writ, or any other paper in the case. It is made out by the clerk, but a copy is served by the officer in addition to the writ in the action. It is provided

18. 7 Va. Law Reg. 77.

by the statute that it may be issued at the time of or after the institution of the action.<sup>19</sup>

*Attachment in Equity.*—When a person has a claim, legal or equitable, to any specific personal property or a like claim to any debt, *whether such debt be payable or not*, or to damages for the breach of any contract, express or implied, if such claim exceed \$20, exclusive of interest, he may on a bill in equity filed for the purpose have an attachment to secure and enforce the claim, on making the affidavit required by the statute.<sup>20</sup> If the claim be to specific personal property, or a debt, or dam-

19. Code, § 2959.

20. Section 2964 of the Code is as follows: "When a person has a claim, legal or equitable, to any specific personal property, or a like claim to any debt, whether such debt be payable or not, or to damages for the breach of any contract, express or implied, if such claim exceed twenty dollars, exclusive of interest, he may, on a bill in equity filed for the purpose, have an attachment to secure and enforce the claim, on affidavit made by himself, his agent or attorney, according to the nature of the case, conforming as nearly as its nature will admit, to the affidavit required by section twenty-nine hundred and fifty-nine; except that if the claim be to a debt not payable, the affidavit shall also state the time when it will be payable. Upon such affidavit, the plaintiff may require the clerk to endorse on a summons an order to the officer to whom it is directed to attach the specific property (if any be mentioned in the affidavit), and the debts owing by other defendants (if any) to the defendant against whom the claim is, and also any other estate of that defendant, whether in his own hands or in the hands of other defendants. Any attachment under this section shall be executed in the same manner, and shall have the same effect as at law, but the proceedings therein shall be the same as in other suits in equity. And the court, or the judge thereof in vacation, may interpose by injunction, or the appointment of a receiver or otherwise, to secure the forthcoming of the specific property sued for, and so much other estate as will probably be required to satisfy any future order or decree that may be made in the cause. This section shall not be construed as giving to a court of equity jurisdiction to enforce by attachment a claim to a debt not payable, where the only ground for the attachment is that the defendant, or one of the defendants, against whom the claim is, is a foreign corporation, or is not a resident of this state, and has estate or debts owing to the said defendant within the county or corporation in which the suit is, or is sued with a defendant residing therein."

ages for a breach of contract, express or implied, the jurisdiction at law and in equity is concurrent if the claim be due. If the claim be for damages for a wrong equity has no jurisdiction. The ground of the attachment may be any one or more of those mentioned in § 2959. If the claim be not due, and the ground of attachment be that the defendant has removed, is removing, or is about to remove his effects out of the state, an attachment may be awarded either in *equity*, or by a justice or clerk. If any other ground of attachment be relied on and the *claim be not due*, equity alone has jurisdiction, unless the only ground for attachment be that the defendant or one of the defendants is a foreign corporation or a non-resident, in which event no attachment can issue from any source. In other words, if the claim be not due, and the only ground of attachment be that of non-residence or foreign corporation, for manifest reasons no attachment can issue. Thus where a formal attachment in equity is issued against a non-resident on the ground that he is about to make an assignment to hinder, delay, or defraud his creditors, upon failure to prove the fraud the suit will be dismissed and the attachment abated. Having failed to establish fraud, the plaintiff presents simply the case of a suit upon an unmatured debt against a non-resident for which no attachment is given.<sup>21</sup> If a claim which is not due be for \$20 or less no attachment can issue.

In equity *no formal attachment issues* at all, but the clerk endorses on the summons in chancery an order to the officer to whom the summons is directed to attach the estate of the defendant.

*Attachment from a Justice.*—For a claim not exceeding \$20 which is due and payable, where the ground of attachment is that the defendant is a foreign corporation, or a non-resident, or is about to quit the state or about to remove his effects out of the state, an attachment may be issued by a justice of the peace, and all of the proceedings are before him, unless the attachment is levied on real estate, when it is to be removed to the proper

21. *Wingo v. Purdy*, 87 Va. 472, 12 S. E. 970.

court.<sup>22</sup> The details of the procedure are sufficiently given in the statute. The jurisdiction of the justice in this case is exclusive. No provision is made for an attachment of this class when the claim is not due.

22. Section 2988 of the Code is as follows: "Any person having a claim, which is cognizable by a justice under the first section of chapter one hundred and forty, if such claim is payable and does not exceed twenty dollars (exclusive of interest), upon complaint on oath by such person, his agent or attorney, conforming as nearly as may be to the affidavit prescribed by sections twenty-nine hundred and fifty-nine and twenty-nine hundred and sixty-four, as the case may be, in which affidavit the only grounds for the attachment stated are the first, second, and third specified in section twenty-nine hundred and fifty-nine, or one or more of them, may obtain from such justice as is mentioned in section twenty-nine hundred and sixty-one, an attachment against the specific property (if any) claimed, and against the estate of the defendants, if the claim be not for specific property, directed to the sheriff, sergeant, or constable of any county or corporation, and made returnable before the justice issuing the attachment, or some other justice of the same county or corporation, and thereupon such proceedings may be had before the justice as would, if the claim exceeded twenty dollars (exclusive of interest) be had before a court except that the proceedings shall in all cases be without formal pleadings, and an order of publication need not be published in any newspaper, and the justice shall try and decide the case without a jury. The attachment may be served on a corporation as process or notice may be served under section thirty-two hundred and twenty-five. All bonds taken under such attachment shall be filed with the clerk of the county or corporation to which the justice belongs. If such attachment be levied on real estate, the justice shall take no further cognizance of it, but it shall be removed by him, together with all papers and proceedings in the case, into any court to which an attachment issued by a justice for a claim exceeding twenty dollars (exclusive of interest) might have been returnable, and be further proceeded with in said court, as if it had been originally cognizable therein."

It will be observed that the statute declares that "an order of publication need not be published in any newspaper" but it provides no substitute for the publication. If the defendant is not a resident of the State, no provision seems to be made for service of process upon him, and without some process the proceeding will be void. *Ante*, § 192.

*Attachment Where No Suit or Action Is Pending.*—Although no suit or action be pending, and the claim of the plaintiff be not due, it is provided by statute that an attachment may be issued in two cases: (1) where the debtor intends to remove, or is removing, or has removed his effects out of this state, so that there will probably not be therein effects of such debtor sufficient to satisfy the claim, when judgment is obtained therefor, should only the ordinary process of law be issued to obtain the judgment.<sup>23</sup> In this instance, the attachment may issue “whether the claim of such person is payable or not;” and (2) where a tenant intends to remove, or is removing, or has, within thirty days, removed his effects from the leased premises, so that there will not be left thereon property liable to distress sufficient to satisfy the rent to become payable.<sup>24</sup> In this instance, the attachment only issues where the claim is *not due*, but will become due within one year. If the claim for rent is due the proper remedy is a distress warrant. Upon filing before the justice or clerk the proper affidavit required by the statute, that officer issues a formal attachment (a separate, distinct and formal paper), against the estate of the debtor for the amount claimed in the affidavit. This attachment is directed to the sheriff, sergeant or constable of any county or corporation, and if the claim exceed \$20 (exclusive of interest) is made returnable at the option of the plaintiff to the next term of the circuit court of the county or of the circuit or any city court having jurisdiction of the subject matter of the corporation in which such justice or clerk resides. If the claim does not exceed \$20 (exclusive of interest), the attachment is returnable and proceeded upon according to the provisions of § 2988 of the Code,<sup>25</sup> providing that when issued by the clerk the attachment shall be returnable before some justice of his county or corporation.<sup>26</sup> Here there is no action at law and no suit in equity but simply the attachment itself.

23. See § 2961, copied in note 5 to § 358, *ante*.

24. See § 2962, copied in note 6 to § 358, *ante*.

25. See *ante*, § 359, note 22.

26. Code, § 2965.

### § 360. Proceedings to procure attachment.

The mode of procuring the attachment is dependent, of course, upon the tribunal from which the attachment is to issue.

*In Equity.*—The procedure in equity is the simplest of all the methods of obtaining an attachment. The bill is prepared, setting forth with the needed particularity the plaintiff's claim, and also the facts relied upon to entitle the complainant to an attachment. This is taken to the clerk's office, lodged with the clerk, and a memorandum made for the issuance of the process. Generally, at the same time an affidavit is prepared and made before the clerk or some officer authorized to administer an oath, setting forth the ground or grounds for the attachment. This is filed with the clerk. If any persons have in their hands effects which it is desired to attach, or are indebted to the defendant these are generally made parties defendants. The clerk then issues the summons in the suit and endorses on the summons an order to attach the effects of the defendant. He will also make copies to be served on all the parties designated as being indebted to the defendant, or having in their hands property belonging to him. If the plaintiff desires the officer to take into his custody the attached effects he is required to give bond with surety to be approved by the clerk as hereinafter pointed out. If this bond is given at the time of or before the suing out of the attachment the clerk also endorses on the summons the fact that the bond has been given, and a direction to the officer to take the property into his custody. The procedure in equity is recommended as being the simplest and least liable to objection on account of informality. Furthermore, equity has jurisdiction in all the cases in which there is jurisdiction at law, except the single case of damages for a wrong, and in addition to this, as has been hereinbefore pointed out, equity has jurisdiction where the claim of the plaintiff (whether legal or equitable) is not due, in which case there is no jurisdiction at law, so that there is less opportunity for mistake on the subject of jurisdiction in equity than elsewhere. In fact, the attachment in equity is the most comprehensive of all the attachments given by the Virginia statute.

*At Law.*—If the procedure be at law, a regular action is instituted just as if no attachment were to issue, and the attachment is ancillary to the action. Here, as pointed out, the claim must be due. Generally, a memorandum is made for the action and the clerk makes out the writ. If any person is to be designated as having in his hands effects of the debtor or as being indebted to him a separate statement of this in writing may be delivered to the clerk, or it may be made a part of the memorandum for the action. This is done by following the memorandum for the writ with a statement on the memorandum book to the following effect: "The defendant is a non-resident of this State, having debts owing to him and estate coming to him in the county of Rockbridge. Issue an attachment and designate Frank Leyman and Henry Brew as having effects of the defendant in their possession and as being indebted to the defendant."<sup>27</sup> An affidavit is then made and lodged with the clerk, showing the nature of the plaintiff's claim and the grounds for the attachment. The form of such an affidavit is given in the margin.<sup>28</sup> The clerk then makes out a regular, formal attachment,

27. *Hilton v. Consumers Can Co.*, 103 Va. 255, 48 S. E. 899.

28. FORM OF AFFIDAVIT.

State of Virginia }  
County of *Rockbridge* } to-wit:

This day *Henry Jones* personally appeared before me, *Gabriel Shields*, a notary public, in and for the county of *Rockbridge*, in the State of Virginia, and made oath before me in my said county that an action of *assumpsit* has been instituted in the Circuit Court of said county by the said *Henry Jones*, plaintiff, against *William Brown*, defendant, upon an *open account* due by the said defendant to the said plaintiff, a copy of which is filed with the declaration in said action, for the sum of \$1000.00, with interest thereon from the first day of *December, 1911*, until payment, which sum at the least affiant believes that plaintiff is entitled to and ought to recover, that affiant believes that the plaintiff's claim is just and justly due him and that no part thereof has been paid, and that affiant further believes that the defendant *intends to remove his estate or the proceeds of the sale thereof, or a material part of such estate or proceeds out of this State so that process of execution on a judgment when obtained in said action will be unavailing.*

Given under my hand this the first day of *December, 1911*.

*Gabriel Shields, Notary Public.*

which is a separate and distinct paper, independent of the declaration, writ, or any other paper in the case. The form of such an attachment is given in the margin.<sup>29</sup> The clerk then makes out a copy of the attachment to be served on each of the

**29.** Form of Attachment issued by clerk in action of assumpsit.

The Commonwealth of Virginia:

To the *Sheriff* of *Rockbridge* County: Greeting:

Whereas *Henry Jones*, the plaintiff in an action of *assumpsit* upon an open account now pending against *William Brown* in the circuit court of *Rockbridge* county, has this day made affidavit before *Gabriel Shields*, a notary public, for said county, as duly appears by the certificate of the said *Gabriel Shields*, that the amount of the said affiant's claim in the said action is \$1000, the principal money, with legal interest thereon from the first day of *December, 1911*, until paid, which sum at the least affiant believes that the plaintiff is entitled to and ought to recover, and that he believes that the said claim is just and is justly due to him and that no part thereof has been paid, and that he further believes that the said *William Brown* intends to remove his estate or the proceeds of the sale thereof or a material part of such estate or proceeds out of this State so that process of execution when obtained in said action will be unavailing.

These are therefore in the name of the Commonwealth of Virginia to command you forthwith to attach so much of the estate of the said *William Brown* as will be sufficient to satisfy the said sum of \$1,000.00, the principal, with legal interest thereon as aforesaid, and so to provide that the said estate so attached may be forthcoming and liable to further proceedings therein to be had before the said court at the next term thereof and that you have this writ at the clerk's office of the said circuit court at rules to be holden for the said court on the first Monday in *January* next and that you then and there make known how you have executed the same.

Witness *R. R. Witt*, clerk of our said court at the courthouse of the said county on the first day of *December, 1911*, and in the 136th year of the commonwealth.

Teste, *R. R. Witt*, clerk.

In the above form, the attachment is addressed to the sheriff. The statute provides that any attachment may be directed to the sheriff, sergeant or constable of any county or corporation. Code, § 2965. Of course, the form of the affidavit and the attachment will have to be changed as to names of parties, dates, nature of the claim, amount, time from which interest runs, and the ground of attachment to fit the particular case. These are all printed in italics, so as to indicate where the changes would occur.

parties designated with an endorsement on each copy that the person so designated is required to appear at the term of the court to which the attachment is returnable, and disclose on oath in what sum he is indebted to the defendant, and what effects of the defendant he has in his hands. The attachment and these copies are delivered by the clerk to the officer and he proceeds to execute it. The attachment here, as in equity, may be issued after the suit is instituted, as well as at the time it is instituted. Some times when the suit or action is brought the plaintiff does not know of any ground for an attachment, but discovers such ground afterwards. The procedure then is similar to that pointed out where the attachment issues at the time of the commencement of the suit or action.

*Attachment Where No Action or Suit Is Pending.*—If no suit or action be pending, the justice or clerk, as the case may be, upon a proper oath conforming to §§ 2961 and 2962, and specially pointing out at what time the debt will be payable issues a formal attachment (a separate, distinct, formal paper) against the estate of the debtor for the amount claimed in the affidavit. The attachment follows the affidavit and generally recites it, and where the claim is in excess of \$20 (exclusive of interest) is returnable to the next term of the circuit court of the county, or to the like term of the circuit or any city court of the corporation having jurisdiction of the subject matter in which such justice or clerk resides, or to some rule day thereof.

The forms of the affidavit and attachment for rent not due are given in the margin.<sup>30</sup>

### 30. AFFIDAVIT FOR ATTACHMENT FOR RENT NOT DUE.

State of Virginia }  
 County of Rockbridge } to-wit:

This day *Henry Jones* personally appeared before me, *Gabriel Shields*, a Justice of the Peace, in and for the county of *Rockbridge* in the State of Virginia, and made oath before me in my said county that *William Brown* is his tenant and is liable to him for rent reserved upon contract for certain premises situate in the county of *Rockbridge*, in the sum of \$300, which sum is payable on *December 31, 1911*, no part of which has been paid, and that he verily believes that the said *William Brown* intends to remove his effects from

*Attachment for Twenty Dollars or Less.*—Here a complaint on oath is made, by the plaintiff, his agent or attorney, conforming as nearly as possible to the affidavit in an action at law, but the only grounds upon which an attachment may be issued for a claim of this nature are the first three mentioned in Section 2959, to-wit: (1) that the defendant is a foreign corporation or a non-resident of the State; (2) that he is removing or about

the leased premises before the time for the payment of the rent aforesaid, and that he verily believes unless an attachment issues there will not be left on such premises property liable to distress sufficient to satisfy the rent so to become payable.

Given under my hand this the *first* day of *October, 1911.*

*Gabriel Shields, Justice of the Peace.*

#### FORM OF ATTACHMENT FOR RENT NOT DUE.

Commonwealth of Virginia:

To the Sheriff of *Rockbridge* county:

Greeting:

Whereas *Henry Jones* has this day made oath before me *Gabriel Shields*, a Justice of the Peace in and for the county of *Rockbridge*, in the State of Virginia, that *William Brown* is his tenant and is liable to him for rent reserved upon contract for certain premises situate in the county of *Rockbridge* aforesaid, in the sum of \$300, which will become due and payable on *December 31, 1911*, no part of which has been paid, and that the said affiant verily believes that the said *William Brown* intends to remove his effects from the leased premises before the time for the payment of the rent aforesaid, and that unless an attachment issues there will not be left on such premises property liable to distress sufficient to satisfy such rent so to become payable.

These are therefore in the name of the Commonwealth to command you to attach such of the goods of the said *William Brown*, or his assignee or undertenant, as might be distrained for the said rent if it had become payable, and any other estate, real or personal, of the said *William Brown*, or so much thereof as will be sufficient to satisfy to the said *Henry Jones* the rent aforesaid, and that you secure said goods and estate so attached in your hands, or so provide that the same may be liable to further proceedings thereon to be had at the next term of the circuit court of the county of *Rockbridge*, when and where you are to return how you have executed this writ.

Given under my hand this the *first* day of *October, 1911.*

*Gabriel Shields, Justice of the Peace.*

to remove himself out of the State, with intent to change his domicile, or (3) that he is removing, intends to remove, or has removed the specific property sued for, or his own estate out of this State.<sup>31</sup> The justice then issues an attachment based upon the complaint, and the attachment proceedings thereon are had before the justice without formal pleadings, and without necessity for an order of publication in a newspaper, and the justice tries and decides the case without a jury. If, however, the attachment be levied on real estate, it is the duty of the justice to remove the case, with all papers and proceedings thereon to any court to which an attachment issued by him for a claim exceeding twenty dollars might have been returnable.<sup>32</sup>

### § 361. Affidavit.

An affidavit is a voluntary *ex parte* written oath or affirmation made before some officer authorized to administer an oath. It is usually signed by the affiant, but it is said that in the absence of positive statute, or some rule of court, the signature is not necessary.<sup>33</sup> In Virginia and West Virginia it is rare that a strict affidavit is used for any purpose. What is generally used is a certificate of some officer authorized to administer an oath (not signed by the affiant) that the affiant made oath before him to certain facts set forth in the certificate, and this has been regarded as sufficient, even under the strict rule of construction applicable to attachment laws.

*Sufficiency.*—Probably more particularity is required in the form of the affidavit than in the form of any other paper connected with attachments. Affidavits are strictly construed, and the omission of any of the requirements of the statute is fatal to the attachment. There must be a substantial compliance with the statute, and if the affidavit is made out of the State it must be itself duly authenticated. The seal of a notary public out of the State does not alone verify and authenticate his act, except as regards certain foreign or interstate matters, and except in

31. See Code, § 2959, quoted in § 358, note 2, *ante*, for exact language.

32. Code, § 2988, quoted in § 359, note 22, *ante*.

33. 1 Encl. Pl. & Pr. 315.

those cases where the domestic statute declares that it shall be self authenticating.<sup>34</sup> While strictness and certainty in an affidavit for attachment is required, it is not necessary that compliance with the statute shall be literal.<sup>35</sup> If the language of the affidavit necessarily implies a fact it is sufficient. Hence an affidavit "that the claim is just" and "that the defendant is converting," etc., is a sufficient compliance with a statute which requires an affidavit "that the claim is believed to be just" and "that to the best of affiant's belief defendant is converting," etc.<sup>36</sup> An affidavit, however, which omits "at the least" from the clause "which (at the least) affiant believes," or the word "justly" from the clause "justly entitled to recover," or substitutes "ought" for "is entitled to," or "thinks" for "believes" the plaintiff is entitled to or ought to recover, is bad.<sup>37</sup> It is not necessary that an attachment issued by a justice, or the affidavit upon which it is based, should describe the character of the debt of the plaintiff, whether due by a bond, note or account. The statute does not require the writ to describe the claim with the precision of the declaration. The amount due must be specified as a guide to the officer that he may attach so much of the debtor's estate as may be sufficient to satisfy the debt and costs. The evidence of the debt is to be exhibited to the court which passes upon the validity of the claim.<sup>38</sup> A paper purporting to be an affidavit, but which does not show that the affiant was sworn, nor the amount to which the plaintiff is entitled and the nature

34. *Bohn v. Zeigler*, 44 W. Va. 402, 29 S. E. 983; *Corbin v. Bank*, 87 Va. 661, 13 S. E. 98. Section 174 of the Code declares that an affidavit before a non-resident notary shall be deemed to be duly authenticated if it be subscribed by him with his official seal attached without being certified by any other officer. It also designates the method in which affidavits taken by other persons shall be authenticated.

35. *Jones v. Anderson*, 7 Leigh at p. 311.

36. *Clinch River Min. Co. v. Harrison*, 91 Va. 122, 21 S. E. 660.

37. *Altmeyer v. Caulfield*, 37 W. Va. 847, 17 S. E. 409; *Dulin v. McCaw*, 39 W. Va. 721, 20 S. E. 681; *Sommers v. Allen*, 44 W. Va. 120, 28 S. E. 787; *Rittenhouse v. Harman*, 7 W. Va. 380. For other rulings on affidavits, see annotations Code W. Va. p. 650; 2 Bar. Law Pr. 933; Note 76 Am. St. Rep. 800; 11 Anno. Cas. 27.

38. *McCluney v. Jackson*, 6 Gratt. 96, 103.

of the plaintiff's claim, is not sufficient as a foundation for an attachment.<sup>39</sup> If the bill upon which an attachment issues contains all necessary averments, and is sworn to and filed before the attachment issues, and the affidavit adopts the bill, this renders the affidavit sufficient.<sup>40</sup>

*Jurisdiction.*—It is said that “in most jurisdictions the statutes require that an affidavit shall be made before the writ may issue, and if the affidavit is not made, or if it is defective when made, the court will be without jurisdiction and the attachment consequently void.”<sup>41</sup> It is generally conceded that the total absence of an affidavit will render the suit one without jurisdiction, but the same is not true of a defective affidavit. A defective affidavit is not void but voidable only, and liable to be quashed in a direct proceeding for that purpose, but it is not a total nullity and cannot be collaterally assailed. If an attachment has been issued upon a defective affidavit, and property sold thereunder, the validity of the attachment proceedings cannot be questioned in a suit against the purchaser at an attachment sale to recover the property purchased.<sup>42</sup> Where a suit in equity is brought under a statute on a legal demand, and an attachment is sued out as ancillary thereto, the jurisdiction of the court of equity rests solely on the attachment. It is said that when the attachment is sued out, though on a defective affidavit, equity has jurisdiction, and that mere error in the proceeding, such as a defect in the affidavit, does not destroy the jurisdiction of the court, and that while the attachment might be abated and the suit in equity dismissed on account of defects in the affidavit if brought to the attention of the court in that suit, yet the proceeding is not a void proceeding, the court is not entirely without jurisdiction, and its judgment cannot be collaterally assailed;<sup>43</sup> but on this proposition the courts are not entirely in harmony. In Virginia the jurisdiction of attachments in equity

39. *Cosner v. Smith*, 36 W. Va. 788, 15 S. E. 977.

40. *Sims v. Tyrer*, 96 Va. 5, 26 S. E. 508.

41. 3 Am. & Eng. Encl. Law (2nd Ed.) 206.

42. *Cooper v. Reynolds*, 10 Wall. 308.

43. *Miller v. White*, 46 W. Va. at pp. 70, 71, 33 S. E. 332; *Cooper v. Reynolds*, *supra*.

on purely legal demands is not rested on the *attachment*, but on the *affidavit*, which is the basis of the attachment; the court saying "courts acquire jurisdiction in attachments in equity alone by force of the *affidavit*."<sup>44</sup> The question, however, arose in a direct proceeding to avoid the attachment, and it is not stated what would have been the effect if the attack has been collateral instead of direct.

The jurisdiction of attachments generally depends on the regularity of the proceedings,<sup>45</sup> and this regularity must appear on the face of the proceedings,<sup>46</sup> but whenever the validity of an attachment is involved, or the jurisdiction of the court is questioned, the affidavit is part of the record, though not mentioned in the declaration or bill.<sup>47</sup>

*Conjunctive and Disjunctive Statements.*—If more than one ground of attachment is relied on, it is well settled that the grounds should be stated in the conjunctive and not in the disjunctive, as otherwise it would be impossible to tell which ground was relied upon to sustain the attachment. It is equally well settled, however, that two or more phases of the same fact may be stated in the disjunctive. Thus an affidavit which states that "affiant believes that some one or more of the following five grounds exist for an attachment" is too indefinite, and is bad, as it is impossible for the defendant to determine upon which of the grounds the plaintiff intends to rely.<sup>48</sup> But an affidavit which states as the ground for an attachment that the defendant has property *or* rights of action which he conceals, is good, notwithstanding the disjunctive "or" is used, as it is apparent that but one ground of attachment is alleged under the statute.<sup>49</sup> The difficulty lies, however, in the application of this rule to the facts of the particular case. For instance, it has been held that an affidavit which states that the defendant has disposed of or assigned his property, or a part thereof, or is about to do so, with intent to defraud his creditors,

44. *Taylor v. Sutherlin*, 107 Va. 787, 797, 60 S. E. 132.

45. *Jones v. Anderson*, 7 Leigh 308, 313.

46. *McAllister v. Guggenheimer*, 91 Va. 317, 21 S. E. 475.

47. *Miller v. White*, 46 W. Va. 67, 71, 33 S. E. 332.

48. *Roberts v. Burns*, 48 W. Va. 92, 35 S. E. 922.

49. *Sandheger v. Hosey*, 26 W. Va. 221; 26 Anno. Cas. 27.

is bad; while, on the other hand, it has been held that an affidavit which alleges that the debtor is converting, or is about to convert his property into money, or is otherwise about to dispose of his property with intent of placing it beyond reach of his creditors, is not objectionable, as it only states several phases of the same fact.<sup>50</sup>

*Who May Make Affidavit.*—It is provided by statute in Virginia that the affidavit for an attachment may be made by the plaintiff, his agent or attorney.<sup>51</sup> Attorney, however, manifestly means attorney at law. Whether an affidavit (in fact made by an agent) must expressly show on its face that the affiant is the agent of the principal is a subject of much conflict of authority.<sup>52</sup> It has been laid down that "it is not generally necessary that it should declare that the affiant is the agent, or expressly aver that he makes it in his behalf," and, furthermore, it is held in some cases that the authority of the agent will be presumed in the absence of evidence to the contrary.<sup>53</sup> The rule, however, is otherwise in Virginia, where it is held that the affiant must be described in the affidavit *as agent*, and that an affidavit made by a party who describes himself as bookkeeper, secretary and treasurer, president, vice-president, director, and the like, is not sufficient, as such terms do not *ex vi termini* import agency.<sup>54</sup>

*Time of Making Affidavit.*—The affidavit need not be made before the summons in a chancery suit issues,<sup>55</sup> but, if the court has jurisdiction of the cause upon other grounds than the attachment, may be made even after the bill has been filed,<sup>56</sup> and, indeed, may be made at any time before the abatement of the suit.<sup>57</sup> As the ground for an attachment should exist when the attachment is sued out, the time between the making of the

50. Note 11 Anno. Cas. 27; 20 Anno. Cas. 576.

51. Code, §§ 2959, 2961, 2962, 2964, 2988.

52. 3 Encl. Pl. & Pr. 9; 4 Cyc. 473.

53. 3 Encl. Pl. & Pr. 9, and notes.

54. *Ante*, § 91, note 30; *Clement v. Adams Bros. Payne Co.*, 113 Va. —, 75 S. E. 294.

55. *Moore v. Holt*, 10 Gratt. 284.

56. *O'Brien v. Stephens*, 11 Gratt. 610

57. *Pulliam v. Aler*, 15 Gratt. 54.

affidavit and the issue of the attachment based thereon should not be unreasonable. While the two acts need not be simultaneous, the attachment should follow the affidavit upon which it is based within a reasonable time. What is a reasonable time is to be judged by the circumstances of the case and the situation of the parties.<sup>58</sup>

*Amendments.*—In some of the States there are statutes allowing amendments in specific cases, in others there are general statutes of amendments applicable to all cases, while in still others there is no statute of amendment applicable to attachments or affidavits therefor. There is no such statute in Virginia, and a number of other States. In the absence of any statute providing for amendments, it is generally declared that courts of general jurisdiction have inherent powers to allow amendments of mere formal or clerical defects, but when we come to examine the cases as to what constitutes formal or clerical defects, there is a great want of harmony among the decisions.<sup>59</sup> In Virginia, authority is very scarce, but it has been held that, on an appeal in a case founded on insufficient affidavit, the Court of Appeals can only abate the attachment and dismiss the proceeding, in the absence of application to amend the affidavit in the trial court, and that it will not remand the case to the trial court for the purpose of allowing such amendment,<sup>60</sup> but there is no specific statute allowing amendments in the trial court. In West Virginia, whose statutes are very similar to those in Virginia, it has been held that an affidavit cannot be amended except as to formal or clerical defects, and hence that the omission from the affidavit of the word “justly” in stating the claim of the plaintiff cannot be cured by amendment; furthermore, that an amendment stating additional facts to show the existence of the ground of attachment specified in the first affidavit for the purpose of upholding that attachment must show

58. *Kesler v. Lapham*, 46 W. Va. 293, 295, 33 S. E. 289.

59. Note 31 L. R. A. 422 gives a collection of authorities on this subject.

60. *Taylor v. Sutherlin-Meade Co.*, 107 Va. 787, 797, 60 S. E. 132; *Clement v. Adams Bros. Payne Co.*, 113 Va. —, 75 S. E. 294.

that such facts existed at the date of the first affidavit.<sup>61</sup> But while such facts must have existed at the time the first affidavit was made, the supplemental affidavit need not state expressly that such additional facts came to affiant's knowledge after making the first affidavit.<sup>62</sup> An affidavit which fails to show that the affiant was sworn cannot be amended for the purpose of showing that fact,<sup>63</sup> but a mistake in the date of the affidavit is a mere clerical error, which may be corrected by amendment.<sup>64</sup>

An order endorsed upon an attachment requiring the garnishee to appear and answer is process. It must be returnable to some legal return day. If it be not so returnable, but skips a term, and is returnable to the second term after its issue, it is not simply irregular, but void, and cannot be amended as to the return day.<sup>65</sup>

*Additional Affidavits or Attachments.*—There may be in the same suit or action more than one affidavit based on different grounds, and attachments sued out thereon. The lien of such other attachment, however, does not relate back to the first attachment, but takes effect from its levy or service, or as to real estate, from the suing out of the attachment. The statute provides that an attachment may issue "at the time of or after the institution of any action at law."<sup>66</sup> Hence there is no reason why, pending an action, a new attachment may not be sued out at any time.<sup>67</sup> Indeed, in a proceeding against a defendant personally, and after the appearance of the defendant, if grounds of attachment exist affidavit may be made and attachments sued out and levied on his property. The proceeding may thus be both personal and *in rem* at the same time.<sup>68</sup> So, likewise, new and additional attachments may be sued out from time to time,

61. *Sommers v. Allen*, 44 W. Va. 120, 28 S. E. 787; *Miller v. Zeigler*, 44 W. Va. 484, 29 S. E. 981.

62. *Miller v. Zeigler*, 44 W. Va. 484, 29 S. E. 981.

63. *Cosner v. Smith*, 36 W. Va. 788, 15 S. E. 977.

64. *Anderson v. Kanawha Coal Co.*, 12 W. Va. 526.

65. *Coda v. Thompson*, 39 W. Va. 67, 19 S. E. 548.

66. Code, § 2959.

67. *Miller v. White*, 46 W. Va. 67, 33 S. E. 332.

68. *O'Brien v. Stephens*, 11 Gratt. 610.

issued upon the original affidavit. This is expressly provided for by statute in Virginia.<sup>69</sup>

### § 362. What may be attached.

All estate, real or personal, of the defendant may be attached, whether the same be in the county or corporation in which the attachment issued, or in any other, including incorporeal hereditaments, choses in action, shares of stock in a domestic corporation, and damages for such torts as would on the death of the defendant survive to his personal representative.<sup>70</sup> Pecuniary legacies and distributive shares in decedent's estate may also be attached in equity,<sup>71</sup> but not at law.<sup>72</sup> Remainders, whether

69. Section 2966 of the Code is as follows: "Upon the application of the plaintiff, his agent or attorney, other attachments founded on the original affidavit may be issued from time to time by the clerk of the court in which the original attachment is pending, and the same may be directed, executed, and returned in like manner as an original attachment. The court shall adjudge the costs of such attachments as to it may seem right and just."

70. Section 2967 of the Code is as follows: "Every attachment (except where it is sued out specially against specified property) may be levied on any estate, real or personal, or when it is against a non-resident or an absconding debtor, any remainder, whether vested or contingent, of the defendant, or so much thereof as is sufficient to pay the amount for which it issues, and may be levied upon any estate of the defendant, whether the same be in the county or corporation in which the attachment issued, or in any other, either by the officer of the county or corporation wherein the attachment issued, or by the officer of the county or corporation where the estate is; and when levied on a contingent remainder, the said contingent remainder shall not be sold until it becomes vested, but the decree or judgment ascertaining the amount due the plaintiff may be docketed as other liens are docketed, and shall be a lien only on the property levied on. \* \* \*"

Clause (10), § 5 of the Code, is as follows: "The word 'land' or 'lands' and the words 'real estate' shall be construed to include lands, tenements, and hereditaments, and all rights thereto and interests therein, other than a chattel interest; and the words 'personal estate' shall include chattels real and such other estate as, upon the death of the owner intestate, would devolve upon his personal representative."

71. *Vance v. McLaughlin*, 8 Gratt. 289; *Anderson v. Desoer*, 6 Gratt. 363; *Moore v. White*, 3 Gratt. 139.

72. *Whitehead v. Coleman*, 31 Gratt. 784.

vested or contingent, are also subject to attachment under the Virginia statute.<sup>73</sup> It is probable that an attachment cannot be levied on a negotiable note which is not due. At all events, a purchaser for value of such note without notice of the attachment would have priority over an attachment previously levied.<sup>74</sup> Shares of stock in domestic corporations are deemed to be so far in the possession of the corporation which issued them that they may be subjected to attachment.<sup>75</sup> But shares of stock in a foreign corporation cannot be reached by process of attachment, although the officers of the corporation are within the State and the business of the corporation is being carried on there. The situs of such stock for the purpose of attachment and execution is the domicile of the corporation and that only.<sup>76</sup>

Subsequent purchasers for value without notice of tangible personal property take subject to a prior attachment and so of real estate if a *lis pendens* is recorded and indexed, but otherwise not.<sup>77</sup> As assignee for value and without notice of a chose in action, not negotiable, takes priority over an execution, because the statute expressly so provides,<sup>78</sup> but the rule is otherwise as to a prior attachment. An attachment duly levied on a non-negotiable chose in action takes priority over a subsequent purchaser thereof for value and without notice simply because the statute makes no exception and the lien dates from the levy. If, however, the chose in action has been assigned before the attachment has been levied, the assignee takes priority as the attaching creditor can never get any greater interest than his debtor had at the time the attachment was levied.<sup>79</sup> An attaching creditor cannot acquire any greater right to the attached

73. Code, § 2967.

74. *Howe v. Ould*, 28 Gratt. 1.

75. *C. & O. R. Co. v. Paine*, 29 Gratt. 502; *Shenandoah V. R. Co. v. Griffith*, 76 Va. 913; *Lipscomb v. Condon*, 56 W. Va. 416, 49 S. E. 392.

76. *Smith v. Downey*, 8 Ind. App. 179, 34 N. E. 823, 35 N. E. 568, 52 Am. St. Rep. 467, and note.

77. Code, § 3566; *Vicars v. Sayler*, 111 Va. 307, 68 S. E. 988.

78. Code, § 3601; *Evans, Trustee v. Greenhow*, 15 Gratt. 153.

79. *Anderson v. DeSoer*, 6 Gratt. 363; *B. & O. v. McCullough*, 12 Gratt. 595.

property than the defendant had at the time of the attachment.<sup>80</sup> If the property be in such a situation that the defendant has lost his power over it or has not yet acquired such interest in or power over it as to permit him to dispose of it adversely to others, it cannot be attached for his debt.<sup>81</sup>

### § 363. What may not be attached.

Some illustrations of what may not be attached were given in the last section. In addition thereto what is known as "the poor debtor's exemption," wages of a laboring man, etc., are exempt from levy of attachment or execution, and also, for most attachments, the homestead. These exemptions, however, would probably not be allowed where the ground of attachment is that the defendant is a non-resident, or is about to leave the State with intent to change his domicile. Property in the custody of the law, as property in the hands of a receiver,<sup>82</sup> or in the hands of an officer, or levied on under a former *fi. fa.* or attachment where bond has been given to have it forthcoming at a later time and place and before it is forfeited, and probably property taken from a prisoner are exempt from attachment.<sup>83</sup> But in Virginia the delivery to an officer of an attachment is deemed a levy thereof on money and effects of the defendant held under an attachment executed, or other legal process.<sup>84</sup> The authorities are not entirely in harmony as to the exemption of property taken from a prisoner.<sup>85</sup> Where personal chattels have been mortgaged and left in the possession of the mortgagor, there is conflict as to whether they may be attached.<sup>86</sup> Property held by a public officer pursuant to public trust, as for instance a deposit by a foreign insurance company, cannot be at-

80. Neill *v.* Produce Co., 41 W. Va. 37, 23 S. E. 702; Seward & Co. *v.* Miller, 106 Va. 309, 55 S. E. 681.

81. Neill *v.* Produce Co., *supra*.

82. Davis *v.* Bonney, 89 Va. 755, 17 S. E. 229.

83. 11 Am. & Eng. Encl. Law (2nd Ed.) 641; 4 Cyc. 558, 593.

84. Code, § 2985.

85. Ex parte Hurn, 92 Ala. 102, 9 So. 515, 25 Am. St. Rep. 23; Holker *v.* Henessey, 141 Mo. 527, 42 S. W. 1090, 39 L. R. A. 165.

86. 11 Am. & Eng. Encl. Law (2nd Ed.) 624, 5; Spence *v.* Repass, 94 Va. 716, 27 S. E. 583, 4 Va. Law Reg. 255; *ante*, § 342.

tached either before or after the company has discharged all of its liabilities to citizens of the state.<sup>87</sup> Money, credits and property are in the custody of the law when held by executors, administrators, guardians and like *quasi* officers in their representative and administrative capacity. Neither an administrator, an executor, nor a debtor of the decedent can be garnished for a debt due by the decedent, because it would disturb the proper administration of the estate.<sup>88</sup> Whether property carried or worn by the defendant which cannot be taken without a breach of the peace, or violating the debtor's personal security, is exempt from levy of an attachment is likewise the subject of conflict.<sup>89</sup> Whether or not the rolling stock of a railroad can be attached is the subject of great conflict of opinion. In some States it is held that it cannot be on the ground that it is essential to the exercise of the corporate franchise and a proper discharge of the duties which the company has assumed toward the public. In others it cannot be if the road is engaged in interstate commerce, because it would be an interference therewith. In still others no exception has been made.<sup>90</sup> In Virginia there are no decisions on the subject except that it has been held that empty coal cars which have been used exclusively for the interstate transportation of coal, and which are intended to be so used again, are not, while being returned from one point in this State to another, engaged in transporting articles of interstate commerce, though en route to coal fields outside of the State, and that the transportation of such cars is controlled exclusively by the law of this State.<sup>91</sup> A comparatively recent holding of the Supreme Court of the United States will probably tend to unify the decisions of the State courts, which seem to have been timid about interference with interstate commerce. It is held in the case referred to that cars and rolling stock of

87. *Rollo v. Ins. Co.*, 23 Gratt. 509; *Buck v. Guarantors Co.*, 97 Va. 719, 34 S. E. 958.

88. *Brewer v. Hutton*, 45 W. Va. 106, 30 S. E. 81.

89. 4 Cyc. 568, citing cases to the effect that it is not subject to levy; 2 Tuck. Com. 362, stating that it is subject to levy.

90. *Connery v. R. Co.*, 92 Minn. 20, 99 N. W. 365, 104 Am St. Rep. 659, and note; *ante*, § 339, and cases cited.

91. *N. & W. R. Co. v. Com.*, 93 Va. 749, 24 S. E. 837.

railroad companies are not "put apart in a kind of civil sanctuary" so as to be immune from attachment laws of the States, and, while standing idle on the tracks, though previously brought into the State loaded with interstate commerce, and simply awaiting return, are subject to attachment.<sup>92</sup> Debts or liabilities to become due upon a contingency which may never happen (for instance, liability on a life insurance policy which may never accrue in consequence of failure to pay premiums) are not the subject of garnishment. Where the contract between parties is of such nature that it is uncertain or contingent whether anything will ever be due by virtue of it, it does not give rise to such a credit as may be attached, for that cannot properly be called a debt which is not certainly and at all events payable either at the present or some future period. To be the subject of attachment, the debt or liability must be due or be *certain* to become due at a future period.<sup>93</sup>

### § 364. How and by whom property is attached.

Property is attached by making some sort of levy of the attachment thereon, but the methods of making the levy vary according to the circumstances of the case.

*Tangible Personal Property.*—The statute provides that it shall be sufficiently levied if sued out against specified property by serving the attachment on the defendant or other person having possession of such property; in every other case by serving the attachment on such persons as may be designated by the plaintiff as aforesaid, and where the defendant is in possession, by service of the attachment on him.<sup>94</sup> If, therefore, the attachment be

92. *Davis v. Cleveland R. Co.*, 217 U. S. 157.

93. *Boisseau v. Bass*, 100 Va. 207, 211, 40 S. E. 647.

94. Code, § 2967, as amended, is as follows: "\* \* \* The plaintiff, his agent or attorney may, by an endorsement on the attachment at the time it is issued, or in writing at any time before the return day thereof, designate any person as being indebted to, or having in his possession effects of, the defendant or one of the defendants; and in such case the officer issuing the attachment shall make as many copies thereof as there are persons designated, with an indorsement on each copy that the person so designated is required to appear at the term of the court to which the attachment is re-

sued out against specified property, it may be levied by simply serving the attachment on the defendant or other person having possession of the property. If not sued out against specified property, but for debt or damages, and is to be levied on tangible property, and any person has been designated as having such property in his possession, the attachment may be served by delivering a copy thereof to the defendant or other person in possession thereof. The designation of the person in possession may be made either at the time the attachment is issued, or in writing by the plaintiff at any time before the return day. If the property is not in the possession of any one, but simply in the constructive possession of the attachment debtor, it may be levied on as an execution would be levied, that is, by having the property in the view and power of the officer, announcing the levy and endorsing the levy on the attachment.<sup>95</sup> Whether the provisions of the statute for levying an attachment are cumulative merely and would still permit a common law levy, or are exclusive, has not been determined, but as the statute does not exclude the common law levy, but simply declares that the attachment shall be sufficiently levied by following the statutory re-

turnable, if the same be returnable to a term, or the first term of the court next after the return day of the attachment, if the same be returnable to a rule day thereof, and disclose on oath in what sum he is indebted to the defendant, and what effects of the defendant he has in his hands. It shall be sufficiently levied, if sued out against specified property, by serving the attachment on the defendant, or other person having possession of such property; in every other case, by serving the attachment on such person as may be designated by the plaintiff as aforesaid; and, where the defendant is in possession, by service of the attachment on him; and as to real estate, by such estate being mentioned and described in an endorsement on such attachment, made by the officer to whom it is delivered for service, to the following effect:

“Levied on the following real estate of the defendant A. B. (or A. B. and C. D.), to-wit: (Here describe the estate), this the \_\_\_\_\_ day of \_\_\_\_\_.

E. F., Sheriff (or other officer).’

and by service of the attachment on the person, if any, in possession of such estate. The attachment in every case may be served as a notice is required to be served by section thirty-two hundred and seven.”

<sup>95</sup> *Dorrier v. Masters*, 83 Va. 459, 2 S. E. 927; *Poling v. Flanagan*, 41 W. Va. 191, 23 S. E. 685.

quirement, it would seem to indicate that the common law method may still be pursued. If it may be, and there is personal property in the hands of a third person which has not been "designated," levy thereon might be as at common law. It must be borne in mind, however, that in levying an attachment, the officer is not required to take possession thereof unless the plaintiff has given bond, but the bond is not at all essential to the validity of the levy. It is doubtful if the officer has authority to take possession unless such bond has been given.<sup>96</sup> Except where the levy is a common law levy on personal chattels, the property need not be in the view and power of the officer making the levy.

*Choses in Action.*—The statute provides that the plaintiff, his agent or attorney, may, by endorsement on an attachment when it is issued, or in writing at any time before the return day thereof, designate any person as being indebted to or having in his possession effects of the defendant, or one of the defendants, and in such case the officer issuing the attachment is required to make as many copies thereof as there are persons designated, with an endorsement on each copy that the person so designated is required to appear at the term of the court to which the attachment is returnable, and disclose on oath in what sum he is indebted to the defendant and what effects of the defendant he has in his hands.<sup>97</sup> The order endorsed on the attachment requiring the garnishee to appear is process and must be returnable to the next term. If a term is skipped, it is void, and the process cannot in this respect be amended.<sup>98</sup> When the garnishee appears he is to be examined on oath. If he discloses property or indebtedness which is liable to the attachment, the court may order him to pay the amount owing, or to deliver the effects to such person as it may appoint as receiver, or the garnishee may, with leave of the court, give bond with sufficient surety with condition to pay the amount owing by him, and have such effects forthcoming at such time and place as the court may

96. *Kenefick v. Caulfield*, 88 Va. 122, 13 S. E. 348. See also, *Moore v. Holt*, 10 Gratt. 284.

97. Code, § 2967.

98. *Coda v. Thompson*, 39 W. Va. 67, 19 S. E. 548.

thereafter require, but the judgment debtor may claim the property as exempt to him, and if it is so determined the court will have it set apart.<sup>99</sup> If the garnishee do not appear, the court may either compel him to appear, or hear proof of any debt owing by him or effects in his hands, and give judgment as if what was so proved had appeared on his examination.<sup>1</sup> If it is suggested by the plaintiff that the garnishee has not fully disclosed the debts owing by him or effects in his hands, the court without any formal pleadings is required to inquire into the matter, and proceed in respect to any debt or effects found in the same manner as if it had been confessed by the garnishee.<sup>2</sup>

99. Section 2976 of the Code is as follows: "When any garnishee shall appear, he shall be examined on oath. If it appear, on such examination, or by his answer to a bill in equity, that at the time of the service of the attachment he was indebted to the defendant against whom the claim is, or had in his possession or control any goods, chattels, money, securities, or other effects belonging to the said defendant, the court may order him to pay the amount so owing by him, and to deliver such effects to such person as it may appoint as receiver; or such garnishee, with the leave of the court, may give bond, with sufficient surety, payable to such person, and in such penalty as the court shall prescribe, with condition to pay the amount owing by him, and have such effects forthcoming, at such time and place as the court may thereafter require, but the judgment debtor, if a householder or head of a family, may claim that the amount so found owing from the garnishee shall be exempt from the payment of the debt to the judgment creditor; and if it shall appear that the said judgment debtor has not set apart and held as exempt in other estate the amount of exemption to which he is entitled, then the court shall render a judgment against the garnishee only for the excess, if any, beyond the exemption to which the judgment debtor is entitled."

1. Section 2977 of the Code is as follows: "If any garnishee summoned as aforesaid, fail to appear in an attachment at law, the court may either compel him to appear, or hear proof of any debt owing by him, or of effects in his hands belonging to the defendant in such attachment, and make such orders in relation thereto as if what is so proved had appeared on his examination."

2. Section 2978 of the Code is as follows: "When it is suggested by the plaintiff in any attachment at law, that the garnishee has not fully disclosed the debts owing by him, or effects in his hands belonging to the defendant in such attachment, the court, without

The mere fact that an attachment is placed in the hands of an officer to be executed (unlike an execution) creates no lien. The lien is created by the levy or service of the copy, and hence before that time the debtor may assign a debt due to him, or his creditor may pay him, and each will be good. So, too, when the garnishee answers, he answers as to what effects he had in his hands belonging to the debtor, or in what sum he was indebted to the attachment debtor "at the time of the service of the attachment," and the attachment fastens only on that, and not on a subsequent indebtedness, nor upon other property that may have come into the hands of the garnishee at any time subsequent to the time of service. Indebtedness arising after the time of the service of the attachment, or property coming into the hands of the garnishee after that time, is not liable to the lien of the attachment. In some jurisdictions it is held that municipal corporations are not liable to garnishment or attachment for debts due to third persons, and this is probably according to the weight of authority.<sup>3</sup> But it has been held in Virginia that a municipal corporation may be garnished or attached for a debt due to one of its creditors just as a natural person may be,<sup>4</sup> and provision is now made by statute for the garnishment of debts due by the State, counties, towns, etc.<sup>5</sup>

*Real Property.*—By statute in Virginia it is provided that real property may be levied on by being mentioned and described in an endorsement on the attachment signed by the officer making the levy, and by delivering a copy of the attachment to the person, if any, in possession. There must be both. The form of the levy is prescribed by statute.<sup>6</sup> It has been held that the

any formal pleading, shall inquire as to such debts and effects, or, if either party demand it, shall cause a jury to be impaneled for that purpose, and proceed in respect to any such found by the court or the jury, in the same manner as if they had been confessed by the garnishee. If the judgment of the court or verdict of the jury be in favor of the garnishee, he shall have judgment for his costs against the plaintiff."

3. *Leake v. Lacey*, 95 Ga. 747, 22 S. E. 655, 51 Am. St. Rep. 112, and note.

4. *Portsmouth Gas Co. v. Sanford*, 97 Va. 124, 33 S. E. 516.

5. Code, §§ 3652 (d), 3652 (e), 3652 (f).

6. Code, § 2967.

description of the property must be given by the officer in his levy, and must be such as may be easily identified by looking alone to the levy without the aid of extrinsic evidence,<sup>7</sup> and that the return must show that the land was levied on as the land of the debtor defendant.<sup>8</sup> But when a map, plan, survey or deed is referred to in the levy for a description of the land, it is not to be regarded as extrinsic evidence, but part of the return itself, so when the return on an attachment describes the land by referring to it as conveyed to the attachment debtor by a designated person by a deed recorded in a designated deed book at a certain page, this identifies the land with sufficient certainty, for the purposes of both sale and conveyance without the aid of extrinsic evidence, and is a substantial if not a literal compliance with the statute.<sup>9</sup> When the attachment is against a non-resident or absconding debtor "any remainder, whether vested or contingent, of the defendant, or so much thereof as is sufficient to pay the amount for which it issued," may be levied on, but a contingent remainder so levied on cannot be sold until it becomes vested.<sup>10</sup> Where the attachment against a non-resident is the sole basis of the equity jurisdiction, the levy of the attachment, as shown by the officer's return, on the non-resident defendant's property, is the foundation of the suit, and if the property attached be not the defendant's property, the court is without jurisdiction.<sup>11</sup>

*By Whom Service May Be Made.*—An attachment may be directed to the sheriff, sergeant, or constable of any county or corporation.<sup>12</sup> When directed to the officer of the county or corporation in which the attachment is sued out, it may be

7. *Raub v. Otterback*, 92 Va. 517, 23 S. E. 883.

8. *Robertson v. Hoge*, 83 Va. 124, 1 S. E. 667.

9. *Richardson v. Hoskins Lumber Co.*, 111 Va. 755, 69 S. E. 935; *Duty v. Sprinkle*, 64 W. Va. 39, 60 S. E. 882.

10. Code, § 2967. The fact that a debtor absconds is not given as one of the grounds of attachment in Virginia, and this is the only section in the chapter on attachments that mentions "absconding" debtors. The fact that he absconds, however, may furnish a basis for one of the other grounds of attachment mentioned in § 2959.

11. *Culbertson v. Stevens*, 82 Va. 406, 4 S. E. 607; *Robertson v. Hoge*, 83 Va. 124, 1 S. E. 667.

12. Code, § 2965.

served by him anywhere in the State, but when directed to the officer of any other county or corporation it can be served by him only within his bailiwick. For instance, if an attachment be sued out from the Circuit Court of Rockbridge County, and be directed to the sheriff of said county, he may serve it anywhere in the State, but if issued from the Circuit Court of Rockbridge County, and directed to the sheriff of Augusta County, the latter can serve it only in Augusta County.<sup>13</sup> The officer levying the attachment is required in Virginia to show in his return the date and manner of service, or execution thereof, on each person and parcel of property, and also to give a list and description of the property, if any, taken under the attachment.<sup>14</sup> The attachment may be issued or executed on Sunday, if oath be made that the defendant is actually removing his effects on that day.<sup>15</sup>

### § 365. Attachment bonds.

An officer charged with the levying of an attachment is not required to take possession of the effects of the debtor, unless a bond is given with surety, approved by the justice or clerk issuing the attachment, in a penalty at least double the amount of the claim sworn to or sued for. Indeed, it is doubtful if he is authorized to take possession unless such bond is given.<sup>16</sup> This bond may be given by any one,<sup>17</sup> is payable to the commonwealth of Virginia, or to the person entitled to the benefit thereof,<sup>18</sup> and is with condition to pay all costs and damages which may be awarded against the plaintiff, or sustained by any person by reason of the suing out of the attachment.<sup>19</sup> The bond may be given by one partner on behalf of the firm, but should bind the obligor for failure of the firm to prosecute their attachment with success.<sup>20</sup> The phrase "any other person"

13. Code, §§ 2965, 2967.

14. Code, § 2969.

15. Code, § 2970.

16. Code, § 2968; *Kenefick v. Caulfield*, 88 Va. 122, 13 S. E. 348; *Cosner v. Smith*, 36 W. Va. 788, 15 S. E. 977.

17. Code, § 2990.

18. Code, §§ 177, 181.

19. Code, § 2968.

20. *McCluny v. Jackson*, 6 Gratt. 96.

used in the statute<sup>21</sup> includes the defendant in the attachment, and the defendant may maintain an action not only to recover damages awarded against the plaintiff in the attachment, but also other damages sustained by him by reason of the attachment having been sued out without sufficient cause.<sup>22</sup> But if the attachment is sued out against the defendant's property generally, and not against specific property, and it is improperly levied by the officer on the property of a stranger, such stranger can maintain no action therefor on the attachment bond. The bond "covers no damages for taking property which the attachment does not command to be taken. Such damages are not sustained by reason of suing out the attachment; but are sustained by reason of an unauthorized act of the officer. The undertaking of the obligors is, that the attachment is properly sued out, and the claim of the plaintiff well founded. They do not undertake that the officer will commit no trespass in its execution. They do not authorize him to levy it on any property which he may think proper, or the plaintiff may direct him to levy it on. A person may be willing to become security in an attachment bond, knowing the debt to be due, and that the debtor is a non-resident or absconding debtor, but very unwilling to become security that the officer will do no wrongful acts under color of the attachment. The bond was not intended to enlarge the attachment, but to run on all fours with it. The attachment may be against the defendant's estate, or against specific property. If it be against the defendant's estate, the bond applies only to that estate, and enures to the benefit of the defendant only. If it be against specific property, the bond applies to the owner of that property, whoever he may be, whether the defendant or any other person, and enures only to the benefit of such owner."<sup>23</sup>

The adverse claimant of property seized under an attachment has ample remedies without giving him the benefit of an indemnifying bond. Besides a summary remedy by interpleader, which is generally sufficient, he may resort for his indemnity to an action of trespass against the sheriff who made the levy,

21. Code, § 2968.

22. *Offtenderinger v. Ford*, 92 Va. 636, 24 S. E. 246.

23. *Davis v. Com.*, 13 Gratt. 139, 145, 146.

and all persons who aided in making it, or directed it to be made; or to an action on the official bond of the sheriff.<sup>24</sup> Specific remedy is also given such claimant in the attachment proceeding.<sup>25</sup> Where an attachment is rightfully sued out with good cause, but is afterwards quashed or abated for the failure of the officer to do his duty, no action lies on the attachment bond for the wrongful acts of the officer.<sup>26</sup> In West Virginia, the scope of the condition of the bond is enlarged by the further condition that the obligors are "to pay to any claimant of any property seized or sold, under or by virtue of said attachment, all damages which he may recover in consequence of such seizure or sale, and also to warrant and defend to any purchaser of the property such estate or interest therein as is sold."<sup>27</sup>

If the defendant against whom the claim is desired to retain property which has been levied on by an attachment, he may do so by giving bond with condition to have the property forthcoming at such time and place as the court may require, or he may give bond with condition to perform the judgment or decree of the court, in which event the whole of the estate attached is to be released to him.<sup>28</sup> Even if the bond given by the defendant be with condition to perform the judgment of the court, the giving of such bond by the defendant is not a general appearance, and does not warrant a personal judgment against the

24. *Davis v. Com.*, 13 Gratt. 139.

25. Code, § 2984.

26. *Offterdinger v. Ford*, 92 Va. 636, 24 S. E. 246.

27. W. Va. Code, § 3541.

28. Code, § 2972, is as follows: "Any property levied on or seized as aforesaid, under any attachment, where the plaintiff has given bond, may be retained by or returned to the person in whose possession it was, on his giving bond, with condition to have the same forthcoming at such time and place as the court may require; or the defendant against whom the claim is, may, by giving bond with condition to perform the judgment or decree of the court, release from any attachment the whole of the estate attached. The bond, in either case, shall be taken by the officer serving the attachment, with surety, payable to the plaintiff, and in a penalty, in the latter case, at least double the amount or value for which the attachment issued, and in the former, either double the same or double the value of the property retained or returned, at the option of the person giving it."

defendant.<sup>29</sup> The bond is required to be returned to the clerk of the court in which the suit is pending, or to which the attachment is returnable, and is subject to exceptions by the plaintiff for insufficiency of the surety or other good cause. If the exception is sustained, the officer is required to file a good bond, and if he fails to do so, he and his sureties on his official bond are made responsible.<sup>30</sup> Although the property or estate attached be not replevied as aforesaid, the interests and profits thereof pending the suit and before judgment or decree, may be paid to the defendant if the court deem it proper, and the court, or judge in vacation, may discharge the attachment on the defendant giving bond with surety, payable to the plaintiff, in a penalty double the value of such estate, with condition, if the judgment or decree be rendered for the plaintiff in said suit, to pay the said value, or so much thereof as may be necessary to satisfy the same.<sup>31</sup> The property levied on and not replevied is kept in the same manner as similar property under execution, but such as is expensive to keep or perishable may be sold as under an execution, except that the court may direct a sale on credit, when the attachment debt is not due, or the court or judge sees other reason therefor.<sup>32</sup>

Although the claim of the plaintiff be established, and judgment or decree be rendered for him, and there be an order for the sale of any effects or real estate of the attachment debtor to pay the judgment or decree, it is provided by statute that if the defendant against whom the claim is, has not appeared or been served with a copy of the attachment sixty days before such judgment or decree, the plaintiff shall not have the benefit of the judgment establishing his demand and ordering the sale, unless and until he shall have given bond with sufficient surety in such penalty as the court shall approve, with condition to perform such further order as may be made upon the appearance of said defendant and his making defence, and if the plaintiff fails to give such bond in a reasonable time, the court is

29. *Hilton v. Consumers' Can Co.*, 103 Va. 255, 48 S. E. 899.

30. Code, § 2973.

31. Code, § 2974.

32. Code, § 2975.

directed to dispose of the estate attached, or the proceeds thereof, as to it shall seem just.<sup>33</sup> If a copy of the attachment has been served on the defendant sixty days before a decree for the sale of the land attached, a sale may be made without requiring the bond last above mentioned.<sup>34</sup> This bond seems to be additional to the bond given requiring the officer to take possession of the attached effects. The statute providing for this bond says nothing about the first bond, and the conditions of the two bonds are entirely different.

### § 366. Lien of attachment.

The lien of an attachment is created by the levy (and not by delivering the attachment to the officer to be executed), and the subsequent judgment or decree is simply the enforcement of a pre-existing valid lien.<sup>35</sup> It is provided by statute that the plaintiff shall have a lien from the *time of levying* such attachment, or serving a copy thereof as aforesaid on personal property; and on real estate, from the suing out of the same, provided the attachment is duly levied as required by law.<sup>36</sup>

*Real Estate.*—The lien of an attachment on real estate dates from the suing out of the attachment or summons, although the endorsement of the attachment on the writ is not made until after that time. In order to have this effect, however, as against purchasers (but not as against any one else), it is provided that the attachment shall not bind or affect a *bona fide* purchaser of real estate for valuable consideration without actual notice of the attachment, unless and until a memorandum of the attachment shall be recorded in the county or corporation in which the land is situated.<sup>37</sup> The language of the statute is that such

33. Code, § 2983.

34. *Anderson v. Johnson*, 32 Gratt. 558.

35. *Jackson v. Valley Tie Co.*, 108 Va. 714, 62 S. E. 964.

36. Code, § 2971.

37. Code, § 3566, is as follows: "No *lis pendens*, or attachment under chapter one hundred and forty-one, shall bind or affect a *bona fide* purchaser of real estate, for valuable consideration, without actual notice of such *lis pendens* or attachment, unless and until a memorandum setting forth the title of the cause, the general object thereof, the court in which it is pending, a description of the

memorandum shall be left with the clerk of the court of the county or corporation in which the land is situate, who shall forthwith record the same in the deed book, and index it in the name of the person whose estate is intended to be affected thereby. Under this language it would seem, by analogy to deeds, that if the creditor had done all that could be required of him, and had left the memorandum with the clerk for record, and the same should be lost or destroyed before it was actually recorded and indexed, the creditor would be protected,<sup>38</sup> but it has been held in Virginia that the memorandum must be recorded and indexed, and even if recorded it is of no avail unless properly indexed.<sup>39</sup>

*Personal Property.*—As to personal property of all kinds, the lien of the attachment dates from the *time* of levying the attachment or serving a copy thereof. This lien overrides and takes priority over all subsequent alienations with or without notice, except probably a holder for value in due course of negotiable paper. An assignee for value and without notice, as has been seen, takes preference over an execution, and a payment by a debtor of an execution debtor is protected, if without notice of the existence of the execution,<sup>40</sup> but in neither case is this true of an attachment, nor is it necessary to make any record of the attachment in order to preserve this lien as to personal property.<sup>41</sup> The lien of a *prior fi. fa.*, or an assignment *before levy* of an attachment, would be superior to the attachment.<sup>42</sup> But the service of an attachment inhibits thereafter the transfer of

land, and the name of the person whose estate is intended to be affected thereby, shall be left with the clerk of the court of the county or corporation in which the land is situate, who shall forthwith record the said memorandum in the deed book, and index the same in the name of the person aforesaid.”

38. *Mercantile Co-Op. Bank v. Brown*, 96 Va. 614, 32 S. E. 64.

39. *Vicars v. Sayler*, 111 Va. 307, 68 S. E. 988. See also, *Cammack v. Soran*, 30 Gratt. 292.

40. *Ante*, § 352.

41. *Ches. & O. R. Co. v. Payne*, 29 Gratt. at p. 509; *Shenandoah V. R. Co. v. Griffith*, 76 Va. at pp. 922-3.

42. *Anderson v. DeSoer*, 6 Gratt. 363; *Seward & Co. v. Miller*, 106 Va. 309, 55 S. E. 681.

the debtor's effects to any other person.<sup>43</sup> The attachment, however, only operates as a lien upon the debts and effects of the absent debtor in the hands of the home defendant at the time the attachment was served, and does not operate upon debts and effects which thereafter come into the hands of such defendant.<sup>44</sup>

*Priorities.*—As between attachments, the first served has priority,<sup>45</sup> and the lien of a *fi. fa.* placed in the hands of the officer to be executed has priority over an attachment of subsequent date.<sup>46</sup> Where goods and chattels had been duly mortgaged in the State in which they were located, it was held that, as the deed was not recorded in this State, an attachment levied thereon, as the goods of the mortgagor, took priority over the deed.<sup>47</sup> This, however, was a decision by the "military court of appeals," whose decisions have never been recognized as decisions of the Court of Appeals of Virginia. Subsequently the same question came before the Court of Appeals of Virginia, and the holding was just the reverse,<sup>48</sup> and it was held that the goods having been duly mortgaged in a foreign State, and temporarily brought into the State of Virginia, the mortgage creditor would prevail, although the deed was not recorded. It was conceded that there were opposing decisions, but it was said that the holding was in accord with the weight of authority in the best considered cases. The decision in the last mentioned case led to the enactment by the legislature of a statute declaring that foreign mortgages or incumbrances upon personal property should not be a valid incumbrance upon said property after it is removed into this State, as to purchasers for valuable consideration without notice and creditors, unless the mortgage or incumbrance was recorded according to the laws of this State, in any county or corporation in

43. *Williamson v. Bowie*, 6 Munf. 176.

44. *Farmers' Bank v. Day*, 6 Gratt. 360; *Haffey v. Miller*, 6 Gratt. 454.

45. *Erskine v. Staley*, 12 Leigh 406; *Farmers' Bank v. Day*, 6 Gratt. 360.

46. *Puryear v. Taylor*, 12 Gratt. 401.

47. *Smith v. Smith*, 19 Gratt. 545.

48. *Craig v. Williams*, 90 Va. 500, 18 S. E. 899.

which the said property is located in this State, thus overruling the last mentioned decision.<sup>49</sup> If, however, an assignment of a *chose in action* be made out of the State by deed of trust or otherwise, it will prevail over a subsequent attachment thereof in this State, although there was no record of the assignment. Assignments of choses in action are not required to be recorded, and the attaching creditor can get no greater interest than his debtor had.<sup>50</sup> The home defendant having property of the absent defendant in his possession, for the keeping of which the absent debtor is indebted to him, is entitled to have his claim first satisfied out of the property as against the attaching creditor,<sup>51</sup> and so if the property attached is subject to a pledge, the lien of the pledge must be first satisfied.<sup>52</sup> An additional attachment sued out on new grounds does not relate back to the time of the levy of the original attachment, but dates from the time of its own levy, and the rights of other persons are to be ascertained and fixed with reference to the time of levying the additional attachment.<sup>53</sup>

The increase of personal property attached probably passes as an incident without any additional levy.<sup>54</sup>

### § 367. When attachment to issue.

If no suit or action is pending, but the attachment is a wholly independent proceeding, we have seen that the attachment can issue in but two cases: (1) where a *debtor* intends to remove, or is removing, or has removed his effects out of the

49. Code, § 2468a.

50. Gregg v. Sloan, 76 Va. 497. See also, Kirkland v. Brune, 31 Gratt. 126.

51. Williamson v. Gayle, 7 Gratt. 152.

52. First Nat. Bank v. Harkness, 42 W. Va. 156, 24 S. E. 548.

53. Miller v. White, 46 W. Va. 67, 33 S. E. 332.

No reference has been made to the case of *Cirode v. Buchanan*, 22 Gratt. 205, because it is believed to be out of harmony with the cases which precede and follow it, and it is not believed to have been correctly decided. It is only mentioned here to indicate that it has not been overlooked.

54. Cf. Gannaway v. Tate, 98 Va. 789, 37 S. E. 768.

State, and (2) against a *tenant* who intends to remove, or is removing, or has, within thirty days, removed his effects from the leased premises. In each of these cases the attachment may be sued out before the debt or rent is due. There is no other limitation on the right to issue the attachment except that it must be issued within a reasonable time after the affidavit therefor is made.<sup>55</sup> If, however, the attachment is sued out as an ancillary process, then the attachment must not be sued out too soon or too late. It is too soon if sued out before the action or suit is commenced, and it is too late if sued out after the suit has been abated or ended. The statute declares that it may be sued out "at the time of or after the institution of any action at law,"<sup>56</sup> or if issued in equity "on a bill in equity filed for the purpose,"<sup>57</sup> or thereafter.<sup>58</sup> Generally no suit or action is pending at the time the attachment is desired, and the practice is to institute a proper suit or action and to sue out the attachment at the same time that the summons is delivered to the officer.

If the proceeding is by a motion for a judgment for money under Code, section 3211, it is not deemed to be a pending action until the notice, duly executed, has been returned to the clerk's office, and hence until that time no attachment can issue.<sup>59</sup> Hence, if the only ground of attachment is the non-residence of a sole defendant, or of all of the defendants, and he or they cannot be served with notice, and do not appear, the proceeding cannot be begun by a motion under section 3211, as the notice never can be returned executed on the defendant. But the proceeding may be by motion under that section if process can be executed on one or more of the defendants.<sup>60</sup> There must be a *pending* suit or action, if the attachment is to be ancillary thereto. No attachment can issue in such case in a suit or action which has abated. The return of "no inhabitant" would cause the abatement of the suit or action as to such

55. *Kesler v. Lapham*, 46 W. Va. 293, 33 S. E. 289.

56. Code, § 2959.

57. Code, § 2964.

58. Code, § 2966.

59. See, *ante*, § 97.

60. *Breeden v. Peale*, 106 Va. 39, 55 S. E. 2.

defendant, and if he is the sole defendant, of the entire action. Hence it is important to see that the garnishee-process issues before such a return is made.<sup>61</sup> Indeed, the better practice is to have the officer make the return of "not found" instead of the return of "no inhabitant" of the state.

If ground for attachment exist, the affidavit may be made and the attachment sued out, and levied, even after the appearance of the debtor. The action is still pending and there may be both a personal judgment and an order subjecting the attachment effects.<sup>62</sup>

### § 368. Defences to attachments.

*Who May Make Defence.*—There is a difference between making defence to the *attachment* and defence to the *action* to which the attachment is ancillary. The mere fact that an action has an attachment as ancillary thereto does not at all affect the defences to the action. The action is still subject to the same defences as if there were no attachment. These defences have been hereinbefore discussed in connection with the separate actions. We are here dealing only with defences to the attachment. It is provided by statute that either of the defendants to any such attachment, or any garnishee, or any party to a forthcoming bond given with condition to have the property forthcoming, or the officer who may be liable to the plaintiff if such bond be adjudged bad,<sup>63</sup> or any person having a claim to, an interest in, or a lien on the property attached,<sup>64</sup> may make defence to such at-

61. Pulliam *v.* Aler, 15 Gratt. 54, 59.

62. O'Brien *v.* Stephens, 11 Gratt. 610.

63. Section 2980 of the Code is as follows: "Either of the defendants in any such attachment, or any garnishee, or any party to any forthcoming bond given as aforesaid, or the officer, who may be liable to the plaintiff by reason of such bond being adjudged bad, or any person authorized by section twenty-nine hundred and eighty-four, to file a petition, may make defence to such attachment, but the attachment shall not thereby be discharged, or the property levied on released."

64. Section 2984 of the Code is as follows: "Any person may file his petition, at any time before the property attached as the estate of a defendant is sold, or the proceeds of sale paid to the plaintiff under the decree or judgment, disputing the validity of the plain-

tachment, but the attachment shall not be thereby discharged, or the property levied on released. It had been held in an early case in Virginia that if the defendant were permitted to contest the case without giving security to perform the decree, or if the plaintiff waived the giving of the security, the effect was to release the property from the attachment.<sup>65</sup> In order to obviate this difficulty, the statute provides that the parties designated may make defence to such attachment, but that the attachment shall not thereby be discharged or the property levied on released, thus leaving the attachment and the levy thereon intact until the case is decided. The language of the statute,<sup>66</sup> allowing "any person" to file a petition disputing the validity of the plaintiff's attachment, is qualified by the subsequent language of that section so as to confine the right to a petitioner who has title to, a lien on, or any interest in the property, and the right is not extended to creditors generally. A general creditor who has no claim to, interest in or lien on the property attached has no right, merely because he is a creditor, to intervene and dispute the validity of the plaintiff's attachment.<sup>67</sup>

*What Defence May Be Made.*—It must be borne in mind that we are still discussing defences to the attachment, and not to the action. The statute in Virginia provides that the right to sue out the attachment may be contested, and that when the court is of opinion that it was issued on a false suggestion, or without sufficient cause, the attachment shall be abated.<sup>68</sup> It will be observed

tiff's attachment thereon, or stating a claim thereto, or an interest in or lien on the same, under any other attachment or otherwise, and its nature, and upon giving security for costs, the court, without any other pleading, shall inquire into such claim, or, if either party demand it, impanel a jury for that purpose, and if it be found that the petitioner has title to, or a lien on, or any interest in, such property, or its proceeds, the court shall make such order as may be necessary to protect his rights, the costs of which inquiry shall be paid by either party, at the discretion of the court."

65. *Tiernan v. Schley*, 2 Leigh 25.

66. Code, § 2984.

67. *Miller v. White*, 46 W. Va. 67, 33 S. E. 332.

68. Section 2981 of the Code is as follows: "The right to sue any such attachment may be contested; and when the court is of opinion that it was issued on false suggestions, or without suffi-

that any defence may be made which shows that the attachment was issued on false suggestion (that the ground assigned was sufficient, but not true), or without sufficient cause (the ground assigned was not sufficient, although true). The attachment debtor cannot defend on the ground that the goods attached do not belong to him, but to a third person. This is not a good ground of defence on his part, and the rights of third persons are otherwise amply protected.<sup>69</sup>

On a motion to abate (quash) the attachment, the burden of proof is on the plaintiff in the attachment, and if the ground of the motion to abate be that the attachment was sued out upon a false suggestion, the issue is not what the plaintiff believed or had probable cause to believe, but the actual existence of the facts warranting the attachment. "This remedy" (attachment) "is justified, not by the belief of the affiant, however honestly entertained upon reasonable grounds, that the fact sworn to in the affidavit exist, but by the *existence of that fact*."<sup>70</sup> One or more of the grounds of attachment given by the statute must *actually exist*, and if the court or jury are satisfied that they do not exist, then the attachment was issued on a false suggestion, and must be abated, no matter what the belief of the plaintiff was, or how reasonable the belief may have been. For example, if the ground of attachment be that the defendant is about to remove his effects out of the state, and it turns out upon the proof that there was no such intention, then the attachment must be abated, although the plaintiff may have had reasonable grounds

cient cause, judgment shall be entered that it shall be abated. If the attachment be returnable to a circuit or corporation court, the judge thereof may, in vacation, either before or at any time after it has been returned, on the motion of any one or more of the persons mentioned in the preceding section, upon reasonable notice of the motion to the attaching creditor, hear testimony and quash the attachment, if of the opinion that it is invalid on its face, or was issued on false suggestions, or without sufficient cause. When the attachment is properly sued out, and the case is heard upon its merits, if the court be of opinion that the claim is not established, final judgment shall be given for the defendant. In either case he shall recover his costs, and there shall be an order for the restoration of the attached effects to him."

69. Note. 123 Am. St. Rep. 1041.

70. Sublett v. Wood, 76 Va. 318; note, 123 Am. St. Rep. 1032.

for believing that the defendant was about to remove his effects from the State. After the attachment has been abated for the reasons just stated, if the defendant in the attachment should sue the plaintiff for malicious prosecution of his attachment because issued on a false suggestion, the plaintiff in the attachment (the now defendant) may make defence on the ground that, although there was not *actual cause* for suing out the attachment, yet that he had *probable cause* for believing the ground of attachment assigned to be true, and if he sustains this defence by proof, it will defeat the action for malicious prosecution. This distinction between *actual cause* and *probable cause* must be borne in mind. Unless the cause for suing out the attachment actually existed, the attachment will be defeated, but if the plaintiff in the attachment had *probable cause* for believing that there was actual cause for suing out the attachment, this will defeat the action for malicious prosecution. Thus, in the instance last given, although the defendant in the attachment did not intend to remove his effects out of the State, yet if the plaintiff in the attachment had probable cause for believing that he intended to remove them, this is a sufficient answer to the action for malicious prosecution.<sup>71</sup> If the sole ground of jurisdiction of the action or suit to which the attachment is ancillary is the right to sue out the attachment, and there has been no appearance to the merits, then the validity of the attachment is jurisdictional, and in this instance the regularity of the attachment must appear on the face of the proceedings, and the defence of irregularity may be raised anywhere, at any time, in any way, and will even be noticed by the court *ex officio*, or may be raised in the appellate court for the first time. Thus, if the only ground of jurisdiction is the non-residence of the defendant, and he has not appeared, nor been served with process, and the attachment is made returnable to rules, when the statute requires that it should be returnable to a term of the court, then no valid attachment has been issued, and the court issuing it is without jurisdiction, and hence the objection may be raised in the appellate court for the first time, or the court may of its own motion

71. 1 Va. Law Reg. 232; *Claffin v. Steenbock*, 18 Gratt. 842, 853; *Sublett v. Wood*, 76 Va. 318; *Spengler v. Davy*, 15 Gratt. 381; *Burkhart v. Jennings*, 2 W. Va. 242.

dismiss the proceeding.<sup>72</sup> So, likewise, if an attachment is issued as ancillary to an action at law, but the attachment was sued out before the action was instituted, the attachment is invalid, for the statute does not authorize such an ancillary attachment, except "at the time of or after the institution of any action at law." Here the attachment has been issued without authority of statute, and the objection may be raised for the first time in the appellate court. In this case it is immaterial that the defendants had appeared to the action. The statute simply does not authorize an attachment to issue until the action has been instituted.<sup>73</sup>

If the writ-tax on an attachment is not paid within thirty days from the time the attachment is actually returned the attachment and the proceedings thereon are to be taken as dismissed.<sup>73a</sup>

*When Defence May Be Made.*—It is provided by statute that a motion to quash an attachment may be made either before or at any time after the attachment has been returned. The motion may be made (where the attachment is returnable to the circuit or corporation court) either before the court, or the judge thereof in vacation. This motion is made upon reasonable notice to the attaching creditor, and the court or judge may hear testimony and quash the attachment if of opinion that it is invalid on its face, or was issued on false suggestion, or without sufficient cause. The statute does not say expressly that the court may hear the motion, but this is necessarily implied.<sup>74</sup> It seems to be well settled that the notice of this motion should specify the grounds upon which it is based. It is not sufficient to state that it is based on irregularities without specifying the irregularities complained of.<sup>75</sup>

*How Defence Is Made.*—In a few States it is held that if the objection to the attachment, or the affidavit on which it is founded, is for matter *de hors* the record, it can be raised only by a plea in abatement, but the great weight of authority is that

72. *McAllister v. Guggenheimer*, 91 Va. 317, 21 S. E. 475.

73. *Furst Bros. v. Banks*, 101 Va. 208, 43 S. E. 360.

73a. Acts 1912, p. 498, amending Code, § 2965.

74. Code, § 2981.

75. Note, 123 Am. St. Rep. 1056.

for matters *de hors* the record objection can be made by a motion to quash, supported by proper proof. It is said that the difference in the two defences consists mainly in the mode of establishing the defects. "In one instance it is by an inspection of the record, in the other it is by a production of the evidence, but this dissimilarity in the mode of proof can make no difference in the nature of the thing proved."<sup>76</sup> In Virginia it would seem that practically all valid objections to an attachment may be made on a motion to quash. If the affidavit upon which the attachment is based is defective or untrue, the remedy is by a motion to quash.<sup>77</sup> But if the attachment is merely ancillary to an action or suit, the merits of the *action* cannot be inquired into on a motion to quash the attachment.<sup>78</sup>

A defendant to an attachment suit who has not been summoned, and has not voluntarily appeared, nor waived summons, may appear specially for the purpose of moving to quash an attachment or to dismiss an action, and such special appearance does not give the court jurisdiction to proceed to judgment in the action, nor does it waive the defects.<sup>79</sup> If the only ground of jurisdiction is the attachment of the effects of a nonresident, and the attachment is abated, the action founded thereon should be dismissed on a motion for that purpose, and the special appearance for the purpose of moving to dismiss on this ground is not an appearance to the action.<sup>80</sup>

A variance between the claim stated in the affidavit and the demand set up in the declaration is fatal to the attachment, and upon a motion to quash the attachment for such variance the declaration may be resorted to for the purpose of establishing the variance. A plea in abatement is not necessary, but if such variance is pleaded in abatement, and the plea be accompanied

76. Note, 123 Am. St. Rep. 1043, 44; *Johnson v. Stockham*, 89 Md. 368, 43 Atl. 943.

77. *Anderson v. Johnson*, 32 Gratt. 558; *Hilton v. Consumers' Can Co.*, 103 Va. 255, 48 S. E. 899.

78. Note, 123 Am. St. Rep. 1058; 3 Encl. Pl. & Pr. 79.

79. *Wynn v. Wyatt*, 11 Leigh 584; *Pulliam v. Aler*, 15 Gratt. 54, 62; *Hilton v. Consumers' Can Co.*, *supra*; *Petty v. Frick*, 86 Va. 501, 10 S. E. 886.

80. *Hilton v. Consumers Can Co.*, *supra*; *Miller v. Zeigler*, 44 W. Va. 484, 29 S. E. 981.

by an oral motion to quash, it will be treated as a motion to quash.<sup>81</sup> The variance, however, must be material. A slight, or unsubstantial variance is not sufficient.<sup>82</sup>

Although only one member of a partnership be a nonresident, his interest in the social assets may be attached, and if an attachment in equity be sued out against a partnership and levied on the interest of the nonresident partner in the social assets, all the partners should be before the court by notice, actual or constructive, before any decree is made in relation to the partnership property, but where some of the parties have been served it is error to abate the attachment and dismiss the suit simply because an order of publication had not been taken against the nonresident. What the court should do is to require the plaintiff to mature his suit within a reasonable time as to the absent partner, and if he fails to do so, then to abate the attachment and dismiss the suit.<sup>83</sup> An order of attachment not signed by the clerk is not void, but voidable only, and may be amended by adding his signature. If the signature be added before the motion to quash is made, the order is good against such motion. The court has inherent power without statutory authority to allow mere clerical errors and omissions of its officers to be corrected and amended.<sup>84</sup> When an attachment bond purports to be signed by the plaintiff by an attorney in fact, the court will not sustain a motion to quash the bond for this supposed defect. If the attorney in fact had no authority to sign the plaintiff's name, this defect can be taken advantage of only by a plea in abatement, if it can be taken advantage of at all.<sup>85</sup> An order overruling a motion to quash an attachment is interlocutory merely, and does not preclude the renewal of the motion at a later time.<sup>86</sup>

*Defence to the Merits.*—As already pointed out, a defence to the merits of the action to which the attachment is ancillary will not usually be allowed on a motion to quash. While the language

81. *Simmons v. Simmons*, 56 W. Va. 65, 48 S. E. 833.

82. *Duty v. Sprinkle*, 64 W. Va. 39, 60 S. E. 882.

83. *Brown v. Gorsuch*, 50 W. Va. 514, 40 S. E. 376.

84. *Miller v. Zeigler*, 44 W. Va. 484, 29 S. E. 981.

85. *Tingle v. Brison*, 14 W. Va. 295.

86. *Simmons v. Simmons*, 56 W. Va. 65, 48 S. E. 833.

of Code, § 2981, appears to be comprehensive—"the right to sue out any such attachment may be contested"—yet the subsequent language of that section seems to limit the grounds of contest to whether or not the attachment is "invalid on its face, or was issued on false suggestions, or without sufficient cause." Under any attachment proceeding it is necessary for the plaintiff to establish his claim, whether there is any appearance by the defendant or not, before he can take judgment against the debtor, or have the effects sold.<sup>87</sup> A subsequent attaching creditor may contest the validity of the plaintiff's debt in a prior attachment and show that the debt does not exist, or has been paid.<sup>88</sup> The prime object in levying the attachment is to obtain *pendente lite* a lien, or, in other words, to put the property in the custody of the law till by the judgment of the proper tribunal the plaintiff's claim is established, when the lien becomes effective as of the date of the levy, but must be enforced, not by virtue of the writ of attachment, but by the judgment of the court ordering a sale of the property which the attachment has simply held in waiting.<sup>89</sup> If the attachment be issued in a pending suit and is merely ancillary to the suit the defendant may make any defence which would defeat the plaintiff's claim, just as he might do in any other action or suit. He may also make defence to the attachment, and although the attachment be abated or quashed, if the plaintiff establishes his demand and the defendant has been served with process, or has appeared, the plaintiff is entitled to a *personal* judgment or decree for the amount of his claim. In equity garnishees and other parties besides the attachment debtor are generally made parties defendant to the suit and set up by answer all the defences they are entitled to make. If the person seeking to make defence be already a party to the proceedings, he may defend by demurrer, plea in abatement, plea to the merits, or other appropriate pleading. If he seeks to defend simply the attachment and not the action, he may, after being admitted to the attachment proceeding, also move to quash the

87. *Withers v. Fuller*, 30 Gratt. 547.

88. *M'Cluny v. Jackson*, 6 Gratt. 96, 104-'5.

89. *Dorrier v. Masters*, 83 Va. 459, 473, 2 S. E. 927. See also, *Trimble v. Covington G. Co.*, 112 Va. 826, 72 S. E. 724.

attachment. Usually persons who wish to intervene in a suit desire to do so in order to defend and defeat the attachment, and not to appear to the merits of the plaintiff's claim. In such case, if such a person is not already a party to the attachment suit, and has a right to defend the attachment, or to assert a claim to, an interest in, or a lien upon the attached effects, he may file a petition in the attachment suit setting up his claim and the nature thereof at any time before the attached property is sold or the proceeds paid over; and upon giving security for costs he is admitted a party and the court, without any other pleading shall inquire into his claim, or, if either party demand it, impanel a jury for that purpose, and if it be found that he is entitled to a lien on or an interest in the property or its proceeds, the court will make such order as will be necessary to protect his rights.<sup>90</sup> Formerly the statute was mandatory that the matter put in issue by this petition should be tried by a jury, and it was held to be error for the court to undertake to decide the issue,<sup>91</sup> but under the present statute<sup>92</sup> the court is directed to make the inquiry unless one of the parties demands a jury. In an intervention proceeding under this statute, if two or more attachments be levied on the property of the same debtor by different creditors, the subsequent attaching creditor may move to quash the earlier attachment for defects in the attachment, the writ or its service, and if the earlier attachment is quashed, the later thereby becomes entitled to priority of lien on the property. As the subsequent creditor is allowed to question the validity of the proceedings on the prior attachment, so also the first attaching creditor has the correlative right of denying the validity of, or otherwise contesting the intervenor's attachment, or claim.<sup>93</sup>

*Judgment for the Plaintiff.*—When the plaintiff's claim is established, judgment or decree should be rendered for him, and an order of sale made, and the proceeds of the sale be directed to be applied to the satisfaction of the judgment or decree, but

90. Code, § 2984.

91. *Anderson v. Johnson*, 32 Gratt. 558.

92. Code, § 2984.

93. *Miller v. White*, 46 W. Va. 67, 33 S. E. 332.

no real estate can be sold until all other property and money subject to the attachment have been exhausted, and then only so much thereof as is necessary to satisfy the judgment or decree.<sup>94</sup> Formerly, when an attachment at law was levied on real property, serious difficulties existed as to how real estate should be sold and the deed made to the purchaser, but the statute now provides that "Upon a sale of real estate, under an attachment at law, the court shall have the same powers and jurisdiction, and the like proceedings thereon may be had, as if it were a sale of real estate under an attachment in equity."<sup>95</sup> If the defendant has not appeared or been served with a copy of the attachment sixty days before the judgment or decree, the plaintiff is not given the benefit of the order of sale unless he gives bond with approved security in such penalty as the court shall approve with condition to perform such future order as may be made upon the appearance of the defendant and his making defence, and if he fails to give the bond within a reasonable time, the court is to dispose of the estate attached, or the proceeds thereof as to it shall seem just.<sup>96</sup> It has been herein-

94. Section 2982 of the Code is as follows: "If the claim of the plaintiff be established, judgment or decree shall be rendered for him, and the court shall dispose of the specific property mentioned in sections twenty-nine hundred and sixty and twenty-nine hundred and sixty-four, as may be right, and order the sale of any other effects or real estate, which shall not have been previously released or sold under this chapter, and direct the proceeds of sale, and whatever else is subject to the attachment, including what is embraced by such forthcoming bond, to be applied in satisfaction of the judgment or decree. But no real estate shall be sold until all other property and money subject to the attachment have been exhausted, and then only so much thereof as is necessary to pay the judgment or decree. Upon a sale of real estate, under an attachment at law, the court shall have the same powers and jurisdiction, and the like proceedings thereon may be had, as if it were a sale of real estate under an attachment in equity."

95. Code, § 2982.

96. Section 2983 of the Code is as follows: "If the defendant against whom the claim is, has not appeared or been served with a copy of the attachment sixty days before such judgment or decree, the plaintiff shall not have the benefit of the preceding section, unless and until he shall have given bond, with sufficient surety,

before pointed out that this is an additional bond to the bond required at the institution of the action for the seizure of the property.<sup>97</sup> The service of the attachment sixty days before the judgment or decree referred to in the section last mentioned (§ 2983) need not be a service within the state, but a service outside the state before judgment will not bar the rehearing accorded the non-resident defendant by § 2986.<sup>98</sup> Of course, no such bond is required when the defendant has appeared or been served with the attachment as above mentioned.<sup>99</sup> There may be a personal judgment or decree against him and also an order for the sale of the attached effects to pay the judgment or decree.<sup>1</sup> In an attachment of real estate there is no decree for renting the land to pay the debt.<sup>2</sup>

*Order of Publication.*—When an attachment other than for rent not due, or against a defendant about to remove his effects out of the State, is returned executed, if the defendant has not been served with a copy of the attachment or of the process in the suit wherein the attachment issued, an order of publication must be made against him.<sup>3</sup> In a proceeding by attachment, the mere seizure of the attached effects does not confer jurisdiction upon the court to dispose of such effects to the prejudice of the owner. An opportunity must be afforded the owner to appear and be heard, and to this end the notice by publication prescribed by the statute is indispensable, and even where a fund is garnished in the hands of a third person, jurisdiction cannot be acquired to sequester the fund attached simply by service of process on the garnishee only. There must be some sort of notice to the non-resident defendant. Notice of some kind is

in such penalty as the court shall approve, with condition to perform such future order as may be made upon the appearance of the said defendant, and his making defence. If the plaintiff fail to give such bond, in a reasonable time, the court shall dispose of the estate attached or the proceeds thereof, as to it shall seem just."

97. *Ante*, § 365.

98. *Anderson v. Johnson*, 32 Gratt. 558, 568, 571. *Post*, § 371.

99. *Anderson v. Johnson*, 32 Gratt. 558.

1. *O'Brien v. Stephens*, 11 Gratt. 610.

2. *Curry v. Hale*, 15 W. Va. 867.

3. Code, § 2979.

indispensable to the validity of the judgment of condemnation or sequestration.<sup>4</sup>

### § 369. Remedies for wrongful attachment.

1. We have already seen in discussing attachment bonds that if the plaintiff desires the officer to take possession of the property of the debtor, he is required to give bond with "condition to pay all costs and damages which may be awarded against him, or sustained by any person by reason of his suing out the attachment."<sup>5</sup> If an attachment against the defendant's estate generally has been wrongfully sued out and has been quashed, the defendant in the attachment, or any person injured by reason of suing it out (but not the adverse claimant of property levied on, as he is not injured by suing out the attachment), is entitled to maintain an action on the bond.<sup>6</sup>

2. If property be distrained for any rent not due, or attached for any rent not accruing, or taken under *any* attachment sued out without good cause, the owner of such *property* may, in an action against the party suing out the writ of distress or attachment, recover damages for the wrongful seizure, and also, if the property be sold, for the sale thereof.<sup>7</sup> It is said by the Revisors of 1849<sup>8</sup> that this section was designed to meet both the case where no rent is due or accruing, and the case where the distress or attachment is for more than is due or accruing. In the absence of any charge of fraud, malice, oppression, or other special aggravation, the measure of the plaintiff's damages under this statute is compensation for the injury suffered.<sup>9</sup>

3. If the attachment is void *ab initio*, or an officer levies a valid attachment against the property of A. on the property of B., then the officer and the plaintiff in the attachment also, if he

4. *Dorr v. Rohr*, 82 Va. 359; *Capehart v. Cunningham*, 12 W. Va. 750; *Haymond v. Camden*, 22 W. Va. 180; *Earle v. McVeigh*, 91 U. S. 503; *Windsor v. McVeigh*, 93 U. S. at p. 279. *Ante*, § 192.

5. *Ante*, § 365; Code, § 2968.

6. *Ante*, § 365; *Davis v. Com.*, 13 Gratt. 139, 143, 145, 151.

7. Code, § 2898.

8. Report of Revisors, p. 735, and note.

9. *Fishburne v. Engledove*, 91 Va. 548, 22 S. E. 354.

directs it, is liable for the damages sustained in the common law actions of trespass or trespass on the case. The officer and the sureties on his official bond would be likewise liable in an action on that bond for the damages sustained.<sup>10</sup>

4. If the attachment was sued out maliciously and without probable cause and the proceeding is ended in a manner not unfavorable to the attachment debtor, then he may bring an action of trespass on the case for malicious prosecution of the attachment. We have seen that in the attachment proceeding it is not sufficient for the creditor to show that he had *probable* cause to believe that grounds for attachment existed, but the facts sworn to must actually exist, so that however good cause the plaintiff may have had for suing out his attachment, the attachment will fall if the ground does not actually exist. If the facts sworn to did not actually exist, then there was not actual or real cause for the attachment, but in the present proceeding for malicious prosecution, if the attachment creditor had *probable* cause for believing that ground for attachment existed, the action for malicious prosecution will be defeated; and the burden is on the plaintiff in the action for malicious prosecution to show that the defendant did not have probable cause for suing out the attachment. In other words, *probable* cause for believing in the existence of the ground for the attachment will defeat the action for malicious prosecution, but will not sustain the attachment. In order to sustain the attachment, there must have existed actual cause.<sup>11</sup>

### § 370. Holding defendant to bail.

If, in any action or suit, the plaintiff, his agent or attorney, shall make affidavit before the court in which it is pending, or the judge thereof in vacation, or a justice, stating that the plaintiff has cause of action or suit against the defendant, the amount and justice of his claim, and that there is probable cause for believing that the defendant is about to quit the State unless he be forthwith apprehended, it shall be lawful for such court, judge

10. *Davis v. Com.*, 13 Gratt. 142; *Sangster v. Com.*, 17 Gratt. 124.

11. *Spengler v. Davy*, 15 Gratt. 381; *Claffin v. Steenbock*, 18 Gratt. 842; *Ogg v. Murdock*, 25 W. Va. 145; 1 Va. Law Reg. 232. See *ante*, § 368, p. 717.

or justice to direct that such defendant shall be held to bail for such sum as the court, judge or justice may think fit, and thereupon the plaintiff may sue out of the clerk's office in such action or suit a writ of *capias ad respondendum* against the defendant.<sup>12</sup> It will be observed that this *capias* can be issued only in a pending action or suit, therefore the action or suit must be first instituted. The plaintiff when he makes this affidavit must believe that the facts sworn to therein are true, and he must have been justified in his belief from the facts then known to him.<sup>13</sup> Upon this *capias* the officer arrests the defendant and confines him in jail, unless he gives bond and security with condition that if judgment or decree shall be rendered against him, upon which a writ of *feri facias* may issue and interrogatories be filed with a commissioner of the court wherein such judgment or decree is rendered, he will, at such time as the commissioner shall issue a summons to answer such interrogatories, be in the county or corporation in which such commissioner may reside, and will, within the time prescribed in such summons, file proper answers upon oath to such interrogatories, and make such conveyance and delivery of his property as is required by law, or else that he will perform and satisfy the judgment of decree of the court.<sup>14</sup> This bond which is to be given by the defendant may be taken by the officer making the arrest, or by the court from which the *capias* issued, or the judge thereof in vacation, or by the clerk of such court, but not by the justice.<sup>15</sup> Before the plaintiff can sue out such a *capias*, however, he or some other person for him is required to file in the clerk's office bond with surety approved by the clerk in a penalty equal to the sum in which the defendant is directed to be held to bail, payable to the defendant, with condition to pay all costs and damages which may be awarded against the plaintiff, or sustained by the defendant by reason of his arrest under such *capias*.<sup>16</sup> While the defendant is in custody, the

12. Code, § 2991.

13. *Forbes v. Hagman*, 75 Va. 168; *Spengler v. Davy*, 15 Gratt. 381.

14. Code, § 2992.

15. Code, § 2993.

16. Code, § 2997.

plaintiff, without having a judgment against him, may file interrogatories to him in like manner as might be done if judgment had been obtained, and a *feri facias* thereon had been delivered to an officer. The court wherein the case is pending, or the judge thereof in vacation, may, after reasonable notice to the plaintiff or his attorney, discharge the defendant from custody unless interrogatories be filed within such time as the said court or judge may deem reasonable, or, though interrogatories be filed, may discharge him when proper answers thereto are filed and proper conveyance and delivery made.<sup>17</sup> This statute applies to a defendant in custody of his bail as well as to a defendant in jail.<sup>18</sup> The conveyance required of the defendant is to be made to the officer making the arrest, or, if for any reason it cannot be made to him, then to such officer as the court or judge may direct. The interrogatories, answers, and report of the commissioner are to be returned to the court in which the case is pending, and filed with the papers in such case, and the court may make such order as it may deem right as to the sale and proper application of the estate conveyed and delivered.<sup>19</sup>

### § 371. Appeal and error.

A non-resident defendant who has not appeared nor been served with process is given a limited time within which to apply to the court to set aside any order made to his prejudice and to rehear the case *de novo*,<sup>20</sup> and he cannot appeal until after

17. Code, § 2995.

18. *Levy v. Arnsthall*, 10 Gratt. 641.

19. Code, § 2996.

20. Section 2986 of the Code is as follows: "If a defendant, against whom, on publication, judgment or decree is rendered under any such attachment, or his personal representative, shall return to or appear openly in this State, he may, within one year after a copy of such judgment or decree shall be served on him at the instance of the plaintiff, or within five years from the date of the decree or judgment, if he be not so served, petition to have the proceedings reheard. On giving security for costs, he shall be admitted to make defence against such judgment or decree, as if he had appeared in the case before the same was rendered, except that the title of any *bona fide* purchaser to any property, real or personal, sold under such attachment, shall not be brought in question or impeached. But this

such application has been made and decided.<sup>21</sup> But it is provided by the statute that this right to a rehearing shall not apply to any case "in which the petitioner or his decedent was served with a copy of the attachment, or with process in the suit wherein it issued, more than sixty days before the date of the judgment or decree, or to any case in which he appeared and made defence." This provision of the statute with reference to serving the attachment or process sixty days before the date of the judgment or decree, however, refers only to such a service in the proceedings in the State, and not to a service out of the State. Hence, if a copy of the attachment or process is sent outside of the State and served on a non-resident defendant, such service does not debar the defendant from making the application for a rehearing provided by the statute. Such service has no greater effect than an order of publication duly published and posted.<sup>22</sup>

Where the right to an attachment is the only ground of jurisdiction, it is a proceeding *in rem*, and the regularity of the proceeding is jurisdictional and must appear on the face of the record, that is, the trial court has no jurisdiction of the subject matter, if the proceeding be irregular, and objection on that account may be made for the first time in the appellate court.<sup>23</sup> Jurisdiction of the subject matter of litigation is always fixed by the legislature, and can neither be changed by the agreement of parties, nor conferred by a failure to object on that account. Such objections may always be made for the first time in the appellate court, and will even be noticed by the court *ex officio*. Hence when an attachment at law is sought to be sued out as ancillary to an action at law, the trial court has no jurisdiction of the attachment at all unless there is a pending action, and the objection that no such action was pending at the time the attachment was sued out may be made for the first time in the appel-

section shall not apply to any case in which the petitioner, or his decedent, was served with a copy of the attachment, or with process in the suit wherein it issued, more than sixty days before the date of the judgment or decree, or to any case in which he appeared and made defence."

21. *Barbee v. Pannell*, 6 Gratt. 442.

22. *Anderson v. Johnson*, 32 Gratt. 558.

23. *Jones v. Anderson*, 7 Leigh 308.

late court.<sup>24</sup> If there be judgment by default in such case against a non-resident who has not appeared or been served with process, any irregularity in the proceedings may be raised in the appellate court for the first time by another defendant in the case, or the court may, of its own motion, dismiss the proceeding as it is one that is harsh towards the debtor and his creditors, and the proceeding must show on its face that the requirements of the statute have been substantially complied with.<sup>25</sup> But if there has been an appearance to the merits by the attachment debtor, irregularities in the affidavit or other proceedings not noticed in the trial court will be deemed to have been waived.<sup>26</sup>

24. *Furst v. Banks*, 101 Va. 208, 43 S. E. 360.

25. *McAllister v. Guggenheimer*, 91 Va. 317, 21 S. E. 475.

26. *Sims v. Tyrer*, 96 Va. 5, 26 S. E. 508.

## CHAPTER XLIV.

### WRITS OF ERROR.

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§ 372. Difference between writs of error and appeals.

*Appeals.*—For practical purposes, though perhaps not technically accurate, we may say that, under existing rules of practice, an appeal lies from a lower to a higher court, and is a continuation of the same case upon the same evidence before the higher tribunal, and the case is simply heard *de novo* before the higher tribunal. It is a rehearing before the higher court, with no presumptions against the appellant, except in case of doubt, where the decision of the lower tribunal will be affirmed. With this exception, the decision of the lower court has no effect. An appeal lies in a suit in chancery. The party taking the appeal is called the appellant. The defendant to the appeal is called the appellee.

*Writs of Error.*—A writ of error lies in a common law action or criminal case, and is in the nature of a new suit. It is awarded by a superior to an inferior court of record, and operates to transfer the record of the case (but nothing else) to the superior court, where the judgment of the inferior court is reviewed. Upon such review the appellate court either affirms or reverses the judgment of the lower court, and if it reverses, enters such judgment as the inferior court ought to have entered.<sup>1</sup> On a writ of error, generally, only questions of law are reviewed. In the Federal courts, and in many of the state courts, the findings of the trial courts upon questions of fact are conclusive.<sup>2</sup>

In Virginia and many other states questions of fact may be reviewed, but the verdict of a jury, or the judgment of the trial court on a question of fact, will not be reversed unless plainly contrary to the evidence, or without evidence. The party who obtains a writ of error is called the plaintiff in error; the opposing party the defendant in error.

*Supersedeas.*—A supersedeas, as used in Virginia, is altogether an ancillary process, addressed to the officer charged with the

1. Code, § 3485.

2. Van Stone v. Stillwell, 142 U. S. 128; 2 Encl. Pl. & Pr. 396.

but see *Humphreys v. Hall* 60 W. Va. 106, 116 Am. St. 862

execution of the judgment of the trial court, directing him to supersede (suspend, stop) the execution of the judgment of the court below, and also directing him to summon the defendant in error to the appellate court, there to have a rehearing of the whole matter. It is simply an adjunct of an appeal or writ of error to stop the execution of the decree or judgment of the court below, pending the hearing in the appellate court. It is not a substitute for a writ of error as has been stated.<sup>3</sup> There may be an appeal or writ of error with or without a supersedeas, but with us we have no such independent proceeding as a supersedeas. In practice, the supersedeas is never issued alone, but always as an ancillary process.<sup>4</sup>

3. *Williams v. Bruffy*, 102 U. S. 248.

4. Form of Writ of Error and Supersedeas in Actual Use:

*The Commonwealth of Virginia,*

*To the Sheriff of the County of Henrico, Greeting:—*

*We command you, that from all further proceedings on a judgment pronounced by the Circuit Court of the City of Richmond on the first day of January, 1905, in a suit in which John Doe was Plaintiff, and John Brown was Defendant you altogether supersede, which judgment before the judges of our Supreme Court of Appeals, in the City of Richmond, for cause of error in the same to be corrected, on the petition of the said defendant we have caused to come. We also command you, that you give notice to the said plaintiff that he be before the judges of our said Supreme Court of Appeals, at the City aforesaid, on the first Monday in May next, then and there to have a rehearing of the whole matter in the judgment aforesaid contained. And have then there this writ.*

WITNESS—H. STEWART JONES, Clerk of our said Supreme Court of Appeals, at Richmond, this 10th day of February, 1905, and in the 129th year of the Commonwealth.

MEMO.—The above writ of supersedeas is not to be effectual, until the petitioner, or some one for him shall enter into bond, with sufficient security in the Clerk's Office of the said Circuit Court, in the penalty of one thousand dollars, conditioned as the law directs, and a certificate of the execution thereof, together with the name or names of the surety or sureties, shall be endorsed hereon by the Clerk of the said court.

Teste:.....  
 Court Clerk.

A Copy-Teste:

.....  
 Court Clerk.

The course of appeal in Virginia is from the circuit and corporation, or city courts, to the Court of Appeals. Circuit and corporation courts are courts of co-ordinate jurisdiction under the constitution, and in no case can there be an appeal from one to the other. An act of the Legislature conferring such right of appeal would be unconstitutional.<sup>5</sup>

### § 373. Errors to be corrected in trial court.

A judgment on confession is equal to a release of errors, and from it no appeal lies.<sup>6</sup> The statute of jeofails cures most of the defects, imperfections or omissions in pleadings which could not have been regarded on demurrer, or which might have been taken advantage of on demurrer but were not.<sup>7</sup> Clerical errors and errors of fact may generally be corrected by the trial court, or if in a circuit court, by the judge thereof in vacation, on motion after reasonable notice.<sup>8</sup>

Upon a judgment *by default* the court rendering such judgment, or the judge thereof in vacation, may on motion reverse such judgment for any error for which an appellate court might reverse it, and give such judgment or decree as ought to have been given. And even when the judgment is *not by default*, but the defendant has appeared, if there be any mistake, miscalculation or misrecital of any name, sum, quantity or time, and the same is right in any part of the record or proceedings, or when there is a verdict or any other writing whereby such judgment may be safely amended, or if a verdict is for more damages than are mentioned in the declaration, such court, or the judge thereof in vacation, may amend such judgment, according to the truth and justice of the case, or the party obtaining the judgment may, in the same court at any future term, by an entry of record, or in vacation by a writing signed by him, attested by the clerk and filed among the papers of the case, release a part of the amount

5. Virginia Constitution (1902), § 98; *Watson v. Blackstone*, 98 Va. 618, 38 S. E. 939.

6. Code, § 3448.

7. Code, § 3449.

8. Code, § 3447.

of his judgment, and such release shall have the effect of an amendment and make the judgment operate only for what is not released. "Every motion under this section shall be after reasonable *written* notice to the opposite party, his agent or attorney in fact or at law, and shall be within three years from the date of the judgment."<sup>9</sup> This section does not apply to errors of judgment where there has been an appearance. These are final after the adjournment of the term at which the judgment is entered, and not subject to be reopened by the trial court.<sup>10</sup> If the error be clerical, and there be a writing in the record by which it may be safely corrected, the court may enter, in a proper case, *nunc pro tunc* orders in order to show the regularity and validity of its proceedings.<sup>11</sup> For errors of the class which may be corrected in the trial court, no writ of error lies from the appellate court until a motion has been made and overruled in whole or in part, as above mentioned, in the trial court.<sup>12</sup> But "when an appellate court hears a case wherein an appeal, writ of error or *supersedeas* has been allowed, if it appears that, either before or since the same was allowed, the judgment or decree has been so amended, the appellate court shall affirm the judgment or decree, unless there be other error; and if it appear that the amendment ought to be, and has not been made, the appellate court shall make such amendment, and affirm in like manner the judgment or decree, unless there be other error."<sup>13</sup> It has been suggested that the court of appeals cannot correct clerical errors in its own decrees when the application is made after the expiration of the period for rehearing.<sup>14</sup>

### § 374. Jurisdiction of the Court of Appeals of Virginia.

*Original Jurisdiction.*—The jurisdiction of the Court of Ap-

9. Code, § 3451.

10. *Shipman v. Fletcher*, 91 Va. 473, 22 S. E. 458.

11. *Powers v. Carter Coal Co.*, 100 Va. 455, 41 S. E. 867.

12. Code, § 3452; *Smith v. Powell*, 98 Va., at page 437, 36 S. E. 522.

13. Code, § 3452; Code W. Va. § 4037; *Farmers' Nat'l Bank v. Howard* (W. Va., Oct. 8, 1912), 76 S. E. 122.

14. 7 Va. Law Reg. 532, 576.

peals of Virginia is prescribed by the constitution and the statutes passed in pursuance thereof.<sup>15</sup>

15. Section 88 of the Constitution (1902) is as follows:

"The Supreme Court of Appeals shall consist of five judges, any three of whom may hold a court. It shall have *original* jurisdiction in cases of *habeas corpus*, *mandamus*, and prohibition; but in all other cases, in which it shall have jurisdiction, it shall have appellate jurisdiction only.

"Subject to such reasonable rules, as may be prescribed by law, as to the course of appeal, the limitation as to time, the security required, if any, the granting or refusing of appeals, and the procedure therein, it shall, by virtue of this Constitution, have appellate jurisdiction in all cases involving the constitutionality of a law as being repugnant to the Constitution of this State or of the United States, or involving the life or liberty of any person; and it shall also have appellate jurisdiction in such other cases, within the limits hereinafter defined, as may be prescribed by law; but no appeal shall be allowed to the Commonwealth in any case involving the life or liberty of a person, except that an appeal by the Commonwealth may be allowed by law in any case involving the violation of a law relating to the state revenue. No bond shall be required of any accused person as a condition of appeal, but a supersedeas bond may be required where the only punishment imposed in the court below is a fine.

"The court shall not have jurisdiction in civil cases where the matter in controversy, exclusive of costs and of interest accrued since the judgment in the court below, is less in value or amount than three hundred dollars, except in controversies concerning the title to, or boundaries of land, the condemnation of property, the probate of a will, the appointment or qualification of a personal representative, guardian, committee, or curator, or concerning a mill, roadway, ferry, or landing, or the right of the State, county, or municipal corporation, to levy tolls or taxes, or involving the construction of any statute, ordinance or county proceeding imposing taxes; and, except in cases of *habeas corpus*, *mandamus*, and prohibition, the constitutionality of a law, or some other matter not merely pecuniary. After the year nineteen hundred and ten the General Assembly may change the jurisdiction of the court in matters merely pecuniary. The assent of at least three of the judges shall be required for the court to determine that any law is, or is not, repugnant to the constitution of this State or of the United States; and if, in a case involving the constitutionality of any such law, not more than two of the judges sitting agree in opinion on the constitutional question involved, and the case cannot be determined, without passing on such question, no decision shall be rendered therein, but the case shall be reheard by a full court; and in no case where the jurisdiction of the court depends solely upon

It will be observed upon reading the constitution and statutes quoted in the margin that the jurisdiction of the Court of Appeals is for the most part appellate, but that it has original juris-

the fact that the constitutionality of a law is involved, shall the court decide the case upon its merits, unless the contention of the appellant upon the constitutional question be sustained. Whenever the requisite majority of the judges sitting are unable to agree upon a decision, the case shall be reheard by a full bench, and any vacancy caused by any one or more of the judges being unable, unwilling, or disqualified to sit, shall be temporarily filled in a manner to be prescribed by law."

For a succinct statement of the differences between the Constitutions of 1869 and 1902, see Mr. Pollard's note to § 3455 of Code of 1904.

Sections 3454 and 3455 of the Code are as follows:

Sec. 3454: "Any person who thinks himself aggrieved by any judgment, decree, or order in a controversy concerning the title to or boundaries of land, the condemnation of property, the probate of a will, the appointment or qualification of a personal representative, guardian, committee, or curator, or concerning a mill, roadway, ferry, wharf, or landing, or the right of the State, county, or municipal corporation to levy tolls or taxes, or involving the construction of any statute, ordinance, or county proceeding imposing taxes, or by any final order, judgment, or finding of the State corporation commission, irrespective of the amount involved, except the action of the said commission in ascertaining the value of any property or franchise of a railroad or canal company; for the purpose of taxation and assessing taxes thereon, or any person who is a party to any case in chancery wherein there is a decree or order dissolving an injunction, or requiring money to be paid, or the possession or title of property to be changed, or adjudicating the principles of a cause, or any person thinking himself aggrieved by the order of a judge or court refusing a writ of quo warranto, or by the final judgment on said writ, or by a final judgment, decree, or order in any civil case, may present a petition, if the case be in chancery, for an appeal from the decree or order; and if not in chancery, for a writ of error or supersedeas to the judgment or order, except as provided in section thirty-four hundred and fifty-five; provided, however, that the Commonwealth may take an appeal from the action of the State corporation commission in all cases, irrespective of the amount involved."

Sec. 3455: "No petition shall be presented for an appeal from, or writ of error or supersedeas to, any final judgment, decree, or order, whether the Commonwealth be a party or not, which shall have been rendered more than one year before the petition is presented, except as provided by section thirty-four of an act relating to the State corporation commission, approved April fifteenth, nineteen hundred and

diction in cases of *mandamus*, and prohibition (except where the collection of public revenue is affected)<sup>16</sup> and of the writ of *habeas corpus*. It has no original jurisdiction in cases of *quo warranto*.<sup>17</sup> In matters of original jurisdiction the amount in controversy is wholly immaterial.<sup>18</sup>

The provision of the constitution of 1869 that the Court of Appeals shall have appellate jurisdiction only, except in cases of *habeas corpus*, *mandamus* and prohibition, did not *ex proprio vigore* confer jurisdiction on it. The exception simply invested the court with the capacity to receive original jurisdiction in that class of cases in event the Legislature should see fit to confer it, and did not of itself confer the jurisdiction.<sup>19</sup> The language of the present constitution is: "It shall have original jurisdiction in cases of *habeas corpus*, *mandamus* and prohibition," which seems to be mandatory and plainly self-executing.<sup>20</sup>

Applications to the court for the exercise of its original jurisdiction in issuing writs of *mandamus* in cases which might have been readily presented to inferior courts became so frequent as to necessitate some regulation which would prevent the disturbance of the regular calling of the docket. This led to the adoption of the rule of court set forth in the margin.<sup>21</sup>

three; nor to any judgment of a circuit or corporation court, which is rendered on an appeal from a judgment of a justice, except in cases where it is otherwise expressly provided; nor to a judgment, decree, or order of any court when the controversy is for a matter less in value or amount than three hundred dollars, exclusive of costs, unless there be drawn in question a freehold or franchise or the title or bounds of land, or the action of the State corporation commission or some matter not merely pecuniary; provided, however, that if the final decree from which an appeal is asked is a decree refusing a bill of review to a decree rendered more than six months prior thereto, no appeal from or supersedeas to such decree so refusing a bill of review shall be allowed unless the petition be presented within six months from the date of such decree."

16. Code, § 3286.

17. *Watkins v. Venable*, 99 Va. 440, 39 S. E. 147.

18. *Price v. Smith*, 93 Va. 14, 24 S. E. 474.

19. *Prison Association v. Ashby*, 93 Va. 667, 25 S. E. 893.

20. Constitution of Virginia, § 88.

21. "Applications addressed to this court for the issue of writs other than the writ of *habeas corpus*, by virtue of its original juris-

*Appellate Jurisdiction.*—The appellate jurisdiction of the court may be, (1) in matters not pecuniary, or, (2) in matters pecuniary.

(1) *Matters Not Merely Pecuniary.*—Where the matter is not merely pecuniary the amount in controversy is wholly immaterial. Matters not merely pecuniary embrace controversies concerning the title to or boundaries of land, the condemnation of property, the probate of a will, the appointment or qualification of a personal representative, guardian, committee or curator, controversies concerning a mill, roadway, ferry, wharf or landing, the right of the state, county, or municipal corporation to levy tolls or taxes, controversies involving the construction of any statute, ordinance or county proceeding imposing taxes, any final order, judgment or finding of the State Corporation Commission, irrespective of the amount involved (with a single exception not necessary to be here mentioned), controversies involving the constitutionality of a law, the refusal of a court or judge to grant a writ of *quo warranto*, and final judgments on said writ.<sup>22</sup>

No appeal, however, lies directly to the Court of Appeals from a judgment of a justice of the peace for less than \$10.00, although the judgment involves the constitutionality of a law. The machinery provided for the Court of Appeals in exercising its appellate jurisdiction is applicable exclusively to appeals from decisions of courts of record, which can furnish transcripts of the records to be reviewed. Provision is made for appeals from justices to circuit and corporation courts and thence to the Court of Appeals in cases involving the constitutionality of a law.<sup>23</sup>

Although § 88 of the constitution gives the right of appeal to diction, will be placed upon the general docket as they mature, and be heard when reached, upon the regular call thereof; subject, however, to be advanced for good cause shown in accordance with rule six.

“The records shall be printed under the supervision of the clerk, as in other cases, and must be submitted upon printed briefs, unless the court shall otherwise direct.” Rule XIX, 111 Va. p. X.

22. Code, §§ 3454, 3455.

23. *South. Ry. Co. v. Hill*, 106 Va. 501, 56 S. E. 278.

the Court of Appeals in controversies concerning "the condemnation of property," it is to be observed that the power of eminent domain is a legislative power to be exercised by the legislature as it pleases, subject only to the constitutional provisions that private property shall not be taken for public uses without the consent of the owner, except upon making just compensation therefor, nor shall the owner be deprived of his property without due process of law. But due process of law in this connection only requires that the power shall be exercised in subordination to established principles. The ascertainment of damages, however, is a judicial question, and hence it is entirely competent for the legislature to refuse an appeal to the Court of Appeals on the question of the right to condemn property, and restrict the appeal entirely to the question of the damages allowed. This is not in contravention of § 88 of the constitution.<sup>24</sup>

If jurisdiction is invoked on the ground that a freehold, or franchise, or the title or boundaries of land, or any other matter not merely pecuniary is drawn in question, these jurisdictional matters must be directly the subject of controversy, and not merely incidentally and collaterally involved.<sup>25</sup> The jurisdiction of the court must affirmatively appear from the record, and the burden is on the plaintiff in error to show the existence of jurisdiction, but it does so appear when the court can see that the judgment of the lower court necessarily involved the constitutionality of some statute or ordinance, or drew in question some right under the State or Federal constitution. Any proceeding which necessarily puts their validity in issue, whether it be by demurrer, plea, instruction or otherwise, is sufficient to give the court jurisdiction of the case.<sup>26</sup> But the question of the constitutionality of a statute must in some way be called in question and decided in the trial court. Error committed in the construction and interpretation of a statute will not, of itself, confer jurisdiction upon the Court of Appeals. The constitutionality of a statute as distinguished from its interpretation is the source of appellate ju-

24. *Wilburn v. Raines*, 111 Va. 334, 68 S. E. 993.

25. *Cook v. Daugherty*, 99 Va. 590, 39 S. E. 223.

26. *Adkins v. Richmond*, 98 Va. 91, 34 S. E. 967.

risdiction.<sup>27</sup> In the case of unlawful entry and detainer the Court of Appeals has jurisdiction regardless of the value of the land, as the case concerns the title to land within the meaning of the constitution.<sup>28</sup> It is immaterial that possession only of land is the subject of controversy.<sup>29</sup>

If the validity of a deed of trust securing the payment of less than \$300.00 is assailed, a writ of error lies, as it is a controversy concerning the title to land,<sup>30</sup> though if it is sought to subject land, no matter of what value, to the payment of a judgment for less than \$300.00 no appeal lies, as the judgment is the matter in controversy, and is for less than \$300.00.<sup>31</sup> The right to subject lands to a tax or to a judgment is not a controversy concerning the title to land.<sup>32</sup> The right, however, of a state to *impose a tax* is a franchise, and the amount is wholly immaterial.<sup>33</sup> Mandamus and prohibition are also cases not pecuniary in which a writ of error lies from the Court of Appeals to an inferior court.<sup>34</sup>

No writ of error lies in any case at law until after *final judgment has been rendered* in the trial court.<sup>35</sup> An exception, however, exists in West Virginia, where it is declared by statute that, in any civil case where there is an order granting a new trial or re-hearing, an appeal may be taken from the order without waiting for the new trial or re-hearing to be had.<sup>36</sup>

(2) *Matters Pecuniary*.—Where the matter is merely pecuniary, the amount in controversy must not be less than three hundred dollars, exclusive of costs. Interest may be calculated

27. *Hulvey v. Roberts*, 106 Va. 189, 55 S. E. 585.

28. *Pannill v. Coles*, 81 Va. 380; *Rathbon v. Ranch*, 5 W. Va. 79.

29. *Gorman v. Steed*, 1 W. Va. 1.

30. *Sellers v. Reed*, 88 Va. 377, 13 S. E. 754.

31. *Cash v. Humphreys*, 98 Va. 477, 36 S. E. 517.

32. *Florance v. Morien*, 98 Va. 26, 34 S. E. 890; *Cash v. Humphreys*, *supra*.

33. *Staunton v. Stout*, 86 Va. 32, 10 S. E. 5.

34. *Price v. Smith*, 93 Va. 14, 24 S. E. 474.

35. Code, § 3454; *Smiley v. Provident Trust Co.*, 106 Va. 787, 56 S. E. 738; *Lockridge v. Lockridge*, 1 Va. Dec. 61; *Damron v. Ferguson*, 32 W. Va. 33, 9 S. E. 39.

36. Code, W. Va., § 4038, cl. 9; *Gwynn v. Schwartz*, 32 W. Va. 487.

as a part of the amount in controversy up to the *date of the judgment of the trial court, but not later*.<sup>37</sup> So, also, where it is clear that if the plaintiff is entitled to recover at all he is entitled to recover interest on the amount claimed from the time his demand was asserted, and the whole claim has been rejected, such interest, up to the date of rejection, is to be taken into account in ascertaining the jurisdiction of the appellate court.<sup>38</sup>

### § 375. Amount in controversy.

*Virginia Doctrine.*—The provision of the Virginia constitution (1902) allowing an appeal or writ of error in certain cases involving not less than three hundred dollars, is not self-executing, and until the Legislature saw fit to confer it, the Court of Appeals could not exercise such jurisdiction.<sup>39</sup>

Nothing, perhaps, in connection with appeals and writs of error has given rise to so much controversy as the meaning of the term "amount in controversy." It is said to be of the same import as the term "matter in dispute," found in the judiciary act regulating the appellate jurisdiction of the Supreme Court, and that the construction of the two phrases has been the same. Both terms have been held to mean the subject of litigation, the matter for which the suit is brought, and upon which issue is joined, and in relation to which jurors are called and examined.<sup>40</sup>

Courts, however, have not agreed upon the proper meaning of the term, and the decisions, even of the same courts, have not always been harmonious. The Court of Appeals of Virginia has said, in a number of cases, that, where the plaintiff appeals, the amount claimed by him in his declaration in the court below is the matter in controversy as to him, although the judgment be for less, or for the defendant; but where the *defendant appeals*, the amount in controversy as to him is the judgment at its date.<sup>41</sup>

37. *Gage v. Crockett*, 27 Gratt. 735.

38. *Herring v. Ches. & W. R. Co.*, 101 Va. 778, 45 S. E. 32. See, also, *Sanger v. Ches. & O. R. Co.*, 102 Va. 86, 45 S. E. 750.

39. *Flanary v. Kane*, 102 Va. 547, 46 S. E. 312, 681.

40. *Harman v. City of Lynchburg*, 33 Gratt. 37; *Lee v. Watson*, 1 Wall. 337.

41. *Gage v. Crockett*, 27 Gratt. 735; *Campbell v. Smith*, 32 Gratt. 288; *Harman v. City of Lynchburg*, 33 Gratt. 37.

These cases were all correctly decided on their merits, but in no one of them was the statement as to the plaintiff's right of appeal, now under discussion, necessary to the decision of the case; and in a later case, although the same statement is repeated as to the plaintiff's right of appeal, it is said that this rule is not universal. Judge Staples, speaking for the court, after laying down the above rule, says: "Upon examining these cases it will be found they do not lay down the rule universally, but subject to exceptions and modifications which must be applied from time to time as new cases arise."<sup>42</sup> He then proceeds to discuss the facts of the case under consideration and holds that where, on a money demand, the *difference* between the amount decreed to be paid in the court below, and the amount of the claim asserted by the plaintiff in that court is not sufficient to give the Court of Appeals jurisdiction, his appeal should be dismissed.

As to the plaintiff, it has been held that the amount in controversy as to him is the difference between the amount claimed on the date of the decree appealed from, and the amount for which a decree was rendered in his favor.<sup>43</sup> This question arose in a chancery suit, but the same rule would apply to an action at law. This principle has been very recently applied in another case arising in chancery. The question was whether or not the holder of a certified check on a suspended bank had accepted it as payment of a debt. The trial court held that it had been so accepted. The check was for three hundred dollars, and the receivers of the bank had declared dividends to the amount of \$112.50 (which the holder declined to accept), leaving a balance still due on the check of \$187.50. The holder of the certified check appealed, but the appeal was dismissed on the ground that the amount in controversy in the Court of Appeals was the amount of loss sustained by the holder of the check, which was measured by the amount of the check less any dividends which had been or might be declared out of the assets of the bank.<sup>44</sup> The cases above cited are believed to state the doctrine in Virginia as to the plain-

42. *Bachelder v. Richardson*, 75 Va. 835.

43. *Ware v. Bldg. Asso.*, 95 Va. 680, 29 S. E. 744. See, also, *Marchant v. Healy*, 94 Va. 614, 27 S. E. 464.

44. *Lamb v. Thompson*, 112 Va. 134, 70 S. E. 507.

tiff's right to a writ of error though it is admitted that there are some cases which probably cannot be reconciled with them.

If the defendant claims and is allowed a set-off which exceeds the jurisdictional amount of the court, the amount in controversy, as to the plaintiff, is the amount allowed. Thus, where the plaintiff claimed three hundred and fifteen dollars (the jurisdictional amount of the court then being five hundred dollars), but the defendant claimed a set-off for five hundred and sixty dollars, and the trial court gave a judgment against plaintiff for the amount of the set-off, to wit: five hundred and sixty dollars, subject to plaintiff's claim of three hundred and fifty dollars, it was held that an appeal would lie at the instance of the plaintiff. In the course of the opinion it is said: "It is true that Bunting (the plaintiff) can satisfy the decree by the payment of a less sum than five hundred dollars, but it is also true that he is aggrieved by the full amount of the set-off established against him."<sup>45</sup> Here the "amount in controversy" consisted of the set-off allowed against the plaintiff. In the same case, if the defendant's set-off had been wholly disallowed, he would have been entitled to an appeal; or, if the plaintiff's claim had been wholly disallowed, and the defendant's set-off had been allowed only to the extent of two hundred dollars, the amount in controversy, as to the plaintiff, would have been the amount of his claim disallowed plus the amount allowed on defendant's set-off, thus making five hundred and fifteen dollars. A set-off is equivalent to an action, and where the amount of a set-off disallowed by the trial court exceeds three hundred dollars, the "amount in controversy" is within the jurisdiction of the Court of Appeals.<sup>46</sup>

Usually, if a party is not satisfied with a verdict or judgment of a trial court, the objection must be made in some way in the trial court, but attention is called to a Virginia case in which no such objection was made, and yet upon writ of error the losing party was allowed to take advantage of alleged irregularities of the judgment of the trial court. The plaintiff sued for one thousand dollars. There was a special verdict finding condi-

45. *Bunting v. Cochran*, 99 Va. 558, 39 S. E. 229.

46. *N. & W. Ry. Co. v. Potter*, 110 Va. 427, 66 S. E. 34.

tionally for the plaintiff the sum of \$242.25. Upon this special verdict the trial court rendered judgment for the *defendant*, but no objection was made to the verdict, nor was any motion made for a new trial, but the plaintiff obtained a writ of error, and it was held that the court had jurisdiction. It was evident that the plaintiff was willing to accept judgment for \$242.25, and hence made no objection to the verdict. This, then, would seem to have been the matter in controversy, and that the Court of Appeals had no jurisdiction, but it was held otherwise and a new trial was ordered. With deference, it is submitted that the conclusion was wrong.<sup>47</sup>

*West Virginia Doctrine.*—The amount in controversy, so far as the plaintiff is concerned, is the amount really claimed by him, which amount is to be ascertained according to the circumstances of each case from the pleadings, the evidence before the court or jury, or from affidavits, though it has been held that, generally, where the plaintiff appeals, the amount claimed by him in his declaration in the court below is the amount in controversy as to him, although the judgment may be for less or for the defendant.<sup>48</sup> Again it has been held that the amount claimed by the plaintiff in his declaration or bill, or by a defendant in his plea or answer or set-off, and not the amount found due to either, is the test of the right to appeal;<sup>49</sup> and in another case,<sup>50</sup> that in determining the question of jurisdiction in an action for the recovery of money on contract, the amount claimed in the *summons* must determine jurisdiction. The last two cases cited in the margin seem to be in conflict with earlier cases deciding that jurisdiction is to be determined by the amount in controversy in the appellate court.<sup>51</sup> Where the defendant appeals, generally, the amount of the judgment against him determines the jurisdiction of the appellate court.<sup>52</sup> But where

47. *McCrowell v. Burson*, 75 Va. 290. See, also, *Rhule v. Seaboard Ry. Co.*, 102 Va. 343, 46 S. E. 331.

48. *Marion v. Craig*, 18 W. Va. 559.

49. *Faulconer v. Stinson*, 44 W. Va. 546, 29 S. E. 1011.

50. *Case v. Sweeny*, 47 W. Va. 638, 35 S. E. 853.

51. *Rhymer v. Hawkins*, 18 W. Va. 309; *Grafton R. Co. v. Foreman*, 24 W. Va. 662.

52. *Marion v. Craig*, 18 W. Va. 559.

the defendant claims a set-off above the jurisdictional amount of the appellate court, and the set-off is wholly disallowed, the defendant may appeal.<sup>53</sup>

*United States Doctrine.*—There have been many decisions by the Supreme Court of the United States, and they are apparently not harmonious. In *Hilton v. Dickinson*, 108 U. S. 165, the previous cases are all reviewed by Chief Justice Waite, and the conclusion reached that the “matter in dispute” means the matter in dispute in the *appellate court*, which is the difference between the amount claimed and the judgment rendered. If the defendant claims to defeat the plaintiff’s demand, the matter in dispute as to him is the judgment against him. If the judgment is for the defendant, generally, the matter in dispute as to the plaintiff is the amount claimed by him in the *body of the declaration*, and not merely the damages alleged in the prayer for judgment at its conclusion. If a counter claim is set up by the defendant, the matter in dispute as to him is the difference between the counter claim and the judgment, and as to the plaintiff the difference between the amount claimed and the recovery. In other words, it is the *real difference* in each case between what the party actually claims and the amount accorded him.

*General Doctrine.*—It is impossible to reconcile the decisions made upon this subject, but the views expressed by Chief Justice Waite, in the case last mentioned, and the similar conclusion reached by the Court of Appeals of Virginia in some of the cases hereinbefore cited, seem to accord with justice, and to be but a fair and reasonable interpretation of the words used. No generalization can be made which will fit the holdings in the different jurisdictions, and the decisions of the particular States will have to be consulted whenever the question arises. It is said that in some States the amount in controversy is the amount claimed in the lower court, no matter who appeals, though with some conflict of decisions in the same courts. Under this head are classed California, Connecticut, Iowa, Louisiana, Massachusetts and Washington.<sup>54</sup> In Illinois and Wisconsin it is said

53. *Dickey v. Smith*, 42 W. Va. 805, 26 S. E. 373; *Faulconer v. Stinson*, 44 W. Va. 546, 29 S. E. 1011.

54. 1 Encl. Pl. & Pr. 733.

that the right of appeal seems to be determined by the amount of recovery, no matter who appeals. *On principle* it would seem that the amount in controversy means *in controversy in the appellate court* and not in the trial court, and this amount is measured by the difference between what was claimed by the party in the trial court and the amount allowed him in that court; and, in ascertaining the amount claimed in the trial court, we should look (in case of the plaintiff) to the amount claimed by him in the *body of the declaration* and not merely to the *ad damnum* clause. The plaintiff in error is not making any complaint of what he has received, but of what he has not received, and so much of what he claimed in the trial court as was not allowed him in that court represents the matter in controversy in the appellate court.<sup>55</sup>

Usually it is incumbent on the plaintiff in error to show affirmatively that the amount in controversy is within the jurisdictional limit of the court, but where the matter is pecuniary, and the amount awarded in the trial court is in excess of such jurisdictional limit, and it is claimed to have been *reduced by payments*, the burden is on the defendant in error to show that fact.<sup>56</sup> If the record in the trial court does not show the value of the thing in controversy, and the form of the proceeding does not require it to be shown, it may be shown by affidavits filed in the appellate court.<sup>57</sup>

*Change in Jurisdictional Amount.*—In the absence of some exception in the statute, the right of appeal depends upon the law in force at the time the appeal is granted, and not when the judgment was rendered. The right of appeal is regarded as a privilege, and not as a vested right. A new statute increasing the pecuniary limit of the jurisdiction of the appellate court does not apply to writs of error which have been sued out and per-

55. *Hilton v. Dickinson*, 108 U. S. 165; *Batchelder v. Richardson*, 75 Va. 835; *Marchant v. Healy*, 94 Va. 614, 27 S. E. 464; *Ware v. Building Asso.*, 95 Va. 680, 29 S. E. 744; *Lamb v. Thompson*, 112 Va. 134, 70 S. E. 507.

56. *Williamson v. Payne*, 103 Va. 551, 49 S. E. 660.

57. *Hannah v. Bank*, 53 W. Va. 82, 44 S. E. 152; *Lamb v. Thompson*, 112 Va. 134, 70 S. E. 507.

fectured before the new law takes effect, but does apply to cases arising before the new law went into effect where the application for the writ of error is made afterwards.<sup>58</sup>

*Aggregate of Several Claims.*—It often happens in equity that several independent claims of different creditors are asserted against a common debtor—for instance, against an executor, administrator, or a trustee—though such a state of facts can seldom be presented at law. If there is no joint interest, or community of interest between them, but each relies upon an independent contract which he has the right to enforce without regard to the other, and the interest of no one amounts to as much as \$300.00 (the minimum jurisdictional amount), no one of them can appeal from an adverse decree; nor can there be a joint appeal, although the aggregate of the several claims rejected exceeds \$300.00.<sup>59</sup> But when the claim of several persons to take as legatees under a will is resisted by *the executor*, and there are separate decrees in their favor, the “amount in controversy” in the appellate court, *as to the executor*, is the aggregate amount of the decrees against him, although no one of them would be sufficient to give the court jurisdiction.<sup>60</sup> So, also, where there are no assets in the hands of a personal representative of a deceased debtor out of which to pay a debt against the decedent’s estate, it is proper to decree against each legatee or devisee for his proportion of the debt. Such a decree is, in effect, a decree against the decedent’s estate, and if the aggregate amount of such decrees exceed the minimum jurisdictional sum of the appellate court, an appeal lies on behalf of such legatees or devisees.<sup>61</sup>

### § 376. Cross-error by defendant in error.

Rule VIII, of the Rules of the Court of Appeals declares: “In any appeal, writ of error, or supersedeas, if error is per-

58. *McGruder v. Lyons*, 7 Gratt. 233; *Allison v. Wood*, 104 Va. 765, 52 S. E. 559.

59. *White v. Bldg. Asso.*, 96 Va. 270, 31 S. E. 20; *Gilman v. Ryan*, 95 Va. 494, 28 S. E. 875.

60. *Ginter v. Shelton*, 102 Va. 185, 45 S. E. 892; *Hicks v. Roanoke Brick Co.*, 94 Va. 741, 27 S. E. 596, citing many previous cases.

61. *Smith v. Moore*, 102 Va. 260, 46 S. E. 326.

ceived against any appellee or defendant, the Court will consider the whole record as before them, and will reverse the proceedings, either in whole or in part, in the same manner as they would do were the appellee or defendant to bring the same before them, either by appeal, writ of error, or supersedeas, unless such error be waived by the appellee or defendant, which waiver shall be considered a release of all error as to him."<sup>62</sup> It has been held, in construing this rule, that the whole record is brought up on writ of error or appeal, and that the plaintiff in error cannot select simply such matters as are prejudicial to him and exclude the court from the consideration of other matters favorable to him, but that the latter may be assigned by the defendant on cross-error.<sup>63</sup> But if the matter is merely pecuniary, it must amount to at least the minimum jurisdictional amount of the court in order to enable the defendant to assign cross-error.<sup>64</sup> Although the amount of the defendant's claim was less than the minimum jurisdictional amount of the appellate court at the time the claim was rejected by the trial court, yet, if the adverse party appeals at a later time, and the claim of the defendant at the time of the hearing in the Court of Appeals has, by reason of the accrual of interest, increased to a sum equal to the minimum jurisdictional amount of the Court of Appeals, the defendant may in that case assign cross-error for the rejection of his claim by the trial court.<sup>65</sup> If both plaintiff and defendant appeal, and the plaintiff either dismisses his appeal or fails to perfect it, he may, on the appeal taken by the defendant, assign as cross-error the rulings of the trial court to his prejudice which he had set up in his own appeal.<sup>66</sup> The rule of court allowing cross-error to be assigned, however, cannot be made the means of compelling the court to decide questions not necessarily involved on the appeal (and which, therefore, are

62. 111 Va. p. VII.

63. *Gaines v. Merryman*, 95 Va. 660, 29 S. E. 738.

64. *Wilson v. Wilson*, 93 Va. 546, 25 S. E. 596.

65. *Osborne v. Big Stone Gap Colliery Co.*, 96 Va. 58, 30 S. E. 446.

66. *Nicholson v. Gloucester Charity School*, 93 Va. 101, 24 S. E. 899.

moot questions) merely for the guidance of the trial court in a future trial of the case.<sup>67</sup>

### § 377. Collateral effect.

Where the effect of the judgment in a particular case is to draw in question the validity of a claim to an amount of greater value than the jurisdictional sum of the appellate court, although the amount involved in the present action is not as large as the minimum required, as where a subscription of over three hundred dollars of stock is drawn in question in an action on quotas of less than three hundred dollars, or where the validity of a bond for a larger amount is drawn in question in an action on a coupon cut therefrom for a smaller amount, it is held in Virginia that a writ of error will lie, if it appears that the judgment conclusively settles the rights of the parties as to the larger amount,<sup>68</sup> but the contrary is held in the Supreme Court of the United States.<sup>69</sup>

### § 378. Release of part of recovery.

If the judgment against the defendant is within the jurisdictional amount of the appellate court, it is held by the weight of authority that the defendant cannot be deprived of his writ of error by a release of part of the recovery by the plaintiff, as it is said this would be in fraud of the jurisdiction of the appellate court.<sup>70</sup> A somewhat different view, however, is taken by the Supreme Court of the United States, where it is held that such a release made by the plaintiff, with the consent of the court, after verdict but before judgment, is valid, and will deprive the appel-

67. *Singer Mfg. Co. v. Bryant*, 105 Va. 403, 54 S. E. 320.

68. *Stuart v. Valley Ry. Co.*, 32 Gratt. 146; *Campbell v. Smith*, 32 Gratt. 288; *Elliott v. Ashby*, 104 Va. 716, 52 S. E. 383; *Inter. Harvester Co. v. Smith*, 105 Va. 683, 54 S. E. 859.

69. *Elgin v. Marshall*, 105 U. S. 578; 1 Ency. Pl. & Pr. 718, citing numerous other cases from the Supreme Court of the United States, and cases from Illinois and Washington to the same effect.

70. *Hansbrough v. Stinnett*, 22 Gratt. 593; 1 Encl. Pl. & Pr. 709-10.

late court of jurisdiction.<sup>71</sup> It was said that it was in the discretion of the trial court whether to permit the reduction or not, and that it would not permit it if in fraud of jurisdiction of an appeal, and that, having allowed it, it must stand. Illinois, Pennsylvania and South Carolina are said to hold the same doctrine.<sup>72</sup>

### § 379. Reality of controversy.

Every writ of error must be for the trial of an actual controversy. The appellate court will not sit to hear mere moot questions. There must be *actual* parties and a *real* controversy. If a prisoner has escaped pending a writ of error, the court will not hear the writ, unless within a reasonable time the prisoner returns into custody.<sup>73</sup> So, if the court discovers that, from lapse of time or otherwise, the controversy is wholly ended and terminated, and nothing but a mere moot question is left for decision, it will dismiss the writ of error.<sup>74</sup> Thus, where the appellate court was asked to decide whether or not a stenographer could use his notes made at a former trial as a record of a past recollection, and it appeared that such notes had in fact been introduced on the trial without objection, the court refused to pass on the question, as it was not in issue.<sup>75</sup> No agreement of counsel can affect the real amount in controversy so as to give the court jurisdiction where it would otherwise not have it.<sup>76</sup>

### § 380. Who may apply for a writ of error.

To entitle a person to apply for a writ of error he must be a party to the cause and aggrieved by the judgment.<sup>77</sup> Not only so, but he must present a petition for a writ of error in order to become a plaintiff in error. A party cannot become a plaintiff

71. *Thompson v. Butler*, 95 U. S. 694. It was said in the same case, however, that if the release had been made after judgment a very different question would have been presented.

72. 1 Encl. Pl. & Pr. 710.

73. *Leftwich v. Commonwealth*, 20 Gratt. 716.

74. *Franklin v. Peers*, 95 Va. 602, 25 S. E. 321; *Hamer v. Commonwealth*, 107 Va. 636, 59 S. E. 400; *Tennessee v. Condon*, 189 U. S. 64.

75. *Roanoke Ry. Co. v. Young*, 108 Va. 783, 62 S. E. 961.

76. *Leigh v. Ripple*, 27 W. Va. 211.

77. *Rowland v. Rowland*, 104 Va. 673, 52 S. E. 366.

in error by virtue of a petition in the name of one person on behalf of himself and a number of others whose names are not mentioned. The only plaintiff in error in such a case is the person whose name appears in the petition. In order to become a party, the person must unite by name in the petition for a writ of error.<sup>78</sup> So, also, appellate proceedings must be between *living* persons, either in a personal or representative capacity. If a party dies after judgment in a trial court, and a writ of error is desired, it must be applied for in the name of his representative. If applied for in the name of a party who is dead, and this fact is disclosed, the writ will be dismissed, though a new writ may be applied for by his representative if not too late.<sup>79</sup> So, also, there must be a party on the other side, on whom process can be served, else there can be no hearing of the case.<sup>80</sup> If a plaintiff in the trial court dies after judgment in his favor, the judgment debtor has no authority to revive the judgment in the name of the personal representative of the creditor, but should apply for a writ of error in his own name and set out in his petition the death of the plaintiff and the qualification of his personal representative, and process can be served on him.<sup>81</sup> As a commissioner of the court is a mere arm of the court, and not a party, he cannot, as such commissioner, apply for a writ of error or appeal.<sup>82</sup>

If several are jointly bound by a judgment, one of them it seems may apply for a writ of error though the others refuse.<sup>83</sup> If, however, the parties jointly interested occupy the relation of principal and surety, and the defence be one that is personal to the principal, although it may inure to the benefit of the surety, the surety cannot alone prosecute a writ of error.<sup>84</sup>

78. *Southern R. Co. v. Glenn*, 102 Va. 529, 46 S. E. 776.

79. *Booth v. Dotson*, 93 Va. 233, 24 S. E. 935; *Jackson v. Wickham*, 112 Va. 128, 70 S. E. 539.

80. *Watkins v. Venable*, 99 Va. 440, 39 S. E. 147.

81. *Charlottesville v. Stratton*, 102 Va. 95, 45 S. E. 737.

82. *Brown v. Howard*, 106 Va. 262, 55 S. E. 682.

83. *Todd v. Daniel*, 16 Pet. 521; *Winters v. U. S.*, 207 U. S. 564; *Flynn v. Jackson*, 93 Va. 341, 25 S. E. 1; *Reno's Ex'or v. Davis and wife*, 4 Hen. & Mun. 283; *Purcell v. McCleary*, 10 Gratt. 246; 2 Cyc. 758.

84. *Kinzie v. Riely*, 100 Va. 709, 42 S. E. 872.

### § 381. Time within which writ of error must be applied for.

The statute in Virginia declares that no petition shall be presented for a writ of error or supersedeas to any final judgment which has been rendered more than one year before the petition is presented.<sup>85</sup> A writ of error must, therefore, be applied for within one year from the *time* the final judgment was rendered; and a bond, if required, must be given within the same period. The same statute declares that "no appeal from, or supersedeas to, such decree so refusing a bill of review shall be allowed unless the petition be presented within six months from the date of such decree." It has been held that the six months mentioned must be counted from the *actual date of the decree* appealed from, and not from the beginning or the end of the term at which it was rendered;<sup>86</sup> and, though there is some difference in the language used, it is presumed that the same construction will be placed upon the former part of the section, fixing the time within which a petition for a writ of error must be presented, that is, one year from the *actual date* on which the judgment was rendered.<sup>87</sup> There is excluded, however, from the computation the time during which the petition and transcript of record are in the hands of the judges for consideration of the application, but if the writ be granted and the papers returned to the clerk's office, time begins to run afresh, and the mere failure of the clerk to open and examine a box containing papers, in which is the writ of error, does not affect the running of the statute, which begins to run afresh from the actual receipt of the petition and record by the clerk.<sup>88</sup> If, after a writ of error has been awarded it be discovered that the statutory period had expired before it was granted, it will, on application, be dismissed as improvidently awarded. No plea of the statute is necessary in Virginia. Time is a jurisdictional fact which must be made to appear.<sup>89</sup>

*See The Hon. Tucker v. Sedner, June 1920*

85. Code, § 3455.

86. *Buford v. North Roanoke Land Company*, 94 Va. 616, 27 S. E. 509.

87. *Allison v. Wood*, 104 Va. 765, 52 S. E. 559.

88. Code, § 3474; *Bull v. Evans*, 96 Va. 1, 30 S. E. 468.

89. *Callaway v. Harding*, 23 Gratt. 542; *Bull v. Evans*, *supra*. See ante, § 227.

*not sustain text*

**§ 382. Application for writ of error.**

Upon the adjournment of the court, at which a final judgment is entered, the party intending to apply for a writ of error must first obtain a transcript (copy) of the record. The first step required of him in Virginia is to give notice to the opposite party, or his counsel, if either reside in the state, of his intention to apply for a transcript of the record, and the clerk is forbidden to make out and deliver such transcript unless it is made to appear that such notice was given. The clerk thereupon proceeds to make a copy of the record, or such part thereof as is desired. If the defendant in error wants some portion copied which the plaintiff in error objects to, the question is referred to the judge of the trial court, who has to decide it. In lieu of such record, the parties, or their counsel, may agree the facts, or any part of them, and have them copied by the clerk in lieu of the complete record, and this practice has been commended.<sup>90</sup> After the record is copied, it is delivered to the applicant, who is thereupon required to file a petition assigning errors. To the foot of this petition must be annexed the certificate of some counsel practicing in the appellate court, that in his opinion the judgment complained of should be *reviewed* (not that it be reversed) by the appellate court.<sup>91</sup> This petition, with the certificate annexed, together with the transcript of the record, is transmitted to some judge of the Court of Appeals, who endorses on it the date of its receipt. He may either grant or refuse the writ of error. If he refuses it, he marks it refused, and passes it to some other judge, and it is passed from one to the other until granted by some one, or refused by all. And although refused by all of the judges in vacation, the applicant may, if he chooses, present his petition to the court at its next term. The court, in term, may grant the writ, although it has been refused by each one of the judges separately. Such applications have been made, but it is more than doubtful if one has ever been granted by the court after having been refused by each

<sup>90</sup>. *Florence v. Morien*, 98 Va. 26, 34 S. E. 890.

<sup>91</sup>. The counsel making this certificate may be the same that represented the applicant in the trial court, provided he has license to practice in the appellate court.

of the judges. The writ of error may be granted either with or without a *supersedeas*, as requested. In either event, a bond is generally required of the plaintiff in error, except where the writ is to protect the estate of a decedent, infant, convict, or insane person. The condition of the bond will be hereafter stated.<sup>92</sup>

Usually where a party against whom judgment has been rendered desires to apply for a writ of error, he wishes to have the execution of the judgment suspended for a reasonable time in order to enable him to make application for the writ. This application for a suspension should be made to the *trial* court during the term at which the judgment is rendered, or to the judge thereof in vacation, within thirty days after the term has ended. The suspension is generally granted as a matter of course, and is for a reasonable time specified in the order, and upon condition that the applicant give bond before the clerk of said court, in such penalty as the court or judge may require, with condition (after making proper recitals) for the payment of all such damages as may accrue to any person by reason of said suspension in case a *supersedeas* to said judgment should not be allowed and be effectual within the time specified in the order.<sup>93</sup>

*The record* in an action at common law comprises the several papers heretofore mentioned<sup>94</sup> and the verdict and judgment. The mere filing of papers does not make them a part of the record. The rule book and the order book are the proper sources of information as to what constitutes the record. It has been held that an amended declaration, although filed among the papers in a cause, and endorsed by the clerk as filed on a particular day, is no part of the record in the absence of an order of court permitting it to be filed; and that a bill of exception, though signed by the trial judge and found among the papers in the cause, is not a part of the record unless shown to have been made so by some order of the trial court.<sup>95</sup>

92. Code, §§ 3457-60, 3464-5-6, 3470.

93. Code, § 3456.

94. *Ante*, § 281.

95. *Williams v. Ewart*, 29 W. Va. 659, 2 S. E. 881; *Wickes v. Baltimore*, 14 W. Va. 157. See, also, Annotations West Virginia Code, 981.

"It has been held that if the evidence was not sufficiently identified and made a part of the bill of exception within the time prescribed for taking the bill, the defect could not be remedied by a *nunc pro tunc* order, but at the recent session of the legislature it was enacted, 'that no case shall be heard and decided in the Court of Appeals on an imperfect or incomplete record, but when said court shall be of opinion that any record or part thereof, testimony or proceeding has not been properly identified or certified, so as to make it a part of the record in the case, and to bring it properly before the Appellate Court, and that justice may be done by directing the trial court to cure the defects in the record, it shall so order; and when the defects shall have been so cured it shall proceed with the hearing on the merits.'"<sup>96</sup>

*The petition* for a writ of error is in the nature of a pleading, and should state clearly and distinctly all the errors relied on for reversal, and errors not assigned in the petition, but stated for the first time in oral argument, or in a reply brief, will not, as a rule, be considered. A suggestion in the petition that other errors are to be assigned is ineffectual to reserve the right to assign errors in a reply brief.<sup>97</sup> But one criminal case, at least, was reversed on error assigned at the bar in oral argument.<sup>98</sup>

*Notice to Counsel.*—The statute<sup>99</sup> requiring that notice of an intention to apply for a transcript (copy) of record, with a view of applying for a writ of error, has been held to be directory merely, but it is said that it is a plain violation of duty by a clerk to make and deliver such transcript until the notice has been given. No form of notice is prescribed, nor it is stated whether it shall be verbal or in writing, but the clerk is required

96. *Ante*, § 290; Barnes Case, 92 Va. 794, 23 S. E. 784; Acts 1912, p. 533.

97. Orr *v.* Pennington, 93 Va. 268, 24 S. E. 928; Atlantic & D. R. Co. *v.* Reiger, 95 Va. 418, 28 S. E. 590; Hite's Case, 96 Va. 495, 31 S. E. 895; Norfolk & W. R. Co. *v.* Perrow, 101 Va. 345, 350, 43 S. E. 614; Hawpe *v.* Bumgardner, 103 Va. 91, 48 S. E. 554; Newport News R. Co. *v.* Bickford, 105 Va. 182, 52 S. E. 1011; Amer. L. Co. *v.* Hoffman, 105 Va. 343, 54 S. E. 25; Sands *v.* Stagg, 105 Va. 444, 52 S. E. 633, 54 S. E. 21.

98. Johnson *v.* Commonwealth, 24 Gratt. 555-560.

99. Code, § 3457.

to certify that the notice was given. The length of the notice is not stated, but it should be reasonable. The notice may be given to counsel who represented the adverse party in the trial court, unless it is known that he has employed other counsel, in which event it is to be given to the latter.<sup>1</sup>

### § 383. Bond of the plaintiff in error.

If no *supersedeas* is awarded, the condition of the bond is to pay specific damages, and such costs and fees as may be awarded or incurred. If a *supersedeas* is awarded to a judgment for the payment of money, the bond is with condition to perform and satisfy the judgment, proceedings on which are stayed, in case said judgment be affirmed or a writ of error be dismissed, and also to pay all damages, costs, and fees which may be awarded against or incurred by the petitioner in the appellate court, and all actual damages incurred in consequence of the *supersedeas*.<sup>2</sup> The penalty of the bond is fixed by the court or judge awarding the writ.<sup>3</sup> This bond may be given by any one.<sup>4</sup> A writ of error may be dismissed for failure to give a proper bond, but it will not be dismissed for informality in the bond, where the motion has been delayed so long that it is too late to give a new bond or to award a new writ of error.<sup>5</sup> Mere informalities in the bond or its condition do not render the bond void, and they may be corrected on application to the appellate court.<sup>6</sup> Dismissal of a writ of error for failure to give bond is equivalent to an affirmation of the judgment of the lower court.<sup>7</sup>

### § 384. Rule of decision.

Where a case has been tried by a jury, or has been decided by the court without the intervention of a jury, and objection is

1. *Mears v. Dexter*, 86 Va. 828, 11 S. E. 538; *Norfolk & W. R. Co. v. Dunnaway*, 93 Va. 29, 24 S. E. 698.

2. Code, § 3470; *Bemis v. Comth.*, 113 Va. 489, 75 S. E. 115.

3. Code, § 3470.

4. Code, § 3495.

5. *Va. Fire & Marine Ins. Co. v. N. Y., etc., Co.*, 95 Va. 515, 28 S. E. 888.

6. *Ackner v. Railroad Co.*, 84 Va. 648, 5 S. E. 688.

7. *Hicks v. Roanoke Brick Co.*, 94 Va. 741, 27 S. E. 596.

made to the verdict of the jury, or to the judgment of the court, as the case may be, on the ground that the same is contrary to the evidence, and reversal is sought on this ground, the trial court may either certify the facts, or, if this cannot be done, may certify the evidence. If there is no conflict in the evidence, and the facts can be certified, it is the duty of the court to do so, but in most cases the evidence is conflicting, and there is a dispute as to what the facts are. In such case the certificate of evidence is all that can be given. The certificate, however, may be partly of facts and partly of evidence.<sup>8</sup> The form of the certificate is immaterial. The court will look to the substance of the certificate itself to determine whether it is one of facts or of evidence.<sup>9</sup> If the facts are certified, the appellate court will determine the case upon the facts without presumption either way. If, however, the certificate be one of evidence, then the plaintiff in error goes up as on a demurrer to the evidence,<sup>10</sup> and the verdict and the judgment thereon of the trial court will not be disturbed unless it is plainly contrary to the evidence, or is without evidence to support it. If the evidence is conflicting on material points the judgment of the trial court *sustaining* the verdict of the jury will be affirmed<sup>11</sup> but if there is serious conflict of evidence on a material point, the judgment of the trial court *setting aside* a verdict will be reversed and judgment entered up by the appellate court on the verdict; and, in considering such a case on a writ of error, it is not heard as on a demurrer to the evidence.<sup>12</sup> When it is said that a plaintiff in error goes up *as on demurrer to the evidence*, it must not be understood that the same judgment is always to be entered as in the case of a demurrer to the evidence. All that is meant is that the plaintiff in error makes the same concessions and admissions as are required of one who demurs to the evidence. Generally the judgment of the appellate court is final where there was a demurrer to the evidence in the

8. N. Y., etc., Ry. Co. v. Thomas, 92 Va. 606, 24 S. E. 264.

9. Read's Case, 22 Gratt. 924.

10. Code, § 3484; Norfolk, etc., Co. v. Adamson, 111 Va. 556, 69 S. E. 1055.

11. Martin v. Ry. Co., 101 Va. 406, 44 S. E. 695.

12. Thompson v. Norfolk & P. R. Co., 109 Va. 733, 64 S. E. 953.

trial court, but where a case has been tried by a jury upon conflicting evidence, and the evidence has been certified and not the facts, although the plaintiff in error makes the same concessions and admissions as are required of a demurrant to the evidence, yet the judgment of the appellate court, upon reversing the judgment of the trial court, is that the verdict of the jury be set aside and the cause remanded for a new trial, as that is the judgment the trial court ought to have entered.

The rule above stated, with reference to a plaintiff in error going up as on a demurrer to the evidence, applies where there has been only one trial in the court below. If there has been more than one trial, a different rule prevails. In this case the appellate court will look first to the proceedings on the first trial to determine whether error was committed in setting aside the first verdict, and in looking at the proceedings for this purpose, it does not consider the case as on a demurrer to the evidence, but looks to the evidence just as the trial court ought to have looked at it in determining whether or not the verdict should be set aside.<sup>13</sup> If it finds that the trial court erred in setting aside the first verdict, it will set aside and annul all proceedings subsequent to that verdict, and enter up judgment on the first verdict. If, however, it finds that no error was committed, and that the verdict was rightly set aside, it will then proceed to consider the second trial (supposing that to be the one under review) as on a demurrer to the evidence by the plaintiff in error.<sup>14</sup> The sec-

13. *Humphrey v. Valley R. Co.*, 100 Va. 749, 42 S. E. 882; *Citizens' Bank v. Taylor*, 104 Va. 164, 57 S. E. 159.

14. Prior to the revision of 1887, there were several rules of decision, as applied to different classes of cases, where the evidence, and not the facts, was certified (Judge Burks' Address, p. 40). In *Jones v. Old Dominion Cotton Mills*, 82 Va. 140, there were three trials. The first and second trials were before a jury, and in each case a verdict for the plaintiff was set aside on motion of the defendant. On the third trial, there was a demurrer to the evidence by the defendant which the trial court sustained. Each successive verdict increased the amount found for the plaintiff. In each of the first two trials, the plaintiff objected to setting aside the verdict, and saved his objection by proper bills of exception. After the third trial, the plaintiff obtained a writ of error from the Court of Appeals, and that Court, instead of examining the first trial first, and entering up judg-

tion of the Code quoted in the margin speaks of only two trials in the lower court. The trial court, if it deems it proper, may grant two *new* trials,<sup>15</sup> which would mean three trials in all. If the writ of error is to a judgment rendered on a third trial, the statute does not say how the appellate court shall view the proceedings on the second trial, but as it has resulted in the setting aside the verdict of a jury it is presumed that the proceedings on the second trial will be viewed in the same light as is provided by the statute for reviewing the proceedings of the first trial when there have been only two trials in the lower court.

Trial courts, however, are invested with a certain amount of discretion in the supervision of verdicts, and in granting or refusing new trials. This fact will be borne in mind by the appellate court where a verdict has been set aside by the trial court,

ment for the error committed in setting aside the verdict, considered the case on the demurrer to the evidence and entered judgment thereon for the largest amount, which was the amount found on the third trial. After this, the revisors undertook to establish a uniform rule of decision in cases where the evidence was certified, and provided in *all cases* that the rule of decision should be as on a demurrer to the evidence by the party excepting. It is stated by Judge Burks, in his Address, p. 40, that it was supposed that this rule operated harshly on the excepting party, where there had been two trials, and hence it was amended by the legislature in this particular. The present law on the subject is embraced in § 3484 of the Code, which is as follows:

"When a case at law, civil or criminal, is tried by a jury and a party excepts to the judgment or action of the court in granting or refusing to grant a new trial on a motion to set aside the verdict of a jury on the ground that it is contrary to the evidence, or when a case at law is decided by a court or judge without the intervention of a jury and a party excepts to the decision on the ground that it is contrary to the evidence, and the evidence (not the facts) is certified, the rule of decision in the appellate court in considering the evidence in the case shall be as on a demurrer to the evidence by the appellant, *except when there have been two trials in the lower court, in which case the rule of decision shall be for the appellate court to look first to the evidence and proceedings on the first trial, and if it discovers that the court erred in setting aside the verdict on that trial it shall set aside and annul all proceedings subsequent to said verdict and enter judgment thereon.*"

15. Code, § 3392.

and allowance made therefor, and this is especially true where the verdict on the subsequent trial is substantially reduced in amount, or is found for the opposite party.<sup>16</sup> Here the last verdict is consistent with the judgment of the court in setting aside the first verdict.

A stronger case must also be made to warrant the appellate court in disturbing an order granting a new trial than one refusing it, because refusal is final, whereas a new trial simply invites further investigation.<sup>17</sup> It was formerly necessary in Virginia for a party to make a motion for a new trial on the ground that the verdict was contrary to the evidence in order to have the benefit of any other exceptions taken during the trial, but this rule has been changed by statute, and it is no longer necessary to make a motion for a new trial in order to have the benefit of other exceptions taken during the trial. The statute now provides that the failure to make such motion shall not be deemed a waiver of any objections made during the trial, if such objections be properly made a part of the record.<sup>18</sup>

### § 385. Judgment of appellate court.

The character of the judgment to be entered by the appellate court is largely dependent upon the proceedings had in the trial court.

*Demurrer.*—If a *demurrer to a declaration* is sustained by the trial court because the declaration *fails to state a case*, and this judgment is *affirmed* on writ of error, that is the end of the case,<sup>19</sup> and whether or not a new action can be maintained for the same cause upon a different state of facts depends upon whether or not the merits of the case were involved in the first action. If they were, and a different case is not made in the second action from that stated in the first, then the decision on the demurrer in the first case is final, as a judgment on demurrer involving the merits is as conclusive as one rendered on the

16. *Citizens' Bank v. Taylor*, 104 Va. 164, 51 S. E. 159.

17. *Chapman v. Va. R. E. Co.*, 96 Va. 177, 31 S. E. 74.

18. Code, § 3385a.

19. *Graves v. Scott*, 104 Va. 775, 51 S. E. 821; *Hortenstein v. Va.-Car. R. Co.*, 102 Va. 914, 47 S. E. 996.

proof.<sup>20</sup> If a demurrer for *misjoinder of causes* of action be overruled by the trial court, but sustained by the appellate court, then it seems that the appellate court will enter judgment overruling the judgment of the trial court and remand the case, with *liberty to the plaintiff to amend* his declaration so as to cure the misjoinder,<sup>21</sup> though it is said, *obiter*, in one case that the judgment of the trial court sustaining a demurrer for such misjoinder "should have been final at that time in favor of the defendants, instead of permitting the plaintiff to amend."<sup>22</sup> If a *demurrer to a declaration* has been overruled in the trial court, and the cause has proceeded to trial, resulting in a judgment for the plaintiff, and, on a writ of error, the appellate court is of opinion that the trial court erred in its ruling on the demurrer, the judgment to be entered by the appellate court varies according to the circumstances of the case. If there was only one count in the declaration, and the appellate court holds that to be bad, or if more than one count and it holds all to be bad, then *usually* the court will reverse the judgment of the trial court and remand the case, with liberty to the plaintiff to amend his declaration.<sup>23</sup> But if the court can see from the facts stated that a good case *cannot* be stated for the plaintiff, it will enter up *final* judgment on the demurrer for the defendant, without remanding the case.<sup>24</sup> So, also, where a demurrer to a declaration has been overruled, and the plaintiff of his own motion has filed an amended declaration, to which a demurrer was also overruled by the trial court, it will be presumed that the plaintiff has stated his case as strongly as the facts would warrant, and the appellate court, upon sus-

20. *Ante*, pp. 364-5.

21. *Creel v. Brown*, 1 Rob. 265; *Fitzhugh v. Fitzhugh*, 11 Gratt. 300; *Penn. R. Co. v. Smith*, 106 Va. 645, 56 S. E. 567.

22. *Gary v. Abingdon Pub. Co.*, 94 Va. 775, 779, 27 S. E. 595.

23. *Norfolk & W. R. Co. v. Gee*, 104 Va. 806, 52 S. E. 572; *Norfolk & W. R. Co. v. Stegall*, 105 Va. 538, 54 S. E. 19; *Washington, etc., R. Co. v. Taylor*, 109 Va. 737, 64 S. E. 975; Note by Judge Burks, 1 Va. L. Reg. 900.

24. *Norfolk & W. R. Co. v. Scruggs*, 105 Va. 166, 52 S. E. 834. Here the complaint was that a railroad company gave no notice to a traveller on the highway of the approach of a train to an overhead crossing.

taining the defendant's demurrer to both declarations, will enter up final judgment for the defendant.<sup>25</sup>

If there are more counts than one in the declaration, some of which are good and others bad, and there is either no demurrer at all, or a demurrer to the declaration *as a whole*, and not to the separate counts, and *entire damages are found*, and it cannot be told upon which count the verdict was founded, judgment must be entered up for the plaintiff, for the statute so declares.<sup>26</sup> If, however, there was a demurrer to *each count* of the declaration, and the court can plainly see that the verdict was founded on the good count, it will uphold it, but if on the bad, it will set it aside. If it cannot see on which count the verdict was founded, the court will treat the demurrer to the faulty counts as *a request to the court to instruct the jury to disregard them*, and will reverse the case and remand it for a new trial.<sup>27</sup> If the case be *reversed for failure of the trial court to sustain a demurrer to any pleading subsequent to the declaration*, the modern practice seems to be to remand with liberty to the party whose pleading is demurred to, to amend, if he so desires. In *Cromer v. Cromer*, 29 Gratt. 280, 286, the defendant demurred to the plaintiff's replication and the trial court overruled the demurrer. This ruling was held to be error by the appellate court, and it was said that the demurrer should have been sustained, and in considering the order to be entered in the appellate court, Judge Burks speaking for the court says: "And on the authority of *Hamtramck v. Selden, Withers & Company*, 12 Gratt. 28; *Strange v. Floyd*, 1 Gratt. 474, and other cases, and according to the settled practice of this court, the cause should be remanded to the circuit court, with direc-

25. *Ches. & O. R. Co. v. Wills*, 111 Va. 32, 68 S. E. 395. But see *Washington, etc., R. Co. v. Taylor*, 109 Va. 737, 64 S. E. 975.

26. The statute (Code, § 3389) provides: "When there are several counts, one of which is faulty, the defendant may ask the court to instruct the jury to disregard it; yet if entire damages be given, the verdict shall be good."

27. See discussion, *ante*, § 301; *So. Ry. Co. v. Hansbrough*, 105 Va. 527, 54 S. E. 17; *Va. Cedar Works v. Dalea*, 109 Va. 333, 64 S. E. 41; *Newport News v. Nicolopoulos*, 109 Va. 165, 63 S. E. 443; *Chesapeake & O. R. Co. v. Melton*, 110 Va. 728, 67 S. E. 346.

tions to sustain the demurrer to the plaintiff's replication and render judgment thereon for the defendant, unless the plaintiff withdraws his said replication, which he should have liberty to do, if he asks it, and file a sufficient replication in its stead."<sup>28</sup>

*Demurrer to the Evidence.*—If a case is heard in the trial court on a demurrer to the evidence, the appellate court must as a rule either affirm the judgment, or else reverse it and give *final judgment* for the opposite party, though in some exceptional cases, hereinbefore pointed out,<sup>29</sup> it may set aside the whole proceeding and order a new trial. Where a demurrer to the evidence has been wholly sustained by the trial court, and the jury have found a gross sum for damages, but on writ of error the appellate court is of opinion that the demurrer should have been overruled as to certain items of account, the amount and value of which are readily ascertainable from the record, it will not remand the case in order to have the error corrected, but will enter up final judgment for the demurree for the value of such items.<sup>30</sup>

*Case Heard by Trial Judge without a Jury.*—Where the trial court hears and determines a case without the intervention of a jury, the appellate court, upon reversing the judgment, will generally enter up *final judgment* for the opposite party. It does not, as a rule, award a new trial. It is required to enter such judgment as the trial court ought to have entered;<sup>31</sup> and in considering whether or not the judgment should be reversed, the judgment of the lower court is given the same weight as the verdict of a jury.<sup>32</sup>

*Jury Trial in Lower Court.*—If the case is heard in the trial court by a jury, upon the evidence adduced, the appellate court, if it reverses, makes an order for a *new trial* to be had in the

28. See, also, 14 Va. L. Reg. 836 and cases cited; *ante*, § 208.

29. *Ante*, § 264, and Note 59.

30. *Whitehead v. Cape Henry Syndicate*, 111 Va. 193, 68 S. E. 263.

31. *N. & W. v. Dunnaway*, 93 Va. 29-41, 24 S. E. 698; *Metropolitan Life Ins. Co. v. Rutherford*, 98 Va. 195, 35 S. E. 361; *Martin v. Ry. Co.*, 101 Va. 406, 44 S. E. 695; *United Moderns v. Rathbun*, 104 Va. 236, 52 S. E. 552; *Edmonson v. Potts*, 111 Va. 79, 63 S. E. 254; *Worley v. Adams*, 111 Va. 796, 69 S. E. 929.

32. *Hoster Co. v. Stag Hotel Corp.*, 111 Va. 223, 68 S. E. 50.

court below, as that is the judgment which the trial court should have entered.

*Divided Court.*—It has been held that § 88 of the constitution, which requires at least three of the judges of the Court of Appeals to agree upon a decision, applies only to constitutional questions, and that other cases may be affirmed by a divided court, and reliance was placed upon the language of § 3485 of the Code of 1887, directing affirmance “where the voices on both sides are equal.”<sup>33</sup> The language of § 3485 of the Code of 1887, “affirming in those cases where the voices on both sides are equal,” which had been the law in Virginia since 1779,<sup>34</sup> was changed by an act approved December 31, 1903, taking effect on and after February 1, 1904, by striking out the words above quoted and substituting the language of § 88 of the constitution in their place.<sup>35</sup> This change was made two weeks before *Funkhouser v. Spahr*, *supra*, was decided, and hence was not in consequence of the decision, nor could the act have affected the decision as it did not go into effect until two weeks *after* the case was decided.

As the law now stands, there is no statute providing for an equally divided court, if no constitutional question is involved. This, however, does not change the law. The former statute was simply declaratory of a well-settled pre-existing rule of necessity, which is not changed by the omission from the present statute of anything on the subject, so that now, as formerly, if the Court of Appeals is equally divided in opinion on other than a constitutional question, the judgment of the lower court is affirmed, and this is the rule generally prevailing elsewhere.<sup>36</sup> Even where there has been no decision of the question by the court below, but there is an equal division of the judges on the question of the jurisdiction of the appellate court, it is held by the Supreme Court of the United States that the writ of error will be dismissed,<sup>37</sup> though a different view has been taken by the Court of Appeals of West Virginia.<sup>38</sup>

33. *Funkhouser v. Spahr*, 102 Va. 306, 46 S. E. 309.

34. 1 Rev. Code, 1819, pp. 194-5.

35. Code (1904), § 3485.

36. *Charlottesville R. Co. v. Rubin*, 107 Va. 751, 60 S. E. 101. This case gives a very full citation of authority.

37. *Holmes v. Jennison*, 14 Peters 540.

38. *State v. Hays*, 30 W. Va. 107, 3 S. E. 177.

While a decision by a divided court is binding upon the parties and settles the particular controversy, it does not constitute any precedent for succeeding cases.<sup>39</sup> West Virginia goes even further than this, and has declared, both by constitutional provision and by statute, that *no decision* of the Court of Appeals shall be binding on the inferior courts, except in the particular case decided, unless it is concurred in by at least three judges of that Court.<sup>40</sup> Hence a decision by a court of three judges is not binding on the inferior courts unless all three of them concur in the opinion.

### § 386. Change in law.

Writs of error in the Court of Appeals of Virginia must be disposed of *on the merits* in accordance with the law as it existed at the time of the rendition of the judgment complained of. If, as the law then stood, there is no error in the judgment, it must be affirmed, but, if erroneous, it must be reversed, and such judgment entered as the lower court ought to have entered.<sup>41</sup> Merely *remedial* statutes, however, though passed after adjudication by the trial court, will be applied to appeals and writs of error thereafter applied for.<sup>42</sup> The rule first above stated is generally otherwise outside of Virginia, and the case is decided according to the law as it is when the case is heard in the appellate court.<sup>43</sup>

### § 387. How decision certified and enforced.

When a case is decided by the Court of Appeals, the clerk of that court is required to transmit the decision of the court to the court below, and the court below enters the decision of the appellate court as its own, and enforces it by execution or other proper process.<sup>44</sup>

39. *Durant v. Essex Company*, 7 Wall. 107.

40. Constitution W. Va., Art. 8, § 4; Code W. Va., § 4058.

41. *Anderson v. Hygeia Hotel Co.*, 92 Va. 687, 24 S. E. 269; *Wilson v. Hundley*, 96 Va. 96, 30 S. E. 492.

42. *Allison v. Wood*, 104 Va. 765, 52 S. E. 559.

43. 3 Cyc. 407.

44. Code, §§ 3488, 3490.

### § 388. Finality of decision.

The decision of the appellate court, right or wrong, is final after the rehearing period has passed. Neither the Court of Appeals nor any other court can correct it.<sup>45</sup>

### § 389. Rehearing.

If a case be decided during the last fifteen days of a term, application may be made for a rehearing at any time before the end of the term, or within fifteen days after the commencement of the next term. In all other cases, the application to rehear must be made during the term at which the case was decided within ten days after the decision is announced, and in all cases the reasons for the rehearing, printed, must be filed at the time application is made. No rehearing will be allowed unless one of the judges who concurred in the decision shall be dissatisfied with it and desire a rehearing.<sup>46</sup>

### § 390. Objections not made in trial court.

The Court of Appeals can only consider a case, on a writ of error, on the record as made in the trial court. If this fails to disclose the errors complained of, they cannot be considered.<sup>47</sup> Generally, objections not shown to have been made in the trial court cannot be set up for the first time in the appellate court. No complete enumeration of such cases will be attempted. A few illustrations must suffice. The rulings of the trial court on the admission or rejection of evidence,<sup>48</sup> on the competency of a witness,<sup>49</sup> on the giving or refusing to give instructions,<sup>50</sup>

45. *Campbell v. Campbell*, 22 Gratt. 649; *Rosenbaum v. Seddon*, 94 Va. 575, 27 S. E. 425; *Stuart v. Peyton*, 97 Va. 796, 34 S. E. 696; *Norfolk & W. R. v. Duke*, 107 Va. 764, 60 S. E. 96; *Matthews Co. v. Progress Co.*, 108 Va. 777, 62 S. E. 924; *Koonce v. Doolittle*, 48 W. Va. 592, 37 S. E. 644; *Ex parte Sibbald*, 12 Peters 492.

46. Code, § 3492; Rule of Court XVIII, 100 Va. p. X; 111 Va. p. IX, Rule XVII.

47. *Barnes' Case*, 92 Va. 794, 23 S. E. 784.

48. *Fentress v. Pocahontas Club*, 108 Va. 155, 60 S. E. 633.

49. *City of Richmond v. Wood*, 109 Va. 75, 63 S. E. 449.

50. *Saunders v. Bank*, 112 Va. 443, 71 S. E. 714; *Wallen v. Wallen*, 107 Va. 131, 57 S. E. 596.

on the misconduct of parties or their counsel,<sup>51</sup> and, indeed, everything which is not *per se* a part of the record, must be made a part thereof by proper proceedings had in the trial court, and if a review of the rulings of the trial court thereon is sought to be had, it must appear that proper objections to such rulings were made in the trial court. Such objections cannot be made for the first time in the appellate court. An objection, for instance, to the size of the type of an insurance policy cannot be raised in the appellate court for the first time.<sup>52</sup> So, where a restrictive provision of a bill of lading was not relied on or considered in the trial court, and no motion was there made to exclude the evidence as to the carrier's liability because of the nonperformance thereof, it will be deemed to have been waived, and cannot be insisted on for the first time in the appellate court.<sup>53</sup> So, likewise, if the unconstitutionality of a statute is relied on as the basis of the appellate jurisdiction under a constitutional provision conferring appellate jurisdiction "in all cases involving the constitutionality of a law as repugnant to the constitution of this state, or of the United States," it must appear that the constitutionality of the law was called in question in some way and decided by the trial court;<sup>54</sup> but any proceeding which necessarily puts in issue the constitutionality of a statute, whether it be by demurrer, plea, instruction, or otherwise, is sufficient to confer jurisdiction on the Court of Appeals.<sup>55</sup> If, however, the objection be that the trial court had no jurisdiction of the *subject matter* of the litigation, the objection may be made in the appellate court for the first time.<sup>56</sup> Indeed, if the trial court had no jurisdiction of the subject matter, its judgment is a mere nullity, and may be treated as such. It may be assailed, directly or indirectly, anywhere, at any time, in any way. So, also, where it appears that the appellate court has no jurisdic-

51. *Southern R. Co. v. Simmons*, 105 Va. 651, 55 S. E. 459.

52. *Sulphur Mines Co. v. Phoenix Ins. Co.*, 94 Va. 355, 26 S. E. 856.

53. *Norfolk & W. R. Co. v. Wilkinson*, 106 Va. 775, 56 S. E. 808.

54. *Hulvey v. Roberts*, 106 Va. 189, 55 S. E. 585.

55. *Adkins v. Richmond*, 98 Va. 91, 34 S. E. 967.

56. *S. & W. R. Co. v. Commonwealth*, 104 Va. 314, 51 S. E. 824;  
*Hanger v. Commonwealth*, 107 Va. 872, 60 S. E. 67.

tion of a writ of error, or appeal, it will be dismissed by the court *ex mero motu*, though no objection was made on that account at the hearing.<sup>57</sup>

Although objections were in fact made in the trial court, they will not be considered unless properly presented in the record.<sup>58</sup> Thus, it has been held that the judgment of a trial court setting aside a verdict because contrary to the law and the evidence cannot be reviewed by the appellate court when the instructions given in the trial court are not made a part of the record. The appellate court cannot assume that the instructions were free from error, nor pass at all upon that ground for setting aside the verdict.<sup>59</sup> So, likewise, if the record does not show what instructions were given by the trial court, an exception to the ruling of the court refusing to give a single instruction will not be considered on a writ of error, as the rejected instruction may have been covered by other instructions given.<sup>60</sup>

### § 391. Putting a party upon terms.

A party may be in effect put on terms in the appellate court as well as in the trial court. When a party is put on terms in the appellate court because a judgment in his favor is excessive, it may reverse the judgment of the trial court and remand the cause, with direction to the trial court to put the successful party upon terms to release the excess, or else submit to a new trial, and if the release is made, to overrule the motion for a new trial and render judgment for the correct amount, with interest and costs;<sup>61</sup> or, if the error be one of mere calculation, readily corrected from the record, or if the verdict and judgment of the trial court is excessive and the record affords plain and certain proof of the amount of the excess so that it may with safety be corrected, in either event the appellate court will amend and affirm

57. *Hobson v. Hobson*, 100 Va. 216, 40 S. E. 899.

58. See *ante*, §§ 281, 290, 291.

59. *Foreman v. Norfolk, etc., Co.*, 106 Va. 770, 56 S. E. 805.

60. *Kecoughtan Lodge v. Steiner*, 106 Va. 589, 56 S. E. 569.

61. *Buena Vista Co. v. McCandlish*, 92 Va. 297, 23 S. E. 781; *Worrell v. Kinnear*, 103 Va. 719, 49 S. E. 988.

the judgment of the trial court, and will not remand the case for such amendment.<sup>62</sup>

Where a party is put on terms in the trial court to release a part of his recovery or else submit to a new trial, and he makes the release and takes judgment for the reduced amount he will not be heard in the appellate court (in the absence of a statute permitting it) to question the action of the trial court in this particular upon a writ of error granted to the other party. Having accepted the verdict he cannot thereafter be heard to question it.<sup>63</sup> In Virginia, however, it is now provided by statute "that in any action at law in which a circuit or corporation court, or any other law court of record shall require a plaintiff to remit a part of his recovery, as ascertained by the verdict of a jury, or else submit to a new trial, such plaintiff may remit and accept judgment of the court thereon for the reduced sum under protest, but, notwithstanding such remitter, and acceptance, if under protest, the judgment of the court in requiring him to remit may be reviewed by the Supreme Court of Appeals upon a writ of error awarded the plaintiff as in other actions at law; and in any such case in which a writ of error is awarded the defendant, the judgment of the court in requiring such remitter may be the subject of review by the Supreme Court of Appeals, upon a cross appeal by the plaintiff, as in other actions at law."<sup>64</sup> Where the matter in dispute is merely pecuniary, it would seem that if a plaintiff applies for a writ of error on the ground that the verdict in his favor has been erroneously reduced by the trial court, the reduction must amount to at least the sum of \$300 in order to confer jurisdiction on the Court of Appeals, and the same is probably true if he assigns cross error on a writ of error awarded to the defendant.<sup>65</sup>

### § 392. Appeals of right.

A writ of error is not a matter of right in Virginia. As here-

62. *Aultman v. Gay*, 108 Va. 647, 62 S. E. 946; *McIntyre v. Smith*, 108 Va. 736, 62 S. E. 930; Code, § 3452; Code W. Va. 4037; *ante*, § 373.

63. *Lynchburg Telephone Co. v. Booker*, 103 Va. 594, 50 S. E. 148.

64. Acts 1906, ch. 167, p. 251.

65. *Wilson v. Wilson*, 93 Va. 546, 25 S. E. 596.

inbefore stated, a party deeming himself aggrieved is required to file a petition, assigning errors committed in the trial court to his prejudice. This petition is submitted to the judges and passed on as hereinbefore indicated, and they may grant or refuse it, as in their judgment is right and proper, and a failure to grant it operates as an affirmance of the judgment below.<sup>66</sup>

### § 393. Refusal or dismissal of writ.

Refusal to grant a writ of error, or the dismissal of it after it has been granted, operates as an affirmance of the judgment of the trial court.<sup>67</sup>

### § 394. Conclusion.

Appellate courts do not sit simply to correct errors. If they did, their work would be unending. To be the subject of review the error must be *material*, and must be *prejudicial* to the interest of the party complaining of it.<sup>68</sup>

66. McCue's Case, 103 Va. 870, 49 S. E. 623.

67. McCue's Case, 103 Va. 870, 49 S. E. 623; Hicks v. Roanoke Brick Co., 94 Va. 741, 27 S. E. 596; Baker v. Watts, 101 Va. 702, 44 S. E. 929.

68. Bank v. Napier, 41 W. Va. 481, 23 S. E. 800; Supervisors v. Gorrell, 20 Gratt. 484; Beirne v. Rosser, 26 Gratt. at p. 546.

## CHAPTER XLV.

### EXTRAORDINARY LEGAL REMEDIES.

§ 395. *Mandamus*.

§ 396. *Prohibition*.

Parties.

Procedure.

§ 397. *Quo warranto*.

Procedure.

§ 398. *Certiorari*.

#### § 395. *Mandamus*.

The only civil remedies in common use that may be designated as extraordinary are *Mandamus*, *Prohibition*, *Quo Warranto*, and *Certiorari*.<sup>1</sup> Of these some brief discussion will be given.

*Mandamus* is a remedial writ, issuing usually from a superior court, directed to any person, corporation, or inferior court, requiring them to do some particular thing, therein specified, which pertains to their duty or office, and concerning the doing of which they have *no discretion*. It never issues to control the discretion of any functionary. It will be issued, for instance, to compel a clerk to record a deed, to compel a corporation to exhibit its books to a stockholder, or an inferior court to hear and determine a cause, but it cannot be issued to direct what judgment the inferior court shall enter.<sup>2</sup> A *mandamus* will not be awarded, however, where to do so would be fruitless or unavailing. If the respondent cannot perform the act required, or if the court is unable to compel its performance, the writ will be denied.<sup>3</sup> But this inability may cease after the writ has been denied, and, upon the changed state of facts, the writ, though formerly denied, may be granted. The former refusal does not

1. *Habeas Corpus* belongs more particularly to the domain of criminal law.

2. *Broaddus v. Supervisors*, 99 Va. 380, 38 S. E. 177.

3. *Mitchell v. Witt*, 98 Va. 459, 36 S. E. 528.

make the question *res judicata*, though it would have been but for the changed state of facts.<sup>4</sup>

While *mandamus* does not lie in favor of a party who has another clear and adequate legal remedy, the "adequate remedy" which will bar *mandamus* must be such as reaches the end intended, and actually compels the performance of the duty in question. It must be equally as convenient, beneficial, and effective as the proceeding by *mandamus*. The function of the writ is to enforce the performance of duties growing out of public relations, or imposed by statute, or in some respect involving a trust, or official duty.<sup>5</sup> Thus *mandamus* may issue to recover books of a predecessor in office, and incidentally to try the title to the office. Neither *detinue* nor *quo warranto* are adequate remedies, even if *detinue* would lie to recover the books. To supersede the remedy by *mandamus*, the party must not only have a specific remedy, but one competent to confer relief upon the very subject matter of litigation, and one which is equally as beneficial as the proceeding by *mandamus*.<sup>6</sup>

Where a surety is entitled, on motion to a proper court, to unconditional relief from his obligation, if such court refuses the relief, the remedy is by *mandamus*, and not by writ of error, as the duty devolved upon the court is purely ministerial, and involves the exercise of no discretion.<sup>7</sup>

So, also, after a controversy has been settled by a decree of the Court of Appeals, and the rehearing period has passed, the questions involved cannot thereafter be reopened between the same parties, and *mandamus* from the Court of Appeals to the trial court to carry into effect the decree of the Court of Appeals is the proper remedy.<sup>8</sup>

So *mandamus* will lie to compel the judge of an inferior court to sign a proper bill of exception which he has refused

4. Winchester, etc., R. Co. v. Commonwealth, 106 Va. 264, 55 S. E. 692.

5. C. & O. R. Co. v. Scott, 109 Va. 34, 63 S. E. 412.

6. Sinclair v. Young, 100 Va. 284, 40 S. E. 907.

7. U. S. Fidelity Co. v. Peebles, 100 Va. 585, 42 S. E. 310; State v. Wood Co. Ct., 33 W. Va. 589, 11 S. E. 72.

8. Miller v. Turner, 111 Va. 341, 68 S. E. 1007.

to sign at the trial, although final judgment has since been entered in the case, as the party has no other legal remedy;<sup>9</sup> but if he refuses to sign a bill certifying the facts or the evidence, because they have faded from his memory so that he cannot do so, the appellate court (while it cannot award a *mandamus*) will, upon proper proceedings had, grant the party aggrieved a new trial.<sup>10</sup>

*Procedure to Obtain the Writ.*—The procedure at common law and formerly in Virginia was dilatory and complicated. Formerly, the party aggrieved filed his petition before the superior tribunal, setting out the ground of the application, without notice to the adverse party. The petition was sworn to, and if it presented a *prima facie* case a rule was made against the adverse party to show cause why the *mandamus* should not issue. Upon the return of this rule, executed, if no sufficient cause was shown against it, a conditional *mandamus* was issued, returnable at a specified time, by which the party was required to do the specific thing, or show cause to the contrary. When return was made to this conditional *mandamus*, the party suing it out had the right to plead to, or traverse, all or any of its material allegations, to which the person making the return had the right to reply, take issue, or demur, and the procedure was as in an action on the case for a false return. At common law an action upon the case lay for the party injured against the person making such false return; and if, in such action, the return was falsified, the court would grant a peremptory *mandamus*.<sup>11</sup>

Now the procedure is much simplified by statute in Virginia.<sup>12</sup> It is provided that the application shall be on petition verified by oath, after the party against whom the writ is prayed has been served with a copy of the petition and notice of the intended application a reasonable time before such application is made. The petition is to state plainly and concisely the ground of the application, and conclude with a prayer for the writ. If

9. Collins v. Christian, 92 Va. 731, 24 S. E. 472.

10. Powell v. Tarry, 77 Va. 250.

11. 1 Rob. Pr. (old) 649-650.

12. Code, Ch. 144, § 3011ff.

no defence is made and the petition states a case proper for the writ, a peremptory writ is awarded with costs. If the defendant appears and makes defence, the defence is to be by demurrer, or answer on oath, or both. If either party demands a jury, the court or judge is to direct such issues of fact as may be proper to be tried in term; "and whether the trial be had with or without a jury, the writ peremptory shall be awarded or denied according to the law and facts of the case, and with or without costs as the court or judge may determine."<sup>13</sup> The petition for the writ is to be presented to the court having jurisdiction, or to the judge thereof in vacation, unless the application be to the Supreme Court of Appeals. If the application be to the latter, the statute declares that "The case shall be heard and determined without a jury, and witnesses shall not be allowed to testify *viva voce* before the court, but their testimony, if desired, may be used in the form of depositions taken by either party on reasonable notice to the other, or his attorney, of the time and place of taking the same."<sup>14</sup>

### § 396. Prohibition.<sup>15</sup>

It is said that no definition of the writ of prohibition can properly be formulated that will not be to some extent at variance with adjudged cases,<sup>16</sup> but the definition given by Blackstone is sufficient for our present purposes. It is "the name of a writ issued by a superior court, directed to the judge and parties to a suit in an inferior court, commanding them to cease from the further prosecution of the same, on a suggestion that the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court."<sup>17</sup>

The office of the writ of prohibition is not to correct error, but to prevent the exercise of jurisdiction of the court by the

13. Code, § 3016.

14. Code, § 3017.

15. This subject is very fully treated in a note, 111 Am. St. Rep. 929.

16. Note, 111 Am. St. Rep. 930.

17. 3 Bl. Com. [112].

judge to whom it is directed, either where he has no jurisdiction at all, or is exceeding his jurisdiction. If the court or judge has jurisdiction to enter any order or decree at all in the proceeding sought to be prohibited the writ does not lie.<sup>18</sup> Although jurisdiction of the person, or of the subject matter, may have once existed, yet, if for any cause it has been lost, the writ may issue. For example, the writ of prohibition will be granted to restrain a justice from allowing a new trial after the lapse of more than thirty days after judgment, and to restrain the defendant from proceeding after such new trial has been allowed.<sup>19</sup> So, in Virginia and West Virginia, if there has been an illegal or unauthorized judgment, the writ will issue to prevent its execution, as, where a justice of the peace has rendered a judgment for an amount in excess of the jurisdiction of the justice. In such case, the plaintiff may, at the instance of the defendant, be restrained from executing the judgment even after the constable has the money in his hands.<sup>20</sup>

If an entire debt exceeding one hundred dollars has been divided into smaller notes, all of which are due, prohibition will lie at the instance of the debtor to prevent a justice of the peace from taking jurisdiction and rendering judgment thereon, or from enforcing the collection of a judgment already rendered thereon,<sup>21</sup> but it has been held that, where separate warrants have proceeded to judgment before the justice, with the consent or acquiescence of the defendant, the judgment cannot thereafter be *collaterally* assailed by *other persons*. This result, it is said, does not impinge in any degree upon the maxim that consent cannot give jurisdiction, as the justice had jurisdiction of the amount represented in each judgment.<sup>22</sup>

Prohibition also lies to prevent the enforcement of a judgment by default where the defendant had no notice of the time and place of trial, and was not present thereat,<sup>23</sup> or to restrain a judge

18. *Fidelity Co. v. Beale*, 102 Va. 295, 46 S. E. 307.

19. *Burroughs v. Taylor*, 90 Va. 55, 17 S. E. 745.

20. *Hutson v. Lowry*, 2 Va. Cas. 42; *James v. Stokes*, 77 Va. 225; *City of Charleston v. Beller*, 45 W. Va. 44, 30 S. E. 152.

21. *James v. Stokes*, *supra*.

22. *Adams v. Jennings*, 103 Va. 579, 49 S. E. 982.

23. *Simmons v. Thomasson*, 50 W. Va. 656, 41 S. E. 335.

from proceeding in a cause in which he is disqualified by reason of interest, though the court over which he presides has jurisdiction of such matters.<sup>24</sup> The writ of prohibition, however, is issued only against a *judicial tribunal*, acting in a judicial capacity, to prevent it from exceeding its jurisdiction, hence it will not issue against a county assessor to prevent him from issuing a liquor license, nor against a county court to prevent the establishment of election precincts or voting places, as the latter acts are not judicial.<sup>25</sup>

Generally, the writ does not lie if the party complaining has any other adequate remedy at law. Formerly the writ of prohibition was not often resorted to in Virginia; the first reported case of a writ of prohibition which came before the Court of Appeals of Virginia being in 1855,<sup>26</sup> but in later years it has been of frequent use.

In many jurisdictions it is prescribed as a condition precedent to the exercise of the power to issue the writ of prohibition that objection shall be interposed in the court whose action is sought to be prohibited, and that the attention of that court shall be thereby or otherwise called to its want of jurisdiction.<sup>27</sup> This is now regulated by statute in Virginia.

*Parties.*—Usually the petitioner for the writ is some party to the proceeding sought to be restrained, but it is said that this is by no means essential, as every citizen is interested in restraining courts within their appropriate jurisdictions.<sup>28</sup> In some jurisdictions the judge of the inferior court is the only party defendant, but the general rule is to make defendants not only the judge but the other parties who are prosecuting the proceeding in his court, and it has been held in West Virginia

24. *Forest Coal Co. v. Doolittle*, 54 W. Va. 210, 46 S. E. 238.

25. *Hawk's Nest v. Co. Ct.*, 55 W. Va. 689, 48 S. E. 205; *Williamson v. Mingo Co. Ct.*, 56 W. Va. 38, 48 S. E. 835.

26. *Mayo v. James*, 12 Gratt. 17; *Hogan v. Guigon*, 29 Gratt. 705. (For a list of cases after that time, see note of Judge Burks in 29 Grattan, at page 713.)

27. Note, 111 Am. St. Rep. 965-970; *Education v. Holt*, 51 W. Va. 435, 41 S. E. 337; *Knight v. Zahnhiser*, 53 W. Va. 370, 44 S. E. 778; *Jennings v. Bennett*, 56 W. Va. 146, 49 S. E. 231.

28. 111 Am. St. Rep. 970ff. Compare *Adams v. Jennings*, 103 Va. 579, 49 S. E. 982.

that it is error not to make a party interested a defendant to the proceeding.<sup>29</sup>

*Procedure.*—The procedure in Virginia is the same as in the case of *mandamus*, and is regulated entirely by statute.<sup>30</sup> This statute was discussed in the section on *mandamus*. It should be noticed, however, with reference to prohibition, that the statute provides that “On petition for a writ of prohibition, the court, or judge in vacation, may, at any time before or after the application for the writ is made, if deemed proper, make an order, a copy of which shall be served on the defendant, suspending the proceedings sought to be prohibited until the final decision of the cause.”<sup>31</sup>

### § 397. Quo warranto.

The writ of *quo warranto* is of very ancient origin. It fell into disuse at an early day, and was substituted by an information in the nature of a writ of *quo warranto*, hence in the modern cases the judges frequently speak of the writ of *quo warranto*, or of an *information* in the nature of such a writ. It commanded the respondent to show by what authority (*quo warranto*) he exercised the franchise of an office, either because there had never been any grant of the franchise, or it had been forfeited by neglect or abuse.<sup>32</sup> Judge Burks, in his address before the Bar Association of Virginia in 1891, says: “The proceeding by writ of *quo warranto* or information in the nature of a writ of *quo warranto* seems to have been little understood in Virginia, and has seldom been resorted to in practice; other indirect methods being often pursued when the writ or information was the appropriate method.”<sup>33</sup> The cases in which the writ may be awarded in Virginia are set out in the statute.<sup>34</sup>

29. *Armstrong v. Taylor*, 15 W. Va. 190.

30. Code, ch. 144.

31. Code, § 3018.

32. 22 Am. & Eng. Encl. Law. 596-597.

33. Judge Burks' address, page 23.

34. 3022. “In What Cases, Writ of *Quo Warranto* Awarded.—A writ of *quo warranto* may be awarded and prosecuted in the name of the state of Virginia, in any of the following cases, to wit:

“First, Against a corporation (other than a municipal corporation) for a misuse or non-use of its corporate privileges and franchises.

These seem to be substantially the same as those existing at common law, and in construing this statute, it has been held that the statute was not intended to, and does not, narrow the proceeding so as to make the writ applicable only where the incumbent is a mere usurper or intruder, without color or pretense of title.<sup>35</sup> Neither at common law, nor under the statute, is the applicant entitled to the writ as a matter of right, but whether it shall be awarded or not lies within the exercise of judicial discretion.<sup>36</sup> It is the appropriate method to test the title to an office,<sup>37</sup> but, being an extraordinary remedy, it generally does not lie where the party aggrieved can obtain full and adequate relief in the usual course of proceedings at law, or by the ordinary forms of civil action.<sup>38</sup> Generally a private person cannot prosecute the writ unless he has some special interest in the matter in controversy. While the proceeding is in its nature civil rather than criminal, the writ must, as a rule, be prosecuted in the name of some public officer, but may also be prosecuted at the instance of a private person, called the relator, where his interest is one in which the public is also interested or concerned. Where the interest is public, the writ may generally be prosecuted in the name of the state at the relation of the attorney general, or the prosecuting attorney of some county or corporation. In the absence of statutory provision, the mere interest of

or for the exercise of a privilege or franchise not conferred upon it by law, or where a charter of incorporation has been obtained by it from a court or the state corporation commission for a fraudulent purpose, not authorized by law;

"Second, Against a person for the misuse or non-use of any privilege and franchise conferred upon him by or in pursuance of law;

"Third, Against any person or persons acting as a corporation (other than a municipal corporation) without authority of law; and

"Fourth, Against any person who shall intrude into or usurp any public office. But no such writ shall be awarded or prosecuted against any person now in office for any cause which would have been available in support of a proceeding to contest the election of such person to such office."

35. *Watkins v. Venable*, 99 Va. 440, 39 S. E. 147.

36. *Watkins v. Venable*, *supra*.

37. *Bland County Judges*, 33 Gratt. 443.

38. 23 Am. & Eng. Encl. Law (2nd Ed.) 607.

a party as a citizen and tax-payer does not give him the right to prosecute the writ in his name as relator. Thus, where two parties are opposing candidates for the office of sheriff, and the one receiving the highest number of votes for the office disqualifies himself from holding the same, this fact does not confer any interest in the office on the party receiving the next highest number of votes at the election.<sup>39</sup> Where the writ is issued to try the title to an office the amount of the salary of the officer is wholly immaterial on a question of the jurisdiction of the Court of Appeals, as the matter in controversy is one that is "not merely pecuniary."<sup>40</sup>

*Procedure.*—In Virginia the application may be for either a writ of *quo warranto*, or an information in the nature of a writ of *quo warranto*. In either event, the application is by petition to the court having jurisdiction of the subject matter. The petition may be filed either by the attorney general, or by any attorney for the commonwealth of any county or corporation, or, if upon being requested, they fail or refuse to apply for the writ, any person interested may present his petition for the same. The petition must be in writing, and may be applied for to the circuit or corporation court, or to the judge thereof in vacation, and if the court adjudges it a proper case for the writ to issue, an order is made directing that the petition be filed, and awarding a summons against the defendant to answer the same, returnable to the next term of court. If it is applied for by a private individual the statute provides that "it shall not be issued until the relator shall have given bond with sufficient surety (if such bond be required by the court or judge), to be approved by the clerk, in such penalty as the court or judge shall prescribe, with condition that the relator shall pay all such costs and expenses as may be incurred by the state in the prosecution of the writ, in case the same shall not be recovered from and paid by the defendant therein."<sup>41</sup> The summons is to be served as a notice is served. If the defendant fails to appear the court may hear proof of the allegations of the petition or information, and

39. *State v. Matthews*, 44 W. Va. 372, 29 S. E. 994.

40. *Watkins v. Venable*, *supra*.

41. Code, § 3024.

if they be sustained shall give judgment accordingly. If the defendant appear before the end of the next term after the service of the writ or summons, or thereafter before judgment is rendered against him, he may demur, or plead not guilty, or both, to the writ, or demur or answer in writing, or both, to such information, and every allegation contained in the information which is not denied by the answer shall be taken as true, and no proof thereof required. Provision is also made for reopening the case at the next term after it was decided, by a defendant who was proceeded against by publication. If the defendant is found guilty, the court is required to give such judgment as is appropriate and authorized by law, and for the costs incurred in the prosecution of the writ or information, including an attorney's fee of not less than ten nor more than fifty dollars, to be fixed by the court. It is further provided by the statute in Virginia that if the defendant be found guilty as to a part only of the charges, the verdict shall be guilty as to such part, and shall particularly specify the same, and as to the residue of such charges the verdict shall be not guilty.<sup>42</sup>

### § 398. Certiorari.

Certiorari is an extraordinary remedy resorted to for the purpose of supplying a defect of justice in cases obviously entitled to redress and yet unprovided for by the ordinary forms of proceedings. It is not a proper remedy where another adequate remedy is available.<sup>43</sup> It is generally issued by a superior court to an inferior court of record, requiring the latter to send into the former some proceeding therein, or the record or proceedings in some cause already terminated, in cases where the procedure is not according to the course of the common law,<sup>44</sup> but it has been said that it is also used in Virginia to bring up the proceedings before a justice of the peace, with a view to inquiry into their regularity.<sup>45</sup> This use of the writ, however, has fallen into practical disuse in Virginia. An appeal lies from the de-

42. Code, Chapter 145.

43. *Poe v. Marion Mach. Wks.*, 24 W. Va. 517.

44. 4 Encl. Pl. & Pr. 8.

45. 4 Min. Inst. 1259.

cision of a justice of the peace where the amount in controversy, exclusive of interest and costs, is greater than ten dollars, and the extensive power given to the appellate court of correcting the errors and irregularities of the justice<sup>46</sup> makes any use of the writ of *certiorari* in proceedings before a justice of the peace wholly unnecessary. In Virginia, practically the only use made of the writ of *certiorari* is by the Court of Appeals, to obtain a fuller or more perfect record when a complete record has not been furnished. After notice to the adverse party the court directs its clerk to issue the directions of the appellate court to the clerk of the inferior court, requiring the latter to certify to the Court of Appeals such parts of the record as the court may deem necessary and proper, and which are usually set forth in the order. In West Virginia, a much more extensive use is made of the writ than in Virginia. The use of the writ in West Virginia is well set forth by Judge Snyder in *Poe v. Machine Works*, 24 W. Va. 520, in which he reviews all of the prior cases.<sup>47</sup>

46. Code, § 2939.

47. The proceedings upon writ of certiorari are given in *McConiha v. Guthrie*, 24 W. Va. 124.

## CHAPTER XLVI.

### HOMESTEADS AND EXEMPTIONS.

- § 399. What is a homestead.
- § 400. History of Virginia Statute.
- § 401. Constitutional provisions.
- § 402. Who may or may not claim the homestead.
  - For whose benefit.
  - Nature of the estate.
- § 403. What may be claimed.
- § 404. How and when to be claimed.
- § 405. Effect of homestead on debts or claims of creditors.
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- § 411. Income, increase and betterments.
- § 412. Excessive homestead.
- § 413. How claims superior to homestead enforced.
- § 414. Cessation of homestead.
- § 415. Poor debtors' exemption.

#### § 399. What is a homestead.

The word "homestead" in its usual legal significance means the house and curtilage set apart for the family residence, and exempt from forced sales for the debts of the householder. Homestead laws are wholly creatures of statute.<sup>1</sup> They were unknown to the common law, and, notwithstanding the many encomiums passed upon them and the policy which dictated their enactment, the fact remains that they generally enable debtors to screen their property from the payment of their just debts; and, whatever may be said in commendation of a statute which provides a real "home" for the family, it can hardly justify the enactment of a law which enables the debtor to claim a "homestead" in every kind of perishable property.

1. The subject is so far statutory that the present discussion is confined almost exclusively to the Virginia statute.

### § 400. History of Virginia statute.

As the legislature of the state has power to pass any law *not prohibited* by the constitution of the state, or of the United States, there is no reason why a homestead may not be created as well by statute as by constitutional provision.<sup>2</sup>

The first homestead law enacted in Virginia was an act approved April 29, 1867.<sup>3</sup> The next homestead law in Virginia was created by the constitution of 1869, and was put into operation by an act of Assembly approved June 27, 1870. The constitutional provision was not self-executing, but required legislation to put it into effect.<sup>4</sup> The present homestead law of Virginia was created by the constitution of 1902, and was put into operation by the Acts of 1902-3-4, page 868. The constitution also continued in operation to a certain extent the former homestead law, with some few modifications.<sup>5</sup>

The homestead created by the law of Virginia is not a "homestead" in any true sense of the word, but is an *exemption*, pure and simple. It may be claimed not only in real estate, but in any personal property whatever, however perishable its nature. Some important changes have been made by the present constitution and Acts of Assembly in pursuance thereof. In the first paragraph of § 190 of the constitution, the following language is new: "If the property purchased and not paid for be exchanged for or converted into other property by the debtor, such last-named property shall not be exempt from the payment of such unpaid purchase money under the provisions of this article." Whether or not this changed the existing law it is not material to inquiry. Under the former law, it was more than doubtful whether the homestead could be claimed in a shifting stock of merchandise.<sup>6</sup>

It had become fixed by judicial decisions in Virginia that the

2. *Hatorff v. Wellford*, 27 Gratt. 356; *Moran v. Clark*, 30 W. Va. 358, 4 S. E. 303.

3. Acts 1866-7, page 962.

4. *Oppenheim v. Myers*, 99 Va. 582, 585, 39 S. E. 218.

5. Constitution of Virginia (1902), § 193.

6. *Rose v. Sharpless*, 33 Gratt. 153; *In re Tobias*, 6 Va. Law Reg. 297, 302.

homestead could be claimed in property which the claimant had conveyed to another, but which conveyance had been set aside on the ground of fraud, or want of consideration. By § 191 of the present constitution, it is expressly provided that "the exemption shall not be claimed or held in a shifting stock of merchandise, or in any property the conveyance of which by the homestead claimant has been set aside on the ground of fraud, or want of consideration." But after goods have been surrendered to a trustee in bankruptcy, they lose their shifting character, and a homestead may be claimed in them.<sup>7</sup> If, however, the bankrupt has intermingled goods paid for with those not paid for, and seeks to claim a homestead in those paid for, the burden of proof is on the bankrupt to show which of the goods have been paid for.<sup>8</sup>

The constitution of 1869 provided that "nothing contained in this article shall be construed to interfere with the sale of the property aforesaid, or any portion thereof by virtue of any mortgage, deed of trust, pledge or other security thereon." This provision is wholly omitted from the present constitution. The words "other security" had been several times the subject of judicial construction, and the decisions had not been harmonious.

Both constitutions provide that "the General Assembly shall prescribe the manner and the conditions on which a householder or head of a family shall set apart and hold for himself and family" a homestead in his property, but that this section "shall not be construed as authorizing the General Assembly to defeat or impair the benefits intended to be conferred by the provisions of this article."

### § 401. Constitutional provisions.

It is held by some courts that where the constitution exempts a homestead "not exceeding" a certain amount to particular individuals, the legislature may enlarge the amount (as in Alabama) while other courts hold that the exemption cannot be enlarged (as in Michigan and South Carolina). The same dif-

7. In re Tobias (D. C.), 103 Fed. 68; 6 Va. Law Reg. 297.

8. In re Tobias, *supra*.

ference of opinion exists as to the persons entitled to claim.<sup>9</sup> In Virginia, where the constitution declares that "every householder or head of a family" may claim the exemption, it has been held that an act extending the right to a widow and minor children is valid.<sup>10</sup>

It is generally held everywhere that neither by constitution nor statute can an exemption be created which will be good against prior debts, as such provisions or enactments would be repugnant to that clause of the constitution of the United States which prohibits a state from passing any law impairing the obligation of a contract.<sup>11</sup>

### § 402. Who may or may not claim the homestead.

The constitution declares: "Every householder or head of a family" shall be entitled to hold,<sup>12</sup> while the Code declares that "Every householder residing in this state" shall be entitled to hold. There was the same difference between the constitution of 1869 and the Code. The Court of Appeals held, in construing the Act of 1870, which put into effect the constitution of 1869, that "householder" and "head of a family" had the same meaning in the provisions of the constitution and statutes relating to homesteads, and that in order to constitute a householder, or head of a family, there must exist the relation of dependence and support coupled with a legal or moral duty on the part of the householder to support the dependent. A mere aggregation of individuals, for example, a fraternity living together in a house, is not sufficient; the aggregation must constitute *a family* of which there must be a master or chief. No particular number is necessary to constitute a family, though there must, at the time the claim is made, be at least two.<sup>13</sup> There seems to be no restriction upon who may be a head of a family. But there must be an obligation, legal or moral, on the part of the head to sup-

9. 15 Am. & Eng. Encl. Law (2nd Ed.) 530.

10. Hatorff v. Wellford, 27 Gratt. 356; Helm v. Helm, 30 Gratt. 404.

11. Homestead Cases, 22 Gratt. 266.

12. Va. Constitution (1902), § 190.

13. Calhoun v. Williams, 32 Gratt. 18; Oppenheim v. Myers, 99 Va. 582, 39 S. E. 218.

port the family, and a corresponding state of dependence on the part of those who answer the description of the family.<sup>14</sup> It has been held that a married woman might claim the homestead, though living with her husband, and though he contributed to the support of the family, provided she managed the house and the family, and was regarded by the family as its head, and that the circumstance that the husband assists in the support of the family and has already claimed the benefit of the "poor law" as head of the family, will not deprive the wife of the right to claim the exemption.<sup>15</sup> The authorities upon the question of the right of a wife to claim a homestead, are in serious conflict, but it seems to be a rather anomalous family that can have one head to claim the "poor law" and another to claim the "homestead."<sup>16</sup> On the other hand, in another case, the court, without deciding whether a wife might not under some circumstances be the head of a family, decided that a married woman whose husband lives out of the state, but visits her at intervals of two or three years, and occasionally makes her small remittances of money, and who has no children dependent upon her for support, is not a householder or head of a family in contemplation of the constitution and the statutes passed in pursuance thereof.<sup>17</sup>

As the constitution confers the right on a "householder or head of a family," the right to claim a homestead must be determined by the language of the constitution, and not by that of the statutes made in pursuance thereof. At all events, if the right is conferred by the constitution, it cannot be taken away by statute.

While it is necessary that there should be a *head*, it is equally necessary that there should be a *family*. An unmarried man with no children or other persons dependent upon him, living with him, is not a householder within the meaning of the act. Doubtless, if one has legally adopted children and has assumed or had imposed upon him the duty of their support, he would be entitled to claim the exemption; but the mere fact that one has

14. Monographic Note in 70 Am. St. Rep. 107.

15. Richardson v. Woodward (C. C. A.), 104 Fed. 873; *contra*, see Rosenberg v. Jett, 72 Fed. 90.

16. 6 Va. Law Reg. 526, 661; Note 70 Am. St. Rep. 111.

17. Oppenheim v. Myers, *supra*.

taken the children of another into his family, when there was no duty upon him to support them, and no dependence upon the part of the children, would not constitute him a head of a family. And even where the children are adopted, it must be done in good faith, and not merely for the purpose of giving a right to the exemption.<sup>18</sup> As to the effect of the destruction of the family, see *infra*.

The words "residing in this state" were inserted in the Code, but were not in the former law. They are, however, merely declaratory of the existing law. It had been decided under the original act before the insertion of these words that the householder must reside in the state to be entitled to the exemption.<sup>19</sup> In *Clendenning v. Conrad*, 91 Va. 410, 21 S. E. 818, the householder claimed a homestead in the proceeds of the sale of real estate, and there was an order to pay the same to him, but before payment he died, and his infant children removed to West Virginia. The non-resident guardian filed his petition in the case, setting out the facts and asking permission to remove the \$2,000, which represented the homestead, to the state of West Virginia, and there was a decree accordingly. Subsequently he was required to give bond and security, with condition to have the principal forthcoming on the termination of the homestead estate. But neither in the briefs of counsel, nor in the opinion of the court, is any suggestion made that the homestead terminated by virtue of the removal. It is possible that the counsel may have taken the view that the removal did not terminate the homestead, because infants cannot control their domicile; and the court may have coincided in this view, or else simply contented itself with affording the relief prayed. At all events the point is not mentioned.

*For Whose Benefit.*—The primary object of a homestead law is to provide for the family, and to enable the person to whom the right is given to provide a home for the family, and to protect them from suffering and want, but the phraseology of the different laws will have to determine who are the beneficiaries.

18. 15 Am. & Eng. Encl. Law (2nd Ed.) 540, 541.

19. *Lindsay v. Murphy*, 76 Va. 428; *Blose v. Bear*, 87 Va. 177, 12 S. E. 294.

Section 192 of the constitution, following the constitution of 1869, provides that the General Assembly shall prescribe the manner and conditions on which a householder or head of a family shall select and hold for *himself* and family a homestead. This language, it is said, makes the householder himself one of the beneficiaries, and if the right to claim the homestead by reason of being the head of the family existed at the time it was claimed, it is argued that it is not lost by the death of all the members of the family, except the head.<sup>20</sup> The language, however, may mean that the householder is to enjoy the benefits of the homestead along with the family *so long as the family* exists, and this seems to have been the construction put upon it by the Revisors of 1887. In Judge Burks' address before the Bar Association,<sup>21</sup> it is said: "The Code declares when the right of exemption shall cease. Among other periods fixed for its termination, it is enacted that it shall cease whenever the householder ceases to be such. It was assumed by the revisors, as without question, that it was competent for the legislature so to enact; but doubt is supposed to be thrown upon the correctness of the assumption by a quite recent decision of the Court of Appeals under the former law [referring to *Wilkinson v. Merrill*, *supra*,] in which it *seems* to be held that the *constitution* fixes the right, and that when once the property is set apart to the householder as exempt, it continues exempt to him, though he afterwards ceases to be a householder or head of a family."

*Nature of the Estate.*—Courts are much divided as to whether a homestead is an estate, or a mere privilege. It is certain that the claim of a homestead cannot in any wise improve the title of the claimant. It has been held that the homestead is a unit, and does not consist of a life estate in land with a remainder over, and that the claimant, when the law is complied with, gets the whole estate in the land; and where a husband is the claimant, he has the right, his wife uniting, to sell or convey the homestead or consume it in any other way recognized by law. This simply shows that the *fee* is set apart, and may be aliened or

20. 6 Va. Law Reg. 143; *Wilkinson v. Merrill*, 87 Va. 513, 12 S. E. 1015.

21. Judge Burks' Address, 2 Bar. L. Pr., pp. 1401, 1402.

consumed without accountability to anyone.<sup>22</sup> Section 3631 of the Code provides that in order to secure the benefit of the exemption provided by the preceding section, the "householder" shall by writing declare his intention to claim it, etc., and in construing this section, it was in effect held that this was a personal privilege which the householder must himself exercise; that he would not be compelled to do it, nor could anyone do it for him, and hence if he failed to set it apart, no homestead could be claimed during his lifetime. This seems to liken the exemption to a privilege.<sup>23</sup> Upon the death of a householder, who has set apart a homestead in land, his widow does not take a life estate in the land, but she and the minor children simply hold it exempt, as before, from liability for certain debts. Neither the constitution nor the statute giving the householder the right to claim a homestead creates or vests in either the householder or his widow any other or different estate from that which they held before. The right of the widow, upon the death of the householder, is a mere personal right to occupy and possess the premises unaccompanied by any new or additional title to or property interest therein. The taxes on the property are not to be assessed against the widow as a life tenant, but are to be assessed as other real estate of the householder.<sup>24</sup>

### § 403. What may be claimed.

The exemption may be set apart in real or personal property of the claimant, or both, including money and debts due him, to an amount not exceeding \$2,000. It may be claimed in property held as joint tenant, coparcener, or tenant in common, and in equitable as well as legal estates. The only restriction put upon the claimant is that "the said exemption shall not be claimed or held in a shifting stock of merchandise, or in any property the conveyance of which by the homestead claimant has been set aside on the ground of fraud, or want of consideration."<sup>25</sup>

22. *Va.-Tenn. C. & I. Co. v. McClelland*, 98 Va. 424, 36 S. E. 479.

23. *Wray v. Davenport*, 79 Va. 19. In *Calhoun v. Williams*, 32 Gratt. 18, 20, it is spoken of as a privilege. Also in *Linkenhoker v. Detrick*, 81 Va. 44, 56.

24. *Murphy v. Richmond*, 111 Va. 459, 69 S. E. 442.

25. Va. Constitution (1902), §§ 190, 191; Code, §§ 3630, 3631, 3632, and 3633.

### § 404. How and when to be claimed.

When the householder is alive, the exemption is to be claimed by a *writing* signed by him and duly admitted to record—to be recorded as deeds are recorded, in the county or corporation wherein the real estate or any part thereof is, if it be claimed in real estate, or wherein he resides, if it be claimed in personal property. The writing is to describe the property selected with reasonable certainty, and have the householder's cash valuation annexed thereto. If the claim be in personal property, the valuation is to be affixed to each parcel or article.<sup>26</sup> If the householder dies without having set apart a homestead, his widow and minor children, or such of them as there may be, may *file a petition* in the Circuit Court of the county, or the city court of a city wherein his real estate or the greater part thereof is, to have commissioners appointed to set it apart, if it is to be set apart in real estate; if to be set apart in personalty, his *widow may select* and set it apart by such writing as the householder would have had to make if living; but if she die or marry, the minor children by their guardian or next friend may have it

26. Code, §§ 3631, 3639. The Statute does not prescribe the form of the writing, but it is believed that the following form is sufficient: Know all men by these presents that I \_\_\_\_\_ a resident of the county of \_\_\_\_\_ in the State of Virginia, being a householder and head of a family, do hereby declare my intention to claim, and I do hereby select and set apart, as and for a homestead, in pursuance of the Constitution and laws of the State of Virginia, the following real and personal property, towit: The tract of land on which I now reside in the said county of \_\_\_\_\_ containing one hundred acres, bounded and described as follows (here insert such description of the land as would be sufficient in a deed of conveyance) of the value of:

	\$1000
One black horse of the value of.....	150
Two milch cows of the value of \$50 each.....	100
One piano of the value of.....	250
	\$1500

All of said personal property being located on the tract of land above mentioned.

Given under my hand and seal this the \_\_\_\_\_ day of \_\_\_\_\_ 1912.

(Seal.)

To be acknowledged as other deeds.

set apart by such a writing.<sup>27</sup> By the Code<sup>28</sup> it is provided that the exemptions may be set apart at any time before the same is subjected by sale, or otherwise, under judgment, decree, order, execution or other legal process. It cannot be asserted as a mere claim, however, for the first time in the Court of Appeals after abundant opportunity to claim it has been given while the case was pending in the trial court.<sup>29</sup>

### § 405. Effect of homestead on debts or claims of creditors.

By express provision of the constitution, the exemption does not extend to any execution, order or other process issued on any demand in the following cases:

“First. For the purchase price of said property, or any part thereof. If the property purchased, and not paid for, be exchanged for, or converted into, other property by the debtor, such last named property shall not be exempted from the payment of such unpaid purchase money under the provisions of this article;

“Second. For services rendered by a laboring person or mechanic;

“Third. For liabilities incurred by any public officer, or officer of a court, or any fiduciary, or any attorney-at-law for money collected;

“Fourth. For a lawful claim for any taxes, levies, or assessments, accruing after the first day of June, eighteen hundred and sixty-six;

“Fifth. For rent;

“Sixth. For the legal or taxable fees of any public officer or officer of a court.”<sup>30</sup>

Nor, as stated above, can the exemption for any purpose be claimed in a shifting stock of merchandise, or in any property

27. Code, §§ 3636, 3640.

28. Code, § 3642.

29. *Wray v. Davenport*, 79 Va. 19, 25-6.

30. Va. Constitution (1902), § 190.

the conveyance of which by the homestead claimant has been set aside on the ground of fraud or want of consideration.

The provision making property received in exchange liable for the purchase price of the property given in exchange is new. In defining the words "laboring person" contained in the constitution of 1869, the Court of Appeals said: "We think it safe to say that the word 'laborer,' when used in its ordinary and usual acceptation, carries with it the idea of actual, physical, and manual exertion and toil, and is used to denote that class of persons who literally earn their bread by the sweat of their brows, and who perform with their own hands, at the cost of considerable labor, the contracts made with their employers. . . . The framers of that instrument (the constitution), in giving to a large class of persons a homestead, clearly designed that it should not affect that class of persons who were dependent upon their own manual labor for the support of themselves and their families, and whose necessity for the prompt and certain payment of their wages they regarded as paramount even to the claims of the debtor to a homestead."<sup>31</sup> Applying this definition to the case in judgment, the court held that a *mail carrier* was a "laboring man" within the meaning of the constitution. Since this decision the Legislature has declared that the term "laboring man" shall include all householders who receive wages for their services.<sup>32</sup>

Owing to the comma contained in the constitution of 1869, immediately after the words "attorney at law" in the third exception, some doubt was cast upon the proper meaning of the exception. Now, however, it seems fairly plain that the exemption does not apply to *any* liability incurred by a public officer, officer of court, or any fiduciary, and that as to attorneys at law, as such, they are excluded from claiming the exemption only for "money collected."

The constitution<sup>33</sup> limits the right of the householder to claim the exemption to "any execution, order or other process issued on any demand for a *debt* hereafter contracted." Code, § 3630,

31. *Farinholt v. Luckhard*, 90 Va. 936, 21 S. E. 817.

32. Code, § 3657.

33. Va. Constitution (1902), § 190.

says: "On any demand for a *debt* or *liability on contract*." Both expressions would seem to deny the right to claim the homestead against liabilities for torts, and such was the construction given to the constitution of 1869, and the act passed in pursuance thereof.<sup>34</sup> In determining whether a demand is for a matter of contract or tort, the court will look to the substance of the transaction and not to its mere form. For example, a breach of promise to marry is enforced in a contract action, and yet the substance of the transaction is a quasi-tort, for which there is no measure of damages, and in which exemplary damages may be allowed. On the other hand, where the right of recovery in an action is based solely upon the ground that the plaintiff has been damaged to a certain amount by a breach of contract on the part of the defendant, and not by reason of a tort, although enforced in an action of trespass on the case, it is a demand founded on *contract* against which the homestead may be claimed. The mere use of violent language in characterizing the alleged fraud in the procurement of the contract and its breach, will not suffice to convert the breach of the contract into a tort, and, as stated, the defendant in such action may claim the benefit of the homestead exemption against the judgment rendered therein.<sup>35</sup> It has further been held that the claim to a homestead cannot be asserted against a demand for taxes due the state, though the claim be asserted by the *sureties* of an officer.<sup>36</sup> Until recently amended, the Code<sup>37</sup> also excepted debts as to which the householder had waived his homestead exemption. Under the recent amendment of this section, this exemption has been omitted. It seems amply provided for by § 3647.

The homestead exemption is an exemption against liability for *debts*, and if the householder dies leaving a widow and heirs

34. *Whiteacre v. Rector*, 29 Gratt. 714, a fine due the commonwealth; *Burton v. Mill*, 78 Va. 468, damages for breach of promise to marry. It has been held, however, that the homestead may be claimed against a fine due the United States. This was based on the language of the U. S. statutes. *Allen v. Clark* (C. C. A.), 9 Va. L. Reg. 694.

35. *Jewett v. Ware*, 107 Va. 802, 60 S. E. 131.

36. *Com. v. Ford*, 29 Gratt. 683.

37. Code, § 3630.

but no debts, the exemption cannot be claimed by the widow against the heirs.<sup>38</sup> In the case just cited, there was a widow and no children, but the court said distinctly that if there are no minor children, she cannot hold a homestead against the adult children. In 2 Va. Law Reg. 172, it was said by the present writer: "Nothing is said about the case where the householder leaves a widow and children, some of whom are infants and others adults, but it seems to us that the plain language, both of the constitution and the Act of Assembly, gives the exemption only against creditors, and hence that the exemption cannot be claimed against the heirs in any case, if there are no creditors. While this seems to be plain, it might lead to an anomalous result. If a householder owning \$2,000 worth of property dies leaving a widow and two children, one an infant and the other adult, and \$500 of debts; as against the creditors the widow and infant might claim the whole \$2,000 as exempt, but not as against the adult heir. If the adult heir chooses to pay off the debts, and does so, as he has the right to do—being one of the heirs—we presume the right to claim the homestead by the widow and infant is destroyed, and the estate would then be divided as if there were no debts." Since this was written, the Court of Appeals has held that, where a husband has set apart a homestead *in his lifetime* and then died, owing debts, and leaving a widow but no infant children surviving him, the widow is entitled to continue to hold the homestead during her life or widowhood, and cannot be deprived thereof by the payment of the husband's debts by his adult heirs. The homestead having been claimed by the husband in his lifetime, it is said that her status is fixed by the death of her husband owing debts and a homestead claimed in his lifetime.<sup>39</sup> This is not the exact case discussed above, and it may be that a different result would follow if the debts were paid before the homestead was claimed, but the reasoning of the court would probably lead to a like result as in the case cited in the margin, whether the homestead were claimed by the husband in his lifetime, or by the widow after his debts were paid by the heir. If so, the question above raised is settled in Virginia.

38. Helm *v.* Helm, 30 Gratt. 404.

39. Davis *v.* Davis, 101 Va. 230, 43 S. E. 358.

**§ 406. Waiver of the homestead.**

It is provided by § 3647 of the Code that the householder may, in any bond, bill, note, or other instrument for the payment of money, or by writing thereon or annexed thereto, waive the benefit of his exemption either before or after it has been set apart, and that, if he does so, the property which would otherwise be exempt, may be subjected in like manner and to the same extent as other property or estate of such person, except that the waiver shall not extend to property excepted under Code, §§ 3650, 3651, and 3652. Both the constitution of 1869 and that of 1902 are silent on the subject of waiver. A waiver clause was inserted in the Act putting into effect the constitution of 1869, and is retained in the present Code by § 3647, which has not been amended or altered since the present Constitution went into effect. The waiver clause in the former Act of Assembly was sustained as valid, and it was deemed immaterial whether the waiver was made before or after the homestead had been set apart.<sup>40</sup>

Whether a homestead under the new constitution can be waived by the householder has recently been the subject of discussion *pro* and *con* in the Virginia Law Register.<sup>41</sup> This doubt is based chiefly upon the supposed repeal, by implication, of § 3647 of the Code. It is not within the purview of this chapter to settle or even to discuss the subject of controversy. Repeals by implication are not favored, and it is not believed that the section mentioned has been so repealed. The waiver, to be effectual, must be made in the bond, bill, note or other instrument, by which the householder is or may become liable for the payment of money, or by a writing thereon or attached thereto. The form of the waiver is: "I (or we) waive the benefit of my (or our) exemption as to this obligation." If non-negotiable paper containing on the face of it a waiver of the homestead by the maker and endorsers is assigned by the payee thereof, the homestead is not thereby waived as to the liability of the assignor by virtue of his assignment. The waiver on the face of the paper is applicable only to the partic-

40. *Reed v. Union Bank*, 29 Gratt. 719; *Linkenhoker v. Detrick*, 81 Va. 44.

41. 10 Va. Law Reg. 363, 469, 563.

ular obligation expressed in the body of the paper, and not to the implied obligation growing out of the assignment.<sup>42</sup> If two or more persons are engaged, as partners, in commercial pursuits, in which it is necessary or customary to execute negotiable paper containing a waiver of the homestead, it is believed that the signature of the firm name in the usual course of business, by any member of the firm, to such note, will be sufficient to waive the exemption of each and every member of the firm. This would seem to result from the nature of the transaction and the rights of the partners among themselves. But it seems to have been held otherwise in Alabama.<sup>43</sup>

If the surety in a bond containing a waiver of the exemption, pays the bond, the question will arise at once, can the principal claim the homestead against the surety when called on to pay the debt? By analogy to the construction placed on the Bankrupt Act, it would seem that he may. The action is no longer on the bond, but on an implied contract which grows out of the relation of the parties. The bond has been paid, and a "bond on which principal and surety are both bound, once paid by the surety in the lifetime of the principal, without assignment by the creditor or agreement to assign, is forever dead as a security as well in equity as in law. There can be no subrogation in such a case."<sup>44</sup>

It is somewhat singular that a married man is permitted to defeat the homestead absolutely by a waiver of this kind, which is his sole act, but cannot by his sole act alien or encumber the property. And yet, it is manifest that the legislature intended to make such a distinction.<sup>45</sup> He is thus allowed to do indirectly what he cannot do directly.

It is provided by the Code,<sup>46</sup> that, where judgment is rendered on an instrument waiving the homestead, or upon a demand superior to the homestead, the judgment and the execution which issues thereon shall state the fact, but that the silence of such a

42. *Long v. Pence*, 93 Va. 584, 25 S. E. 593, 2 Va. Law Reg. 607, and Note by Judge Burks.

43. *Vincent v. Hurst*, 76 Ala. 588, as cited in 9 Am. & Eng. Encl. Law (1st Ed.) 488.

44. *Cromer v. Cromer*, 29 Gratt. 280.

45. *Va. & Tenn. Coal Co. v. McClelland*, 98 Va. 424, 36 S. E. 479.

46. Code, § 3649a.

judgment or execution upon that subject shall not raise a presumption of non-waiver. A judgment otherwise valid, however, is not invalidated by the fact that it erroneously states that it was rendered on an instrument waiving the homestead.<sup>47</sup>

### § 407. Prior liens.

It has been held in Iowa and Texas that where property acquired the homestead character subsequent to the creation of liens or incumbrances thereon, the latter are not affected thereby.<sup>48</sup> The constitution of 1869, Art. XI, § 3, declared, "That nothing contained in this article shall be construed to interfere with the sale of the property aforesaid or any part thereof by virtue of any mortgage, deed of trust, pledge or other security thereon." No such provision is contained in the present constitution. In construing the words "other security" in the constitution of 1869, the court held that "other security" meant security of a like character, that is, such as was created by the party's own act, and consequently that a judgment against the householder before he became such was not superior to the homestead, and that the homestead might be claimed against it.<sup>49</sup> Afterwards it was held that such a judgment was a security within the meaning of the constitution, thereby in effect overruling *White v. Owen*, cited in the margin, though no mention was made of the case.<sup>50</sup> In a still later case, however, the doctrine of *White v. Owen* was reaffirmed, and the case of *Kennerly v. Swartz*, cited in the margin, was overruled, so that the present holding is that the homestead may be claimed by a householder against a judgment obtained against him before he became a householder.<sup>51</sup>

### § 408. Effect of will of householder.

It would seem from the provisions of the Code,<sup>52</sup> permitting the widow and minor children of a householder to set apart a

47. *Long v. Pence*, 93 Va. 584, 25 S. E. 593.

48. 95 Am. St. Rep. 931-2, and cases cited.

49. *White v. Owen*, 30 Gratt. 43.

50. *Kennerly v. Swartz*, 83 Va. 704, 3 S. E. 348.

51. *Oppenheim v. Myers*, 99 Va. 582, 39 S. E. 218.

52. Code, §§ 3636, 3640.

homestead in his property, that he cannot, if indebted, make a will by which he can deprive them of this privilege. It is expressly provided,<sup>53</sup> however, that if the widow receives either dower or jointure, she cannot claim the benefit of the homestead in the householder's *real estate*; but the rights of minor children in that event are not affected. What this language would seem to indicate is that the application must be joint, yet the language of § 3637 is quite explicit and evidently contemplates a separate interest for the children in the event that the widow receives either dower or jointure. It would seem, therefore, that if she receives neither, that the application should be by the widow and infant children, but that if she has received either, the application for the homestead should be by the children only. In this event, the estate of the householder would be burdened both by the dower or jointure of the wife and the homestead in the infant children. While the widow who has received either dower or jointure cannot claim the homestead in her husband's real estate, the right to claim a homestead in the personalty is left unaffected.<sup>54</sup> There can be but one homestead, however, carved out of the householder's estate. Where the widow has received dower or jointure it would seem that she cannot claim a homestead in his personal estate, if a homestead has been claimed by the minor children in the real property.

If a householder who is indebted has set apart a homestead in his lifetime, he cannot by will deprive his widow and minor children of the benefit of the exemption, for it is expressly provided that, after his death, it shall be held by his widow and minor children, or such of them as there may be, exempt as before, and also from the debts and obligations of such widow and children, or any of them.<sup>55</sup> Inasmuch as the homestead set apart by the husband in his lifetime is exempt not only from his debts, but also from the debts of the widow and her minor children as well, it is doubtful whether she can claim a homestead in her property while enjoying one set apart in her husband's property. It would seem to be against public policy and the spirit of the act. It is not per-

53. Code, § 3637.

54. Code, § 3640.

55. Code, § 3635.

mitted in South Carolina.<sup>56</sup> It must be borne in mind that the homestead can only be claimed as against a debt or liability on contract, and if there are no such debts or liabilities, the widow and minor children cannot claim the homestead against the adult children, or other heirs.<sup>57</sup>

### § 409. Deed of trust or mortgage.

It is provided by the Code,<sup>58</sup> that the *real estate* set apart by a householder shall not be mortgaged, encumbered or aliened by the householder, if a married man, except by the joint deed of himself and his wife admitted to record, except for the purchase price thereof, or for the erection or repair of buildings thereon. The statute is silent as to a homestead claimed in personal property. It is probable that this may be aliened or encumbered by the sole act of the householder. In Virginia it has been held that the sole deed of a *husband* conveying a homestead in real estate which has been set apart by him is void, and such seems to be the weight of authority.<sup>59</sup>

### § 410. Power over homestead.

The householder has the unrestrained power of alienation and encumbrance over the homestead except as hereinbefore stated, and a court of equity will not require security to be given for the forthcoming of the articles exempted, or their value, at the expiration of the homestead period, either of a householder, or a widow and children after his death, although a limit is fixed to the duration of the homestead. During the homestead period, no lien *in invitum* attaches thereto.<sup>60</sup>

### § 411. Income, increase and betterments.

It is expressly provided by the Code,<sup>61</sup> that if, at the time the

56. *Lanham v. Glover*, 46 S. C. 65, 24 S. E. 49.

57. *Helm v. Helm*, 30 Gratt. 404.

58. Code, § 3634.

59. *Va.-Tenn., etc., Co. v. McClelland*, 98 Va. 424, 36 S. E. 479; Note, 95 Am. St. Rep. 911, 914.

60. *Williams v. Watkins*, 92 Va. 680, 24 S. E. 223; *Mahoney v. James*, 94 Va. 176, 26 S. E. 384.

61. Code, § 3643.

homestead is set apart, it does not exceed \$2,000 in value, the exemption thereof shall not be affected by any increase in its value afterwards, unless such increase is caused by permanent improvement upon the real estate set apart. This provision is taken from the West Virginia law.<sup>62</sup> Under the West Virginia Code, the homestead could only be claimed in *real estate*, and hence many of the difficulties which arise under the so-called homestead law of Virginia do not and cannot arise under the West Virginia law. No matter how valuable the real estate thereafter may become, unless it be by permanent improvements placed thereon, it is exempt. If, for instance, the building of a railroad or other improvements in proximity to it, should greatly enhance its value, it would still be exempt. If in all respects fair in the first instance, it is probable that the discovery of valuable minerals thereon afterwards would not affect the exemption. If, however, the property is enhanced in value by permanent improvements, a creditor can subject the excess. Crops raised in the ordinary course of husbandry upon land previously set apart as a homestead, while they remain such, are exempt from levy to the same extent as the land itself.<sup>63</sup> But how about the increase of personal property? This, when well managed, generally increases more rapidly than real estate, and, if a liberal construction is put upon this statute; all increase of personal estate is exempt. It is difficult to say what is the proper construction of this section.<sup>64</sup>

#### § 412. Excessive homestead.

It is provided by the Code,<sup>65</sup> that where the homestead is excessive, in the first instance, or has been made excessive by improvements upon real estate, any creditor against whom the exemption is claimed, may file a bill in equity for the purpose of subjecting such excess.

#### § 413. How claims superior to homestead enforced.

If a householder die leaving debts, on some of which the home-

62. Burks' Address, page 31, 2 Bar. L. Pr. 1401.

63. *Neblett v. Shackleton*, 111 Va. 707, 69 S. E. 946.

64. 15 Am. & Eng. Encl. Law (2nd Ed.) 592, *et seq.*

65. Code, § 3644.

stead has been waived, and others not, and the claim of exemption is asserted by his widow and infant children, that portion of his property not embraced in his homestead should be first applied ratably to all of his debts, and, if not sufficient to pay them, then those creditors holding a waiver of the homestead exemption may resort to the homestead for the payment of the balance of their debts; and even if the householder be alive, a creditor holding a debt paramount to the homestead is required to exhaust the non-exempt property in the county or corporation wherein the proceeding is before resorting to that which is exempt. If, however, the claim is secured by mortgage, deed of trust, or other specific lien on the real estate set apart, such security may be enforced in the first instance before resorting to the other estate of the debtor.<sup>66</sup> "But a judgment creditor who has the first lien on the real estate of his debtor, worth nearly \$30,000, has the right to subject the same to the payment of his judgment, though his debt contains no waiver of the exemption, and the subsequent liens which are paramount to the homestead are in excess of the whole value of the land. If the judgment debtor claims the homestead, it may be set apart to him, and the judgment be paid out of the residue, but if necessary to pay subsequent liens which are paramount to the homestead, the land so set apart should be subjected."<sup>67</sup>

#### § 414. Cessation of homestead.

It is provided by the Code,<sup>68</sup> that when any person entitled as a householder to the exemption provided for him in § 3630 ceases to be a householder, or when any person removes from this state, his right to claim or hold any real estate as exempt under the Chapter on Homesteads, shall cease; and upon the death of a householder leaving neither wife nor minor children surviving him, or, if there be a wife or minor children, then upon her death or marriage, and if there be minor children, as soon as the youngest of them who attain the age of twenty-one years attains that

66. Code, § 3648; *Strange v. Strange*, 76 Va. 240; *Scott v. Cheat-ham*, 78 Va. 82.

67. *Strayer v. Long*, 93 Va. 695, 26 S. E. 409.

68. Code, § 3649.

age, or all marry, if they marry before attaining that age, the exemption shall cease, and the property pass as other real and personal estate, according to the law of descents and distribution, or as the same may be devised or bequeathed by said householder, subject to his debts; but that the lien of a judgment or decree for money upon a demand not paramount to the homestead shall attach to such only of his real estate as he may be possessed of or entitled to at the time the exemption ceases. It is said by Judge Burks, in his address, that "The main object in declaring when the exemption shall cease is to fix a time when a judgment lien shall attach to the exempted real estate, and it is declared that it shall not attach except to such real estate as the householder shall have at the time the exemption shall cease, and that it shall attach then. This leaves the householder at liberty while the exemption continues to alien the exempted real estate free from any encumbrance by the lien of a judgment (in the absence of waiver) recovered during the time the right of exemption exists, and thus enables him to make a good title to the purchaser, at least so far as such judgment is concerned."

Under the language of this section, it would seem, if there had once been a family which had ceased to exist, the homestead would likewise cease to exist.<sup>69</sup> It has been hereinbefore observed, however, that the right to the homestead is conferred by the constitution, and that the legislature is simply directed to enact the necessary legislation to carry out the provisions of the constitution, and it has been strongly argued that, as the legislature was directed to prescribe the manner in which the householder or head of a family should set apart and hold for *himself and family* the homestead provided by the constitution, the legislature had no power to deprive the householder of his homestead set apart when there was a family, simply on account of the fact that the family had ceased to exist as such; and such is the holding of the court.<sup>70</sup>

The prohibition upon the enforcement of a judgment against property set apart as a homestead, during the homestead period was not intended to suspend the running of the act of limitations

69. Calhoun v. Williams, 32 Gratt. 18.

70. Wilkinson v. Merrill, 87 Va. 513, 12 S. E. 1015.

during the homestead period as to judgments against the householder, nor to extend the life of the judgment. Hence, where a judgment rendered against the householder has become barred by the act of limitations, before the exemption period ceased, a suit to enforce the lien after the householder's death, leaving neither widow nor minor children, cannot be maintained, as the judgment is barred by the act of limitations applicable to judgments, and there is no deduction of any time on account of the existence of the homestead period. The statute fixing the limitation on the life of judgments contains no such exception.<sup>71</sup>

### § 415. Poor debtors' exemption.

Section 190 of the constitution, in providing for the homestead, and also the Act of Assembly putting it into operation, each expressly states that it is "in addition" to the articles now exempted from levy or distress for rent. These latter exemptions are usually spoken of as the "poor debtors' law." The exemption embraces the wearing apparel of the debtor and his family, necessary beds and bedding, and numerous articles of household and kitchen furniture, and a small amount of supplies. If the householder is at the time actually engaged in agricultural pursuits, he is allowed an additional exemption in the way of work animals, necessary gearing, and certain enumerated farming utensils.<sup>72</sup> If the householder be a laboring man, his wages are exempt to an amount not exceeding \$50.00 per month.<sup>73</sup> By the Code,<sup>74</sup> it is provided that "householder" as used in the chapter on exemptions, shall be equivalent to the expression "householder or head of a family;" and the term "laboring man" shall be construed to include all householders who receive wages for their services.

It is not necessary to "set apart" the articles constituting this exemption by any writing. They are *selected by the householder*, or his agent, and are then simply *held*. But there must be a householder, and he must reside in this state. If the house-

71. *Ackiss v. Satchell*, 104 Va. 700, 52 S. E. 378.

72. Code, §§ 3650, 3651.

73. Code, § 3652.

74. Code, § 3657.

holder has not all the articles enumerated in §§ 3650 and 3651, he cannot substitute other articles in lieu of them. The enumerated articles are exempt, or "so much or so many thereof as he may have." The right to the exemption, however, is never diminished by death of exempted stock, consumption, or otherwise. The householder may at all times select so many of the articles exempt as he may then have. Upon the death of the householder leaving a widow and minor children or daughters who have never married, there shall be vested in them, or such of them as there may be, absolutely, what would have been exempt to the householder if alive, under § 3650, but not the exemption provided by § 3651.<sup>75</sup>

The exemption, when allowed, is absolute, and the property is not liable for the debts of the decedent, charges of administration, or funeral expenses.<sup>76</sup> If there be no minor children or daughters who have never married, the widow is entitled to the exemption, whether the estate of her husband is solvent or not, and if his administrator has sold them, she is entitled to their value.<sup>77</sup> There is likewise exempt for the use of the family the dead victuals (or so much thereof as may be necessary) laid in by the householder for the consumption of his family; and any live stock necessary for the use of the family may be killed for that use before sale or distribution, without any account thereof being taken by the executor or administrator.<sup>78</sup>

The former act used the words "unmarried daughters," which was broad enough to cover widows, but § 3653 says, "daughters who have never married." If there are daughters who have never married, but who do not constitute members of the household at the death of the householder, it is not clear what estate, if any, they take in the property exempted by the Code.<sup>79</sup> The language of the section is broad enough to give them a joint interest or estate with members of the household who answer the description of beneficiaries under the section, but the spirit of the law

75. Code, § 3653.

76. Code, § 3653.

77. *Riggan v. Riggan*, 93 Va. 78, 24 S. E. 920.

78. Code, § 2649.

79. Code, § 3653.

seems to be to provide for the "family"—to furnish them the necessities of life in their hour of greatest need. It is hardly to be supposed that the legislature intended to make this provision for those who have broken their connection with the household, and yet the subject is not free from doubt.

By recent amendment of the Code,<sup>80</sup> there is added to the list of exempted articles "*twenty bushels of potatoes*" and "*fowls, not exceeding in value \$10.00.*" It is also provided that the live stock exempt under this section shall not be exempt from levy or distress made under the provisions of Chapter 93 of the Code, which relates to trespasses by cattle. Nor does the poor debtor's exemption apply to taxes or the purchase price of the article set apart.<sup>81</sup>

Payments made in weekly or monthly installments to the holder of any policy of insurance in any accident company, sick benefit company, or any company of like kind, are exempt from attachment, garnishment, levy or distress in any manner for any debt due by the holder of such policy.<sup>82</sup> It will be observed that the holder is not required to be a householder or head of a family, and this is the only case where he need not be such in order to claim the statutory exemption.

The wages of a minor are not liable to garnishment nor otherwise liable to the payment of debts of his parents.<sup>83</sup>

The wages of laboring men are also protected against garnishment outside of the state by penalty imposed upon the garnishing creditor.<sup>84</sup>

The householder during his lifetime has the absolute power of *disposition* of articles exempted under Code, §§ 3650 and 3651, but he cannot *encumber* the articles exempt under § 3650. It is expressly provided that any deed of trust, mortgage or other writing or pledge made by a householder to give a lien thereon shall be void as to such property. It will be observed that this restriction applies only to articles exempt under § 3650.<sup>85</sup>

80. Code, § 3650.

81. Code, § 3654.

82. Code, § 3652b.

83. Code, § 3652c.

84. Code, § 3652a.

85. Code, § 3655.

The language of the Code<sup>86</sup> seems to be broad enough to justify the conclusion that the householder cannot waive the benefit of the exemptions provided by §§ 3650, 3651, 3652. But if a householder refuses to accept the benefit of these provisions and permits his property to be sold under a *fi. fa.*, it is presumed that neither he nor his privies can thereafter assert a claim to the property as against a *bona fide* purchaser. If, however, the sale be under a deed of trust, he could probably reclaim the property, as the statute expressly declares such deed to be void.

An injunction may be awarded to enjoin the sale of any property exempted under the provisions of the preceding sections, and to prevent wages, exempt by § 3652, from being garnished, or otherwise collected by an execution creditor.<sup>87</sup>

86. Code, § 3647.

87. Code, § 3656.

## CHAPTER XLVII.

### MECHANICS' LIENS.

- § 416. Origin and development of the lien.
- § 417. Who may take out the lien.
- § 418. Rights of Assignee.
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- § 420. How lien of general contractor is perfected.
  - The account.
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- § 423. Mechanics' lien record.
- § 424. Conflicting liens.
- § 425. Enforcement of lien.
- § 426. How lien may be waived or lost.

#### § 416. Origin and development of the lien.

The mechanics' lien is purely a creation of statute. It had no existence at common law, and, independently of statute, is unknown in equity. Common law liens were inseparably connected with the possession of the subject of the lien, and were lost when the possession of the specific article on which the lien was claimed passed from the lien creditor. The common law recognized the right of the creditor to retain the possession of the article, created or enhanced in value by his labor, till the compensation due for his labor thereon was paid. As his labor, under contract with the owner of the chattel, had gone into the chattel, and of course could not be separated therefrom, the workman was permitted to retain possession of the finished article till he was paid for the labor that had become inseparably a part of it.

A development of this common law lien, by which the workman was permitted to retain possession of the chattel, which

had been increased in value by his labor and material, has produced statutes providing for mechanics' liens in every state of the Union, in the provinces of Canada, and in the District of Columbia. If the workman was permitted to follow his labor and material into the chattel that he had created, or had given value to, why should not the workman and the materialman be permitted to follow his labor and supplies into the buildings and structures, which owed their value to the industry and the material that had created the buildings and structures? If the workman might retain possession of the chattel, and so give notice to the world of his claim, preventing frauds and deceptions on purchasers and creditors, could not the resources of the law devise some method as to a subject matter not admitting of possession, by which notice of the lien might be given to the world, and thus prevent frauds on purchasers and creditors?

If the increased value of the chattel by reason of the labor bestowed upon it, the fact that the loss of his earnings would be a greater hardship on the workman than a similar loss to other members of the community, together with the benefit conferred by his labor in increasing the resources of the country, entitled the men doing labor on, or furnishing materials for chattels, to a peculiar security not given other classes of citizens, why should not the same considerations provide a lien for workmen whose labor and material went into buildings and other structures, so essential to the development of a new country? These considerations would not appeal so strongly to an old and fully developed country, and consequently there is no mechanics' lien known to the laws of England today. But that such a policy is suited to the needs of our own country is shown by its universal adoption and retention here.

The statutes of the various states will be found similar in many respects, though differing widely in detail. The courts in construing them have entertained very different views as to their policy. One line of decisions will be found to construe them liberally, whilst another line of well-considered decisions will be found to require an almost literal compliance with the requirements of the statute, as a condition of securing the benefit of the lien they provide. Probably the true rule of construction is that adopted in Virginia, declaring that the remedial portion of the

statute, which provides for enforcing the lien after it is perfected, is to be liberally construed, but that portion dealing with the right to the existence of the lien, being in derogation of the common law, is to be strictly construed.<sup>1</sup>

### § 417. Who may take out a mechanics' lien.

The statute provides that "All artisans, builders, mechanics, lumber dealers and other persons performing labor about or furnishing materials for the construction, repair or improvement of any building or structure permanently annexed to the freehold, and all persons performing any labor or furnishing material for the construction of any railroad, whether they be general or sub-contractors, or laborers, shall have a lien, if perfected as hereinafter provided," etc.<sup>2</sup>

It would seem that this statute was broad enough to include an architect, whether he simply provided the plans and specifications, or, in addition to this, superintended the construction of the building, though this conclusion is not free from doubt.<sup>3</sup>

It frequently happens—as, for instance, in a case of persons performing labor or furnishing material for the construction of a railroad—that persons may perfect their liens either under § 2475 or § 2485 of the Code. The claimant may proceed under either section but cannot proceed under both. When such a person has perfected his lien under one section, he cannot abandon it and proceed under the other. He is confined to the section under which he first perfects his lien.<sup>4</sup>

The term "general contractor," as used in the mechanics' lien law, is not necessarily one who contracts for the whole building, but includes all persons furnishing materials for, or doing work upon, a building, under a contract made by such person *directly with the owner* of the building, whether he contracted for the whole or for only a part of the work or material. A

1. *Clement v. Adams Bros.-Payne Co.*, 113 Va. 547, 75 S. E. 294; 20 Amer. & Eng. Enc. of Law (2nd Ed.), 278.

2. Code, § 2475.

3. See 2 Jones on Liens, § 1367; *Stryker v. Cassidy*, 76 N. Y. 50, 32 Am. Rep. 262, and note 264.

4. Code, § 2485.

plumber, a plasterer, a carpenter, a bricklayer, a roofer and a material-man are all general contractors for the same building, if the contracts are severally made with the owner.<sup>5</sup>

### § 418. Rights of assignee.

Whilst the assignee of a supply claim is given the same rights as the original claimant,<sup>6</sup> there is no such provision as to the assignee of a mechanics' lien, and the fact that a statute was deemed necessary to give such right to the assignee in the one case, might be thought to imply the absence of any such right in the assignee of a mechanics' lien, but suits to enforce mechanics' liens have been maintained by assignees in several cases.<sup>7</sup> In the first two cases cited in the margin, the lien seems to have been perfected prior to the assignment, but in the other case it was perfected by the assignee, and it is now settled law in Virginia that whenever the assignor may take out a mechanics' lien, the assignee may perfect it and prosecute a suit in equity in his own name to enforce it.

### § 419. On what the lien may be taken out.

The lien is given upon "such building or structure and so much land therewith as shall be necessary for the convenient use and enjoyment of the premises, and upon such railroad and franchise."

The common law lien in favor of the workman upon the article into which his work has gone, has found a rational development by statute in the lien in favor of the workman on the house into which his work has gone, and, as the house would be useless without the support of the land on which it is built, the lien has been extended, not to other land of the owner, but only to "so much land therewith as may be necessary for the convenient use and enjoyment of the premises." The lien on the land arises purely out of the lien on the house, and if the lien on the house

5. *Merchants & Mechanics Savings Bank v. Dashiell*, 25 Gratt. 616; *Boston, etc., Co. v. Ches. & O. R. Co.*, 76 Va. 180.

6. Code, § 2487.

7. *Pairo v. Bethell*, 75 Va. 825; *Iaeger v. Bossieux*, 15 Gratt. 83; *Bristol Iron & Steel Co. v. Thomas*, 93 Va. 396.

ceases, as, for instance, by the destruction of the house by fire, whilst the lien would still exist upon the brick, iron and other materials not destroyed by the fire, it would seem that, under our statute, as the land was no longer "necessary for the convenient use and enjoyment" of these remnants, when the destruction had been so complete as to leave them valuable only for material, the lien on the land would cease. The question has never arisen under our statute, and the decisions under the statutes of other states are conflicting. The conflict seems, however, to arise principally out of the difference in the provisions of the various statutes on this subject.<sup>8</sup>

It has been held that, in the absence of proof to the contrary, a small lot in a town is necessary to the convenient use and enjoyment of the building put upon it.<sup>9</sup>

The holder of a mechanics' lien has an insurable interest, which he may protect by taking out a policy in his own name, and it would seem on principle that, even where the policy is obtained by and in the name of the owner of the property, on the destruction of the building, the money might take its place, and the lienholder<sup>10</sup> might be subrogated to the same interest in the insurance money that he had in the building, which, by its destruction, has been converted into insurance money, but the weight of authority is the other way.<sup>11</sup>

The material must be "furnished for the construction, repair and improvement" of some building. Therefore, if a material man sell lumber to a contractor on general account, and not for use in any particular building, he has no lien on the building in which it may afterwards be used.<sup>12</sup>

Again, the lien is *specific* and exists upon such building or structure as the claimant has furnished material for, or performed labor upon. Therefore, where materials are furnished

8. See 2 Jones on Liens, §§ 1538-1540, and cases cited in notes; Phillips on Mechanics' Liens, §§ 12 and 42; Vol. 42, p. 319, of Central Law Journal, where the adjudged cases are cited and discussed.

9. *Pairo v. Bethell*, 75 Va. 825.

10. *Wyman v. Wyman*, 26 N. Y. 253.

11. See 2 Jones on Liens, § 1541; Phillips on Mechanics' Liens, § 9, and cases there cited.

12. 2 Jones on Liens, § 1325.

under one contract for several buildings, and the prices paid for the different buildings are specified, there must be several liens on each building. The amount due for labor and material used in one house cannot constitute a lien upon another house in which it was not used.<sup>13</sup> But if under one contract several buildings are to be erected, and an entire price is charged, there must be a joint lien on all the buildings for the whole amount. The lien must follow the contract.<sup>14</sup>

Under a former statute, prior to the amendment hereinafter mentioned, it was held that the claimants had no statutory lien against a railroad company, and that if railway companies were within the provisions of the mechanics' lien law, which question the court did not pass upon, in order to obtain the benefit of the lien against the railroad in its entirety, the required memorandum and account would have to be filed in the proper clerk's office of every county and corporation through which the road passed.<sup>15</sup> Under the present statute, a lien is given upon such railroads and their franchises, and a method of perfecting such lien is prescribed in detail by the statute.<sup>16</sup>

Where the property on which the lien is sought lies within the jurisdiction of a corporation court, or of the chancery court of the city of Richmond, but outside the city limits, the lien must be recorded in the clerk's office of the circuit court of the county. It cannot be recorded in the city.<sup>17</sup>

From considerations of public policy, liens frequently cannot be taken out on property which would fairly come within the class covered by the terms of the statute; the general rule being that a mechanics lien can be taken out on no property, the sale of which would be against public policy. Mechanics' lien laws do not apply to public buildings or structures erected by states, cities and communities for public use, unless the statute creating the lien expressly so provide.<sup>18</sup>

13. *Gilman v. Ryan*, 95 Va. 494, 28 S. E. 875.

14. 2 *Jones on Liens*, §§ 1310-14; *Id.*, §§ 1326 and 1337; *Sergeant v. Denby*, 87 Va. 206, 12 S. E. 402.

15. *Boston, etc., Co. v. Ches. & O. R. Co.*, 76 Va. 180.

16. *Code*, §§ 2475, 2476.

17. *Boston, etc., Co. v. Ches. & O. R. Co.*, 76 Va. at p. 185.

18. *Hicks v. Roanoke Brick Co.*, 94 Va. 741, 27 S. E. 596. On the

Churches are not exempt from mechanics' lien on grounds of public policy.<sup>19</sup>

It would scarcely seem necessary to have declared,<sup>20</sup> that where the lien is for repairs only, no lien shall attach to the property repaired, unless the said repairs were ordered by the owner or his agent, since this would seem to be the law independently of such a provision. It is not believed that, by either building or repairing, a man can be improved out of his property, without his consent.

The statute<sup>21</sup> expressly provides that if the person who shall cause the building or structure to be erected or repaired owns less than a fee simple estate in the land, only his interest therein shall be subjected to the mechanics' lien.<sup>22</sup>

**§ 420. How lien of general contractor is perfected.<sup>23</sup>**

The statute provides that the general contractor shall file, in subject of exemptions from public policy, see 2 Jones on Liens, §§ 1375-1381; Phillips on Mechanics' Liens, §§ 179-183. On sub-contractors' rights, see Phillips, § 179a; Frank v. Chosen Freeholders, 39 N. J. 347; Whiting v. Story County (Iowa), 37 Am. Rep. 189; Loving v. Small (Iowa), 32 Am. Rep. 136; Leonard v. City of Brooklyn, 71 N. Y. 498, 27 Am. Rep. 80; and valuable note to La Crosse, etc., R. Co. v. Vanderpool, 78 Am. Dec. 696-97.

19. Note to La Crosse, etc., R. Co. v. Vanderpool, 78 Am. Dec. 696. In Trustees of Franklin St. Church v. Davis, 85 Va. 193, 7 S. E. 245, the question was not considered, but it was held that the lien had been lost for other reasons.

20. Code, § 2475.

21. Code, § 2483.

22. See, also, Carter v. Keeton, 112 Va. 307, 71 S. E. 554.

23. Section 2476 of the Code provides: "A general contractor, in order to perfect the lien given by the preceding section, shall at any time after the work is done and the material furnished by him and before the expiration of sixty days from the time such building, structure, or railroad is completed, or the work thereon otherwise terminated, file in the clerk's office in the county or corporation in which the building, structure or railroad, or any part thereof is, or in the clerk's office of the chancery court of the city of Richmond, if the said building, structure or railroad, or any part thereof, is within the corporation limits of said city, an account showing the amount and character of the work done or materials furnished, the

the clerk's office of the circuit or corporation court of the county or corporation in which the building, structure or railroad, or any part thereof, is, or in the clerk's office of the chancery court of the city of Richmond, if the building, structure or railroad is within the corporate limits of the city, (1) an account showing the amount and character of the work done, or materials furnished; the prices charged therefor; the payments made, if any, and the balance due—this account to be verified by the oath of the claimant, or his agent; (2) a statement attached to the account declaring the contractor's intention to claim the benefit of the mechanics' lien, and (3) a brief description of the property on which he claims the lien. The clerk is required to record these papers in a book to be kept for that purpose, called the "Mechanics' Lien Record," and to index the same as well in the name of the claimant of the lien as the owner of the property, and it is declared that "from the time of *such filing* all persons shall be deemed to have notice thereof." The words quoted would seem to indicate that if the claimant files in the proper clerk's office the papers above mentioned, duly verified, he will be entitled to a lien, whether the clerk ever records them or not, just as a deed which is duly admitted to record is effective whether it is ever in fact recorded or not, but there has been no decision upon this branch of the statute.

*The Account.*—Where it does not appear that the materials furnished by a contractor for a building were contracted for at an agreed sum, an account, which fails to show the prices charged for the items of which the account is composed, is insufficient to sustain a mechanics' lien. The omission of the prices charged

prices charged therefor, the payments made, if any, and the balance due, verified by the oath of the claimant or his agent with a statement attached, declaring his intention to claim the benefit of said lien and giving a brief description of the property on which he claims the lien. It shall be the duty of the clerk in whose office such account or statement shall be filed, as hereinbefore provided, to record same in a book to be kept for that purpose, called the mechanics' lien record, and to index the same in the name as well of the claimant of the lien as of the owner of the property, and from the time of such filing all persons shall be deemed to have notice thereof."

is not a mere inaccuracy in the account, but is an entire failure to give the information which the statute requires. Hence, a statement, "Amount of estimate, \$450.00," or "To balance of account rendered, for work and labor done, and material furnished, for your house," is not in compliance with the statute requiring an account to be filed showing the prices charged.<sup>24</sup> If, however, the work or the material has been contracted for at a gross sum, and this is set out in the account filed, all the information is given that is needed, or that can reasonably be required.<sup>25</sup>

Although the statute requires the payments, if any, on the account to be also stated, yet, where a credit for machinery purchased by the debtor, as well as some other credits known to the *debtor*, are omitted, the lien is not thereby invalidated when it does not appear in the record that the contractor knew, at the time of filing his account, just what the credits were; or the amounts thereof, and if the account is as true an account as can be made under the circumstances it is sufficient.<sup>26</sup>

No particular form of verification of the account is prescribed, and the certificate of a notary at the foot of the account filed, that the contractor personally appeared before him in his county or city and made oath to the correctness of the account, is a sufficient verification under the statute.<sup>27</sup>

*Description of the Property.*—It is sufficient "if the property can be reasonably identified by the description given."<sup>28</sup>

*When Claim of Lien to Be Filed.*—The lien must be perfected after the work has been done, or the materials furnished, and before the expiration of sixty days from the time such building,

24. *Brown v. Cornwell*, 108 Va. 129, 60 S. E. 623; *Gilman v. Ryan*, 95 Va. 494, 28 S. E. 875; *Shackleford v. Beck*, 80 Va. 573.

25. *Taylor v. Netherwood*, 91 Va. 88, 20 S. E. 888.

26. *Rison v. Moon*, 91 Va. 384, 22 S. E. 165. See, also, *Richlands Flint Glass Co. v. Hildebeitel*, 92 Va. 91, 22 S. E. 806.

27. *Taylor v. Netherwood*, 91 Va. 88, 20 S. E. 888. For form of account and affidavit, and of declaration of intention to claim lien, see notes to § 2476, Code 1904.

28. *Taylor v. Netherwood*, 91 Va. 88, 20 S. E. 888; *Richlands Flint Glass Co. v. Hildebeitel*, 92 Va. 91, 20 S. E. 806; *Jones on Liens*, § 1421; Code, § 2478.

structure or railroad is completed, or the work thereon otherwise terminated. The lien must not be taken out too soon, nor deferred too late. Impatience and delay are equally dangerous. If taken out too soon, or too late, the lien is void.<sup>29</sup>

The statute does not undertake to say how much work shall be done or materials furnished during the sixty days reserved for the taking out of the lien. The building may have been substantially done for more than sixty days, but if the "finishing touches" have been put on in that time, it is sufficient, provided that the work done within the sixty days was done in good faith for the purpose of completing the contract, and not for the purpose of extending the time during which the lien might be taken out.<sup>30</sup>

In the case of *Trustees of Franklin Street Church v. Davis*, 85 Va. 193, 7 S. E. 245, the lien was filed November 5, 1885. The claimant testified that the work was substantially completed in the first days of November, 1884; that he did no work on the building from November, 1884, till August, 1885; that he had returned and put on the "finishing touches" August 20, 1885, and contended that the time for perfecting the lien, ninety days at that time, ran from the latter date. The "finishing touches" were topping off the chimneys and penciling the brick work. The court held that the time ran from the substantial completion of the building, and not from the putting on of the "finishing touches," because the parties, by their dealings and agreement, had fixed the earlier period as the time of the completion of the building. The court said: "It was competent for the parties to agree that the work should be considered as completed before what may be called the "finishing touches" were actually put upon it; and in view of the agreement between them, of which the collection of the second payment and the charge and receipt of interest is evidence, the complainant was entitled to file his lien in the office on the first day of November." It would

29. *Moore v. Rolin*, 89 Va. 107, 15 S. E. 520.

30. See *Jones on Liens*, §§ 1427 and 1444; *Nichols v. Culver*, 51 Conn. 177; *McCarthy v. Groff*, 48 Minn. 325, 51 N. W. Rep. 218; *Bruce v. Berg*, 8 Mo. App. 204; 15 Am. & Eng. Ency. Law (1st Ed.) 149, and cases there cited.

seem that the parties by their agreement had changed the time for the running of the lien, from the putting on of the "finishing touches" (the time from which it would have otherwise run) by the receipt of the second payment, in November, 1884, which was to be made when the building was completed, and by the calculation of interest from that date.

Where the last charge on the bill was for work for the month of October, and the lien was taken out on November 8, it was held that it sufficiently appeared that the lien was taken out within the thirty days required by the statute.<sup>31</sup>

Where nothing to the contrary appears, a running account is regarded as due at the date of the last item.<sup>32</sup>

All the statutory provisions for a mechanics' lien are indispensable, and the omission of any one of them is fatal.<sup>33</sup>

### § 421. Remedies of sub-contractor.

The sub-contractor is given three different methods by which he may secure the payment of the amount due him. He may (1) file his independent lien; (2) he may take steps to hold the owner of the building personally responsible; or (3) he may have the benefit of the lien taken out by the general contractor.

*Independent Lien.*—If the sub-contractor wishes to take out his independent lien, he may do so by doing just what the general contractor is required to do, and, *in addition*, give notice in writing to the owner of the property, or his agent, of the amount and character of his claim; but the amount secured by this lien cannot exceed the amount in which the owner is indebted to the general contractor at the time the notice is given, or shall thereafter become indebted to the general contractor upon his contract with him for such structure, building or railroad; and when

31. *Richlands Flint Glass Co. v. Hildebeitel*, 92 Va. 91, 20 S. E. 888.

32. *Osborne v. Big Stone Gap Colliery Co.*, 96 Va. 58, 30 S. E. 446. For cases where the lien was filed too late, see *Boston, etc., Co. v. Ches. & O. R. Co.*, 76 Va. 180; *Harrison & Bro. v. Homeopathic Assn.*, 134 Penn. St. 558, 19 Am. St. Rep. 714.

33. *Trustees Franklin Street Church v. Davis*, 85 Va. 193, 7 S. E. 245; *Shackleford v. Beck*, 80 Va. 573; *Davis v. Alvor*, 94 U. S. 545; *S. V. R. R. Co. v. Miller*, 80 Va. 821.

labor has been performed, or work done, or material furnished for one who is himself a sub-contractor, then the person claiming the lien shall also give a like notice to the general contractor, provided that the amount for which a lien may be perfected by such person shall not exceed the amount for which such sub-contractor could himself claim a lien under the statute.<sup>34</sup>

The right of the sub-contractor does not extend to what becomes due for extra work not covered or contemplated by the original contract, and paid for by the owner as soon as completed; nor does the failure of the owner to retain a percentage of the contract price, when he is authorized to do so by the terms of his contract with the contractor, render the owner liable to a sub-contractor for the *per cent.* of the contract price he might have retained. The provision is for the benefit of the owner, and not for the benefit of the sub-contractor.<sup>35</sup>

*Personal Liability of the Owner.*—If the sub-contractor is satisfied with the personal liability of the owner, he may render him personally liable for his claim in the following manner:

First: He must give notice in writing to the owner, or his agent, stating the nature and character of his contract and the probable amount of his claim.<sup>36</sup> This preliminary notice need not be given "before performing the work or furnishing the materials to a general contractor,"<sup>37</sup> but may be given (a) before the work is done, or the materials furnished, or (b) whilst the work is being done, or material is being furnished, but probably *not after* the work has been done, or material has been furnished.<sup>38</sup> This notice must (1) be in writing, (2) must be given

34. Code, § 2477. As to the *form of the notice*, it has been held that, when the account is sufficient, and a copy thereof, together with a statement of intention to claim the lien, is served on the owner within the time prescribed by the statute, it is sufficient notice to the owner. *Taylor v. Netherwood*, 91 Va. 88, 20 S. E. 888.

35. *Schrieber v. Citizens Bank*, 99 Va. 257, 38 S. E. 134.

36. Code, § 2479.

37. The words quoted in § 2479 of the Code of 1887 were stricken out by the amendment of Acts, 1893-94, p. 523.

38. *Steigleder v. Allen*, 113 Va. 686, 75 S. E. 191. When *Roanoke L. & I. Co. v. Karn & Hickson*, 80 Va. 589; *S. V. R. R. Co. v. Miller*, *Idem.* 821, and *N. & W. R. R. Co. v. Howison*, 81 Va. 125, were de-

to the owner, or his agent, and (3) must state (a) the nature and character of the contract and (b) the probable amount of the claim.

Second: *After the work is done*, or the material is furnished by the sub-contractor, and *before* the expiration of thirty days from the time such building, structure or railroad is completed, or the work thereon otherwise terminated, the sub-contractor must furnish (1) to the owner of the building, structure or railroad, or his agent, and also (2) to the general contractor, a *correct account* of his claim against the general contractor for the work done, or material furnished, showing the *amount due*, and this account must be verified by affidavit. This account and affidavit may be given at any time between the finishing of the sub-contractor's work, or the furnishing of his material, and thirty days after the completion of the building or structure. It is not necessary that the sub-contractor shall wait till the building is completed.<sup>39</sup> If these requirements are complied with, the owner becomes personally liable for the amount due from the general contractor to the sub-contractor, provided that amount does not exceed the sum the owner owes the general contractor at the time the notice is given, or afterwards owes him by virtue of his contract. There is no obligation on the owner to protect the sub-contractor, unless the latter has complied with the provisions of the mechanics' lien law.<sup>40</sup>

A sub-contractor who has complied with the provisions of the statute<sup>41</sup> fixing a personal liability on the owner, is to be paid in

cided, the statute did not require the *probable* amount of the claim to be stated as the present statute does. The present statute requires the *account* and *affidavit* not the *notice*, to be furnished after completion. The amount due would no longer be *probable*, after the work had been done or the material had been furnished. See, however, note to § 2479 of Pollard's Code, Vol. 3.

39. *Norfolk & W. R. Co. v. Howison*, 81 Va. 125; *Roanoke L. & I. Co. v. Karn & Hickson*, 80 Va. 589; *Shenandoah R. Co. v. Miller*, 80 Va. 821.

40. *Schrieber v. Citizens Bank*, 99 Va. 257, 38 S. E. 134; *University of Va. v. Snyder*, 100 Va. 567, 42 S. E. 337.

41. Code, § 2479.

full before those who claim liens on the property receive anything.<sup>42</sup>

Where a sub-contractor refuses to do work, or furnish material, unless the owner will agree to pay him, it seems that, if the contractor cannot have the work done in a reasonable time, and the owner is thus compelled to guarantee bills of sub-contractors, the owner is entitled, both as against the general contractor and other sub-contractors, to deduct the amounts for which he has thus become responsible.<sup>43</sup> The statute<sup>44</sup> gives a simple and satisfactory method of settling disputed accounts between the general contractor and sub-contractor when a personal liability in favor of the latter has been fastened on the owner, and affords full protection to the owner. It provides for an arbitration, in which one arbitrator shall be selected by the general contractor and another by the sub-contractor, and, in case of their disagreement, an umpire to be selected by the arbitrators; and if either party refuses to select an arbitrator, then the matter is to be settled by an action at law.<sup>45</sup>

The statute giving the lien to sub-contractors declares that the term "sub-contractor" shall include "all contractors, and laborers, and mechanics, and those furnishing materials, as provided in § 2475 of the Code and Acts amendatory thereof, other than general contractors."<sup>46</sup>

*Benefit of General Contractor's Lien.*—The sub-contractor is given a third remedy dependent on the action of the general contractor in taking out a lien.<sup>47</sup> When the general contractor has perfected his lien, the sub-contractor may obtain the benefit thereof, to the extent of his debt, by a *written notice* of his claim against the general contractor to the *owner, or his agent*, before the amount of the general contractor's lien is paid off or discharged.

42. Schrieber *v.* Citizens Bank, 99 Va. 257, 38 S. E. 134.

43. Schrieber *v.* Citizens Bank, *supra*.

44. Code, § 2480.

45. Kirn *v.* Champion Iron Fence Co., 86 Va. 608, 10 S. E. 885; Norfolk & W. R. Co. *v.* Howison, 81 Va. 125; Roanoke L. & I. Co. *v.* Karn & Hickson, 80 Va. 589.

46. Code, § 2477.

47. Code, § 2482.

**§ 422. Protection of sub-contractor against assignments and garnishments.**

The statute<sup>48</sup> provides that no assignment of a debt, or any part thereof, due or to become due to a general contractor, for the construction, erection or repairing of any building, structure or railroad, shall be valid or enforceable by the assignee, until the claims of all sub-contractors, supply men and laborers against the general contractor, for labor performed, or materials furnished, in and about the construction, erection and repairing of such building, structure or railroad, shall have been satisfied, unless the sub-contractors, supply men and laborers give their consent in writing to the assignment, and if the owner, without such written assent, makes payment to such assignee, such payment affords the owner no protection against sub-contractors, supply men and laborers who have not been paid for work done or material furnished about the building, structure or railroad for which the payment is made. The statute<sup>49</sup> further provides that the debt due the general contractor from the owner cannot be subjected by any creditor of the general contractor, whose debt arose in any other manner than in the construction, repairing or erection of such building, structure or railroad for such owner, until all the sub-contractors, supply men and laborers shall have been paid for their labor performed and material furnished in and about the construction, erection or repairing of such building, structure or railroad.

It will be observed that the owner must exercise much more care in dealing with an assignee than with the contractor. He is safe in making payments to the general contractor, so long as he has no written notice of the debt due the sub-contractor, whilst if he *pays the assignee*, the owner must see at his peril that all sub-contractors, laborers and supply men are paid, or that they give their written assent to the assignment, though he may have no possible means of ascertaining who they are. This statute, however, does not prohibit payments by the owner to an assignee whose claim is due from the general contractor for material or work furnished for the erection of the building, on

48. Code, § 2482a, cl. 1.

49. Code, § 2482a, Clause 2.

account of which the owner is indebted. By such payments the contract price of the building goes to those who did the work and furnished the material, which is just what the act was intended to accomplish.<sup>50</sup>

### § 423. Mechanics' lien record.

The memorandum prescribed by the statute having been filed with the clerk, it is made the duty of that official<sup>51</sup> to record the same in a book to be kept by him for that purpose, called "Mechanics' Lien Record," and to index the same in the name as well of the claimant of the lien as of the owner of the property, and from the time of such filing all persons are deemed to have notice thereof.

It may be observed that the mechanics' lien must be recorded in "a book kept by the clerk for that purpose," whilst a supply lien must be recorded in the deed book.<sup>52</sup>

Attention is again called to the fact that the statute seems to give notice of the lien to all persons from the *filing of the lien*, whether it is ever actually recorded or not.

### § 424. Conflicting liens.

The statute,<sup>53</sup> in its practical application, gives rise to some problems exceedingly difficult of solution, not because of the terms of the statute, but because of the subject with which it undertakes to deal.

It first deals with the case of a person having less than a fee simple estate in the land on which is situated the building or structure erected or repaired, and provides that only his interest therein shall be subject to the mechanics' lien.

In the matter of conflicting liens on the property, the statute provides for the following cases:

*First:* Where the lien was created on the land *before the work was begun*, or the materials were furnished, it is the first

50. Schriber v. Bank, 99 Va. 257, 38 S. E. 134.

51. Code, § 2476.

52. Code, §§ 2485 and 2486.

53. Code, § 2483.

lien on the land, and the second lien on the building or structure, and when the property is sold, the lien or encumbrance created first is preferred in the distribution of the proceeds of sale only to the extent of the estimated value of the land at the time of the sale, which value must be fixed before the sale, exclusive of the value of the building or structure. In other words, the first lienor has the prior lien on so much of the purchase money as corresponds to the estimated value of the land at the time of the sale, without the building, whilst the claimant under the mechanics' lien law has the first lien upon the remainder of the purchase money. The scheme of distribution is a *preference*, not a *ratio*.<sup>54</sup>

*Second:* Where the lien or encumbrance on the land was created *after the work was commenced*, or the materials furnished, the lien in favor of the person performing the work, or furnishing the material, is prior both as to the land and the building.

*Iaegé v. Bossieux*, 15 Gratt. 83, was decided before the mechanics' lien statute had undertaken to deal with the question of priorities. There a building fund company agreed to advance to one of its members money to build a house on his lot. A lien was taken upon the lot, and the buildings to be erected upon it, to secure the advances made and to be made. The mechanics' lien was then recorded, and subsequently the balance of the loan was paid to an assignee of the mechanic, with the knowledge on his part that it came from the building fund company, and that the building fund company claimed priority for its lien on the property. The court held that the company was entitled to priority over the mechanics' lien for the advances made after the lien was recorded, as well as for those made before. It would seem that under the peculiar circumstances of the case the same result would follow now, as the deed of trust went to record before the work was begun, and the money paid out after the work was begun was secured in it and was paid by the deed of trust creditor directly to the claimant, who received it knowing that the deed of trust creditor asserted a priority over him.

54. *Fid. L. & T. Co. v. Dennis*, 93 Va. 504, 25 S. E. 546.

**§ 425. Proceedings to enforce mechanics' liens.**

It is provided by statute that mechanics' liens may be enforced in equity; that there shall be no priority among them, except that the lien of a sub-contractor shall be preferred to that of his general contractor, and that, when a suit is brought to enforce such lien, all parties entitled to such liens on the property, or any part thereof, may come in by petition with the same effect as though each petitioner had brought an independent suit.<sup>55</sup> It is further provided by statute that no suit to enforce such lien "shall be brought after six months from the time when the whole amount covered by such lien has become payable; provided, however, that the filing of a petition to enforce any such lien in any suit wherein such petition may be properly filed shall be regarded as the institution of a suit."<sup>56</sup> This is a limitation of the right, and not merely of the remedy; and hence a bill seeking to enforce such lien must affirmatively show on that the suit is brought within the time prescribed by the statute, else it will be bad on demurrer.<sup>57</sup> But although the bill does not allege that the suit was brought in six months after the whole account had become payable, yet if it does allege the dates on which the bill sued on became due, the court will take judicial notice of the time when the suit was instituted; and if it thus appears that the bill was filed within six months after the whole account became payable, the bill will be good, and a demurrer thereto will be overruled.<sup>58</sup> If a suit be brought by a sub-contractor to enforce a mechanics' lien which has been duly recorded, and the general contractor is made a party defendant, and his recorded lien is properly set forth in the bill, such suit stops the act of limitation from running, not only on the complainant's lien, but also on the lien of the general contractor and all claiming as contractors under him, and operates to suspend any further suit by any one or more of them during the pendency of the suit instituted by the sub-contractor.<sup>59</sup> If a suit to enforce a

55. Code, § 2484.

56. Code, § 2481.

57. *Savings Bank v. Powhatan Clay Co.*, 102 Va. 274, 46 S. E. 294.

58. *Sands v. Stagg*, 105 Va. 444, 52 S. E. 633.

59. *Spiller v. Wells*, 96 Va. 598, 32 S. E. 46.

mechanics' lien is brought within due time against the debtor upon whose property the lien rests, the failure to implead subsequent lienors within six months does not defeat the lien so far as such encumbrances are concerned. They are *proper*, but not *necessary* parties to such suit, and may be brought in at a subsequent time.<sup>60</sup>

Usually, the statute of limitations is a personal defence, and can be relied on only by the debtor, but it has been held in Virginia that, in suits to enforce a mechanics' lien, although the defendant is still living, one creditor may set up the statute against the claims of another.<sup>61</sup>

When a court of equity has obtained jurisdiction of the subject-matter, by virtue of the statute giving jurisdiction in mechanics' lien cases, it goes on to adjust the rights of all the parties, to allow compensation for defects, to determine priorities of liens, to give relief in cases of part performance, and to grant complete relief.<sup>62</sup>

60. *Monk v. Exposition Corp.*, 111 Va. 121, 68 S. E. 280.

61. *McCartney v. Tyrer*, 94 Va. 198, 26 S. E. 419. For criticism of this case, see *ante*, § 223.

62. *Iaeger v. Bossieux*, 15 Gratt. 83; *Bailey Construction Co. v. Purcell*, 88 Va. 300, 13 S. E. 450; *Rison v. Moon*, 91 Va. 384, 22 S. E. 165; *Taylor v. Netherwood*, 91 Va. 88, 20 S. E. 888; *Pace v. Moorman*, 99 Va. 246, 37 S. E. 911.

*Kirn v. Champion Iron Fence Co.*, 86 Va. 608, 10 S. E. 317, and *Norfolk & W. R. Co. v. Howison*, 81 Va. 125, were both actions of *assumpsit* to enforce personal liability of owner, and rules were laid down as to what must be, and what need not be, averred and proved by the claimants.

The first case was decided by a court of three judges, Lewis, P., and Hinton, J., being absent. Of the three judges who sat in the case, Richardson, J., dissented from the opinion of the court sustaining a demurrer to the declaration, because the performance of the contract in the time agreed on between the general contractor and the sub-contractor was not averred and proved.

The latter case held that it need not be alleged or proved in a suit by a sub-contractor that the account was approved by the general contractor, or that, after ten days' notice, he had failed to object to it, or that the same had been ascertained to be due to the sub-contractor according to sec. 6, chap. 115 of Code of 1873. All these were deemed to be matters of defence, and constituted no part of plaintiff's statement of his case.

In a suit to enforce a mechanics' lien, real property of value should be sold on a reasonable credit, unless peculiar circumstances take it out of the rule, and these circumstances should appear on the record.<sup>63</sup>

A sale for cash enough to pay the amount of the lien is proper when that amount is but a small proportion of the whole value of the property.<sup>64</sup>

There is no requirement that property shall be rented out to pay off a mechanics' lien, and it would seem in all cases where the claimant has established his lien that he is entitled to a sale, but a decree for renting has been affirmed on appeal. The appeal, however, was by the owner, and the contractor does not seem to have insisted on his right to a sale.<sup>65</sup>

It has been held that, although a bill was filed by a sub-contractor to enforce his lien against the real estate of the owner, yet if the account was established, and the owner admitted funds in his hands and his readiness to pay, it would be a vain and useless act to subject property to the payment of the lien, and that it was not error to give a personal decree against the owner and the general contractor for the amount of the account.<sup>66</sup> Upon a bill to enforce a mechanics' lien and asking for a personal decree against the owner, the general contractor and his assignee, and for general relief, although the plaintiff failed to establish his mechanics' lien, he may have a personal decree against the assignee of the general contractor for the amount found to be due to the sub-contractor from the assignee.<sup>67</sup> So, also, in a suit by a general contractor against the owner to enforce his mechanics' lien, to which the party with whom he contracted is made a defendant, although it shall appear that the general contractor is not entitled to a lien because the person causing the improvements to be made was neither the owner of the property nor the agent of the owner, yet the general contractor may take a per-

63. *Pairo v. Bethell*, 75 Va. 825.

64. *Lester v. Pedigo*, 84 Va. 309, 4 S. E. 703.

65. *Rison v. Moon*, 91 Va. 84, 22 S. E. 165.

66. *Taylor v. Netherwood*, 98 Va. 88, 20 S. E. 888. See note by Judge Burks, 1 Va. Law Reg. 34-36, stating what decree should have been entered in the case.

67. *Johnston v. Bunn*, 108 Va. 490, 62 S. E. 341.

sonal decree against the person with whom he contracted for the amount shown to be due.<sup>68</sup>

**§ 426. How a mechanics' lien may be waived or lost.**

When the claimant undertakes to enforce his mechanics' lien he may find that he has lost it in any one of a variety of ways.<sup>69</sup>

Amongst the most common methods by which the mechanic loses his lien are: (1) By not bringing suit within six months after the whole of the amount covered by the lien has become payable; (2) by agreement; (3) by estoppel; (4) by the contractor's abandoning the contract; (5) by taking security; (6) by destruction of the building.

The question as to whether a mechanics' lien is waived by taking additional security is frequently an interesting one. It would seem that in this state, following the analogy of the decisions in reference to the release of vendors' liens and other securities, the question of the waiver or release of the lien is dependent upon the intention of the parties, as gathered from all the circumstances surrounding the transaction. Taking a personal judgment against the person liable for the debt secured by the lien does not operate as a release or merger of the lien any more than the taking of a personal judgment on a debt secured by a vendor's lien, or a deed of trust. The remedies upon the debt and security are distinct and concurrent, and either or both may be pursued.<sup>70</sup> Taking the debtor's negotiable note, the maturity of which does not extend beyond the time within which a lien may be asserted, in the absence of an express agreement to that effect, does not amount to a waiver of the right of the lien, but the negotiable note must be produced at the trial, or the debtor secured against its subsequent production, or the lien cannot be enforced.<sup>71</sup> If, however, the note extends the credit be-

68. *Carter v. Keeton*, 112 Va. 307, 71 S. E. 554.

69. Code, § 2481; 2 Jones on Liens, Chapter 38; Phillips on Mechanics' Liens, Chapter 272.

70. 2 Jones on Liens, § 1622, and cases cited.

71. 2 Jones on Liens, §§ 1532-1537, and cases cited; *Steamboat Charlotte v. Hammond*, 9 Mo. 58, 43 Am. Dec. 536; *Bailey v. Hull*, 11 Wis. 289, 78 Am. Dec. 706; *McMurray v. Taylor*, 30 Mo. 363, 77 Am. Dec. 611; Phillips on Mechanics' Liens, §§ 276-8.

yond the six months fixed by the statute for the institution of the suit to enforce the lien, no suit can be brought till the note is due; and, as the limitation fixed by the mechanics' lien statute then applies, the taking of the note maturing more than six months after the time when the whole amount covered by the lien has become payable would operate as a virtual waiver of the lien.<sup>72</sup> In such cases it would frequently become an interesting question to determine when "the whole amount covered by such lien has become payable." This would generally appear from the lien itself, and it is certainly eminently wise and just that creditors and purchasers from the owner who, by an examination of the recorded lien, found themselves protected against suits by the expiration of the six months fixed by statute, should not be put in peril by the owner's giving evidences of debt extending the statutory period for the suit.

In the case of *Iaegé v. Bossieux*,<sup>73</sup> the suit was brought under a statute providing that the lien shall not be in force more than six months from the time when the money, or the last instalment of the money to be paid under the contract, shall become payable, unless a suit in equity to enforce the lien shall have been commenced within the said six months, and the court held that the suit might be brought after the first instalment had fallen due, without waiting for the remaining instalments to become due, and that a sale might be decreed for the payment of all the instalments that had fallen due up to the time of the decree, with leave to the claimant to obtain satisfaction out of the surplus, if any there might be, for the instalments not due at the time of the decree.

It has been held in Kentucky, Mississippi, Massachusetts and probably other states, that the taking of a note maturing after the time fixed by statute for bringing a suit to enforce a mechanics' lien, operates as a waiver of the lien, and it is believed that the same rule will be applied in Virginia.<sup>74</sup> Of course, the

72. 2 Jones on Liens, §§ 1535-6; *Iaegé v. Bossieux*, 15 Gratt. 83; *Trustees Franklin Street Church v. Davis*, 85 Va. 193, 7 S. E. 245.

73. 15 Gratt. 83.

74. *Pryor v. White*, 16 B. Mon. Rep. 605; *Jones v. Alexander*, 10 Sm. & M. 627; *McClallan v. Smith*, 11 Cush. (65 Mass.) 238. The first two of these cases are commented on without disapproval in *Iaegé v. Bossieux*, 15 Gratt. 83.

claimant will not have any lien if he fails to perfect it within the time and manner prescribed by the statute.<sup>75</sup>

Where collateral security is taken for the debt for which a mechanics' lien may be taken out, the question of a waiver or release depends upon the intention of the parties, and it is believed that in this State there is no waiver unless the intention of the party entitled to waive it be clearly shown.<sup>76</sup>

75. *Trustees of Franklin St. Church v. Davis*, 85 Va. 193, 7 S. E. 245.

76. Bearing on this question, see *Coles v. Withers*, 33 Gratt. 186; *Smith v. Blackwell*, 31 Gratt. 291; *Brockenbrough v. Brockenbrough*, 31 Gratt. 580; *Morriss v. Harveys*, 75 Va. 726.



PART II

Stephen's Rules of Pleading



## CHAPTER XLVIII.

### PRINCIPAL RULES OF PLEADING.

- § 427. Object of pleading—Principal rules of pleading.
- § 428. Materiality of issue.
- § 428a. Singleness of issue.
- § 429. Certainty of issue.

#### § 427. Object of pleading—Principal rules of pleading.

The account of the course of an action being now concluded, and a view thus obtained of the general form and manner of pleading, and its connection with other parts of the suit, it is next proposed to investigate its principal or fundamental rules, and to explain their scope and tendency as parts of an entire system. For this purpose, some observations shall be premised, relative to the manner in which that system was formed, and the objects which it contemplates.

The manner of allegation in our courts may be said to have been first methodically formed, and cultivated as a science in the reign of Edward I. From this time, the judges began systematically to prescribe and enforce certain *rules of statement*, of which some had been established at periods considerably more remote, and others apparently were then, from time to time, first introduced. None of them seems to have been originally of legislative enactment, or to have had any authority except usage or judicial regulation; but from the general perception of their wisdom and utility, they acquired the character of fixed and positive institutions, and grew up into an entire and connected *system of pleading*. This system, which in its essential parts still remains in practice unaltered, appears to have been originally devised in a view to certain objects or results, which it will be necessary to the right apprehension of the subject of this chapter here to explain.

The pleadings (as appears in the preceding chapters) are so conducted as always to evolve some question, either of fact or law, disputed between the parties and mutually proposed and

accepted by them as the subject for decision; and the question so produced is called *the issue*.

As the object of all pleading or judicial allegation is to ascertain the subject for decision, so the main object of that system of pleading established in the common law of England, is to ascertain it by the production of an *issue*. And this appears to be peculiar to that system. To the best of the author's information, at least, it is unknown in the present practice of any other plan of judicature. In all courts, indeed, the particular subject for decision must, of course, be in some manner developed before the decision can take place; but the methods generally adopted for this purpose differ widely from that which belongs to the English law.

By the general course of all other judicatures, the parties are allowed to make their statements *at large* (as it may be called) and with no view to the extrication of the precise question in controversy; and it consequently becomes necessary, before the court can proceed to *decision*, to review, collate, and consider the opposed effect of the different statements, when completed on either side, to distinguish and extract the points mutually admitted, and those which, though undisputed, are immaterial to the cause, and thus, by throwing off all unnecessary matter, to arrive at length at the required selection of the point to be decided. This retrospective development is, by the practice of most courts, privately made by each of the parties for himself, as a necessary medium to the preparation and adjustment of his *proofs*; and is also afterwards virtually effected by the judge, in the discharge of his general duty of *decision*; while, in some other styles of proceeding, the course is different, the point for decision being selected from the pleadings by an act of the court or its officer, and judicially promulgated prior to the proof or trial. The common law of England differs (it will be observed) from both methods, by obliging the parties to come to issue; that is, so to plead, as to develop some question (or issue) *by the effect of their own allegations*, and to agree upon this question as the point of decision in the cause, thus rendering unnecessary any retrospective operation on the pleadings, for the purpose of ascertaining the matter in controversy.

The author is of opinion that this peculiarity of coming to issue, took its rise in the practice of *oral* pleading. It seems a nat-

ural incident of that practice to compel the pleaders to short and terse allegations, applying to each other by way of answer, in somewhat of a logical form, and at length reducing the controversy to a precise point. For while the pleading was *merely* oral, and not committed by any contemporaneous record to writing (a state of things which may be distinctly traced among the yet extant archives of the early continental jurisprudence), the court and the pleaders would have to rely exclusively on their memory for retaining the tenor of discussion; and the development of some precise question or issue would then be a very convenient practice, because it would prevent the necessity of reviewing the different statements, and leave no burden on the memory, but that of retaining the question itself so developed. And even after the practice of recording was introduced, the same brief and logical forms of allegation would naturally continue to be acceptable, while the pleadings were still *viva voce*, and committed to record on the inconvenient plan of contemporary transcription.

A co-operative reason for coming to issue, was the variety of the modes of decision which the law assigned to different kinds of questions. The various modes enumerated in the first chapter as still recognized in practice, were (with several others now abolished) in full vigor and observance in the days of oral pleading; and evidently made it necessary to settle publicly between the parties, the precise point on which their controversy turned. For on the nature of this depended the very manner of the subsequent decision, and the form of proceeding to be instituted for that purpose. As questions of law were decided by the *judges*, and matters of fact were referred to other kinds of investigations, it was, in the first place, necessary to settle whether the question in the cause, or issue, was a matter of *law or fact*. Again, if it happened to be a matter of fact, it required to be developed in a form sufficiently specific to show what was the method of trial appropriate to the case. And unless the state of the question were thus adjusted between the parties, it is evident that they would not have known whether they were to put themselves on the judgment of the court, or to go to trial; nor, in the latter case, whether they were to prepare themselves for trial by jury, or for one of the other various modes of deciding the matter of fact.

To the opinion that this distinctive feature of the English pleading was derived from the practice of oral allegation, and from that of applying different forms of trial to the determination of different kinds of questions, it may perhaps, be objected, that both these practices anciently prevailed, not only in England, but among the continental nations; among whom, nevertheless, the method of coming to issue is now unknown. This objection, however, is capable of a satisfactory answer. On the continent, the ancient system of judicature, of which these practices formed a part, was, at early periods, supplanted by the methods of the *civil law*—in which the pleadings were *written*(a)—and there was but *one form of trial*, viz, a trial by the judge himself, upon examination of instruments and witnesses adduced in evidence before him. On the other hand, in the courts of Westminster, the law of trial still remains without material alteration; and with respect to oral pleading, though it at length grew out of fashion there, it gave place, not to allegations formed upon the principles of the imperial practice, but to supposed transcriptions from the record; the effect of which (as explained in the first chapter) has been to preserve in these written pleadings the style and method of those which were delivered *viva voce* at the bar of the court.

But whatever may be the origin and reason of the method of coming to issue, it is at least certain that that method has been substantially practiced in the English pleading, from the earliest period to which any of the now existing sources of information refer; and from the work of Glanville on the laws of England, it may clearly be shown to have existed, in effect, in the reign of Henry 2. The term itself, of "*issue*," though, perhaps, somewhat less ancient, yet occurs as early as the commencement of the Year-Books, viz, in the first year of Edward 2; and from the same period, at least, if not an earlier one, the production of the issue has been not only the constant effect, but the professed aim and object of pleading.

### § 428. Materiality of issue.

It was not, however, the *only* object. It was found, that though the parties should arrive at an issue, that is, at some point

(a) Fortescue de laud., ch. 20.

affirmed on one side and denied on the other, and mutually proposed and accepted by them as the subject for decision, it might yet happen that the point was *immaterial*; that is, *unfit to decide the action*. This, of course, rendered the issue useless. When it occurred, the proper remedy, as in the practice of the present day, was a *repleader*. But it was also naturally an object to avoid its occurrence, and so to direct the pleadings as to secure the production not only of an issue, but a *material* one.

### § 428a. Singleness of issue.

Again, it was found to be in the nature of many controversies, to admit of *more than one* question fit to decide the action; or, in other words, actions would often tend to more than one material issue. This might happen, in the first place, in causes which involved *several distinct claims*. Thus, if an action be brought, founded on two separate demands, for example, two bonds executed by the defendant in favor of the plaintiff, the issue may arise, as to one of them, whether it be not discharged by the subsequent release, as to the other, whether it were not executed under duress of imprisonment—which would make it avoidable in law. So, there may be more than one material issue in causes which involve only a *single claim*. Thus, in an action brought upon one bond only, two issues of the same kind may arise—viz, whether it were not executed under duress of imprisonment; or whether, at any rate, it were not, after its execution, released by the plaintiff. In the case of *several* claims, justice clearly requires that if the cause tend to several issues distinctly applicable to each, these several issues should all be raised and decided; for otherwise there would be no determination of the whole matters in demand. But in case of a *single* claim, the same consideration does not apply; for the decision of any one of the material issues that may arise upon it, will be sufficient to dispose of the entire claim. Thus, in the first example given, the finding that one bond was released, or that it was not released, would leave the demand on the other wholly untouched. On the other hand, in the second example, if the party be put to his election, either to rely on the fact of the execution under duress, or on the release, either of the questions which he so elects will lead to an issue sufficient to de-

cide the whole claim. While several issues, therefore, must of necessity be allowed in respect of *several subjects of suit*, the allowance of more than one issue in respect of *each subject of suit*, is, in some degree, a question of expediency. Those who founded the system of pleading took the course of not allowing more than one; and the motives which led to this course are sufficiently obvious. For reasons assigned in another place, it was of considerable importance to the judges, in those remote times, when the contention was conducted orally, to simplify and abbreviate the process as much as possible; and it was in this view, no doubt, that it was found expedient to establish the principle of confining the pleaders to a *single* issue in respect of each single claim, allowing, at the same time, from necessity, of several issues, when each related to a distinct subject of demand. But whatever the reason, it is clear that, in point of fact, this principle was very early recognized in pleading, and that the issue was required not only to be *material*, but *single*.

#### § 429. Certainty of issue.

There was still another quality essential to the issue—that of *certainty*. This word is technically used in pleading, in the two different senses of *distinctiveness* and *particularity*. It is here employed in the latter sense only; and when it is said that the issue must be *certain*, the meaning is that it must be *particular* or *specific*, as opposed to undue generality.

One of the causes, which have been above assigned for the practice of coming to issue, made it also necessary to come to issue with some degree of certainty. The *variety of modes of decision* required that the issue should be sufficiently certain to show whether the point in controversy consisted of *law* or *fact*; and if the latter, so far to show its nature as to ascertain by what form of trial it ought to be decided. But a certainty still greater than this was required by a cause of another kind; viz, the *nature of the original constitution of the trial by jury*. It is a matter clear beyond dispute (but one that has perhaps been too little noticed in works that treat of the origin of our laws) that the jury anciently consisted of persons who were *witnesses* to the facts, or at least in some measure *personally cognizant* of them; and who, consequently, in their verdict, gave not (as now) the conclusion

of their judgment, upon facts proved before them in the cause; but their testimony as to facts which they had antecedently known. Accordingly the *venire facias*, issued to summon a jury in those days, did not (as at present) direct the jurors to be summoned from the *body of the county*, but from the *immediate neighborhood* where the facts occurred, and from among those persons *who best know the truth of the matter*. And the only means that the sheriff himself had of knowing what was the matter in controversy, so as to be in a condition to obey the writ, appears to have been the *venire facias* itself; which then stated the *nature of the issue* instead of being confined (as now) to a short statement of the form of the action. (b) In this state of things, it was evidently necessary that the issue should be sufficiently *certain* to show specifically the nature of the question of fact to be tried. Unless it showed (for example) at what *place* the alleged matter was said to have occurred, it would not appear into what county the *venire* should be sent, nor from what neighborhood the jury were to be selected. So, if it did not specify the *time* and other particulars of the alleged transaction, the sheriff would have no sufficient guide for summoning, in obedience to the *venire*, persons able of their own knowledge to testify upon that matter. For all these reasons, and probably for others also, connected with the general objects of precision and clearness, (c) it was considered as one of the essential qualities of the issue that it should be *certain*, and the certainty was generally to be of the degree indicated by the preceding considerations. In modern times, as the jurors have ceased to be of the nature of *witnesses*, and are taken generally from the body of the county, it is no longer necessary to shape the issue for the information of the summoning officer, and, accordingly the *venire facias* no longer even sets the issue forth. But as the parties now prove their facts by the adduction of evidence before the jury, and have consequently to provide themselves with the proper documents and witnesses, it is as essential that they should each be apprised of the specific nature of the question to be tried, as it formerly was that the sheriff should be so instructed; and the particularity which was once required for

(b) *Vide* Bract., pp. 309b, 310a, etc.

(c) Bracton, 431a.

the information of that officer, now serves for the guidance of the parties themselves in preparing their proofs. (*d*)

On the whole, therefore, the author conceives the chief objects of pleading to be these—that *the parties be brought to issue*, and that the issue so produced be *material, single, and certain*, in its quality. In addition to these, however, the system of pleading has always pursued those general objects also, which every enlightened plan of judicature professes to regard—the avoidance of *obscurity*, and *confusion*, of *prolixity* and *delay*. Accordingly, the whole science of pleading, when carefully analyzed, will be found to reduce itself to certain principal or primary rules, the most of which tend to one or other of the objects above enumerated, and were apparently devised in reference to those objects; while the remainder are of an anomalous description, and appear to belong to other miscellaneous principles. It is proposed in the following chapters, to collect and investigate these principal rules, and to subject them to a distribution, conformable to the distinctions that thus exist between them in point of origin and object. The following chapters will therefore treat:

- I. Of rules which tend simply to *the production of an issue*.
- II. Of rules which tend to secure the *materiality* of an issue.
- III. Of rules which tend to produce *singleness* or unity in the issue.
- IV. Of rules which tend to produce *certainty* or particularity in the issue.
- V. Of rules which tend to prevent *obscurity* and *confusion* in pleading.
- VI. Of rules which tend to prevent *prolixity* and *delay* in pleading.
- VII. Of certain *miscellaneous* rules.

The discussion of these principal rules will incidentally involve the consideration of many other rules and principles, of a kind subordinate to the first, but extensive, nevertheless, and important in their application; and thus will be laid before the reader an entire, though general, view of the whole system of pleading, and of the relations which connect its different parts with each other.

(*d*) As to this latter or modern reason for certainty, see Collett *v.* Lord Keith, 2 East. 270; *J'Anson v. Stuart*, 1 T. R. 743; *Holmes v. Catesby*, 1 Taunt. 543.

## CHAPTER XLIX.

### RULES WHICH TEND SIMPLY TO THE PRODUCTION OF AN ISSUE.

#### § 430. Introductory.

##### RULE I.

§ 431. *After the declaration, the parties must at each stage demur, or plead by way of traverse, or by way of confession and avoidance.*

§ 432. Pleadings.

§ 433. The general issue.

§ 434. Scope of general issue in assumpsit.

§ 435. Scope of general issue in trespass on the case.

§ 436. Special pleas.

§ 437. Traverse *de injuria*.

§ 438. Special traverse.

§ 439. Use and object of special traverse.

§ 440. Essentials of special traverse.

§ 441. Traverses in general.

§ 442. Traverse on matter of law.

§ 443. Matter not alleged must not be traversed.

§ 444. Traversing the making of a deed.

§ 445. Pleadings in confession and avoidance.

§ 446. Express color.

§ 447. The nature and properties of pleadings in general—without reference to their quality, as being by way of traverse, or confession and avoidance.

§ 448. Exceptions to the rule.

##### RULE II.

§ 449. *Upon a traverse issue must be tendered.*

##### RULE III.

§ 450. *Issue, when well tendered, must be accepted.*

#### § 430. Introductory.

Upon examination of the process or system of allegation by which the parties are brought to issue, as that process is described in the first chapter, it will be found to resolve itself into the following fundamental rules or principles: *First, that after the declaration, the parties must at each stage demur, or plead by way of traverse, or by way of confession and avoidance; second, that*

upon a traverse, issue must be tendered; (a) third, that the issue when well tendered, must be accepted. Either by virtue of the first rule, a demurrer takes place, which is a tender of an issue in law; or, by the joint operation of the first two, the tender of an issue in fact; and then, by the last of these rules, the issue so tendered, whether in fact or in law, is accepted, and becomes finally complete. It is by these rules, therefore, that the production of an issue is effected; and these will consequently form the subject of the following section.

#### RULE I.

§ 431. After the declaration, the parties must at each stage demur, or plead by way of traverse, or by way of confession and avoidance.

This rule has two branches:

1. The party must *demur*, or *plead*. One or other of these courses he is bound to take (while he means to maintain his action or defense) until issue be tendered. If he does neither, but confesses the right of the adverse party, or says nothing, the court immediately gives judgment for his adversary; in the former case, as by confession—in the latter, by *non pros.* or *nil dicit*.

2. If the party *pleads*, it must either be by way of *traverse*, or of *confession* and *avoidance*. If his pleading amount to neither of these modes of answer, it is open to demurrer on that ground. (b)

Such is the effect of this rule, generally and briefly considered. But for its complete illustration, it will be necessary to enter much more deeply into the subject, and to consider at large the doctrines that relate both to *demurrers* and to *pleadings*.

Of *demurrer*.

\* \* \* \* \*

[The subject of *demurrer* has been fully treated in chapter XXV, and the discussion need not be here repeated.]

(a) With respect to *demurrer*, it will be remembered that it *necessarily implies* a tender of issue.

(b) Reg. Plac. 59; 1 Tidd, 582; 21 Hen. 6, 12; 5 Hen. 7, 13, a, 14, a, b.

### § 432. Pleadings.

Having now taken some view of the doctrine of *demurrers*, the next subject for consideration will be that of pleading.

Under this head, it is proposed to examine: 1. The nature and properties of *traverses*. 2. The nature and properties of pleadings in *confession and avoidance*. 3. The nature and properties of *pleadings in general*, without reference to their quality, as being by way of traverse, or confession and avoidance.

#### 1. Of the nature and properties of traverses.

Of *traverses* there are various kinds. The most ordinary kind is that which may be called a *common* traverse. It consists of a *tender of issue*; that is, of a denial, accompanied by a formal offer of the point denied, for decision; and the denial that it makes, is by way of express contradiction, in terms of the allegation traversed. Of this kind the following is an example:

In covenant, on Indenture of Lease, for not repairing.

And the said defendant, by his attorney, comes and says that the windows of the said message and tenement were not, in any part thereof ruinous, in decay and out of repair in manner and form as the said plaintiff hath above thereof complained against him, the said defendant. And of this he puts himself upon the country.

W. W. A., p. d.

This form of traverse is generally expressed in the negative. This, however, is not invariably the case with a common traverse, for if opposed to a preceding negative allegation, it will, of course, be in the *affirmative*, as in the following example:

#### PLEA.

#### *Of the Statute of Limitations, in Assumpsit.*

And the said C. D., by ——— ———, his attorney, comes and defends the wrong and injury, when, etc., and says that the said A. B. ought not to have or maintain his aforesaid action against him; because he says that he, the said C. D., did not at any time within six years next before the commencement of this suit, undertake or promise in manner and form as the said A. B. hath above complained. And this the said C. D. is ready to verify. Wherefore he prays judgment if the said A. B. ought to have or maintain his aforesaid action against him, etc.

## REPLICATION.

And the said A. B. says that, by reason of anything in the said plea alleged, he ought not to be barred from having and maintaining his aforesaid action against the said C. D.; because he says that the said C. D. did, within six years next before the commencement of this suit, undertake and promise in manner and form as he, the said A. B., hath above complained. And this he prays may be inquired of by the country.

## § 433. The general issue.

Besides this, the common kind, there is a class of traverses, which requires particular notice. In most of the usual actions, there is a fixed and appropriate form of plea for traversing the declaration, in cases where the defendant means to deny its whole allegations, or the principal fact on which it is founded. (c) This form of plea or traverse has been usually denominated *the general issue* in that action: and it appears to have been so called, because the issue that it tenders, involving the whole declaration, or the principal part of it, is of a more general and comprehensive kind than that usually tendered by a common traverse. \* \* \* From the examples of it that will be given presently, it will be found, that, in point of form, it sometimes differs from a common traverse; for though, like that, it *tenders issue*, yet, in several instances, it does not contradict in terms of the allegation traversed, but in a more general form of expression. (d)

The first of these traverses that shall be mentioned is called the plea of *non est factum*. \* \* \* It occurs in debt on bond or other specialty, and also in covenant, and is as follows:

“And the said defendant, by —— his attorney, says that the said supposed writing obligatory (or ‘*indenture*,’ or ‘*articles of agreement*,’ according to the subject of the action,) is not his deed. And of this he puts himself upon the country.”

Another of them is the plea of *never indebted*, usually called “*nil debet*.” It occurs in actions of debt on *simple contract*, and its form is as follows:

“And the said defendant, by —— his attorney, says, that he

(c) Reg. Plac. 57; Doct. & Stud. 272.

(d) See the general issues of *non est factum*, and not guilty, *infra*.

never was indebted in manner and form as in the declaration alleged. And of this he puts himself upon the country.”

[Another general issue in debt occurs when an action of debt is brought upon a record, and is called the plea of *nul tiel record*. It is as follows:

“And the said defendant, by his attorney, comes and says that there is not any record of the said supposed recognizance (or if in debt upon a judgment, say, *of the said supposed recovery*) in the declaration mentioned, remaining in the said ——— court of ——— County, in manner and form as the said plaintiff hath above in his said declaration alleged. And this the said defendant is ready to verify.”<sup>1</sup> (See 4 Min. Ins., p. 1483.)]

Another of these traverses is called the plea of *non detinet*. It occurs in detinue, and is as follows:

“And the said defendant, by ——— his attorney, says, that he does not detain the said goods and chattels (*or, ‘deeds and writing,’ according to the subject of the action,*) in the said declaration specified or any part thereof, in manner and form as the said plaintiff hath above complained. And of this the said defendant puts himself upon the country.”

Another of them is called the plea of *not guilty*. It occurs in trespass and trespass on the case, *ex delicto*, and is as follows:

“And the said defendant, by ——— his attorney says, that he is not guilty of the said trespasses (*or, in trespass on the case, ‘the premises,’*) above laid to his charge, or any part thereof, in manner and form as the said plaintiff hath above complained. And of this the said defendant puts himself upon the country.”

Another of these is called the plea of *non assumpsit*. It occurs in the action of *assumpsit*, and is as follows:

“And the said defendant, by ——— his attorney, says, that he did not undertake or promise in manner and form as the said plaintiff hath above complained. And of this the said defendant puts himself upon the country.”

1. Unlike the other general issues, this one concludes with a verification. The reason is that the issue is to be tried by the *court* upon a simple inspection of the record, and hence it should not tender an issue to be tried *by a jury*.

There belongs also to the same class, the plea of *non cepit*. It occurs in the action of replevin, and is as follows:

“And the said defendant, by —— his attorney, says, that he did not take the said cattle (or ‘*goods and chattels,*’ according to the subject of the action,) in the said declaration mentioned, or any of them, in manner and form as the said plaintiff hath above complained. And of this the said defendant puts himself upon the country.”

According to the principle of these pleas it will be observed, that (like all other traverses) they purport to be a mere *denial* of something adversely alleged. But an allowed relaxation in the modern practice has given to some of them an application more extensive than belongs to them in principle; and the defendant has, under such issues been permitted to give in evidence any matter of defence whatever (subject to some few exceptions) which tends to deny his liability to the action.<sup>2</sup>

\*            \*            \*            \*            \*

A very important effect attends the adoption of the general issue, viz, that by tendering the issue on the declaration, and thus closing the process of the pleading, at so early a stage, it throws out of use, wherever it occurs, a great many rules of pleading, applying exclusively to the remoter allegations. For it is evident that, when the issue is thus tendered in the plea, the whole doctrine relating to pleadings in confession and avoidance, replications, rejoinders, etc., is superseded. At the same time, the general issue is of very frequent occurrence in pleading; and it has, therefore, on the whole, the effect of narrowing, very considerably, the application of the greater and more subtle part of the science.

The important character of this plea, makes it material to explain distinctly in what cases it may and ought to be used; and this is the more necessary, because an allowed relaxation in the modern practice has, in some actions, given it an application more extensive than belongs to it in principle. To obtain a clear view of this subject, we must examine the language of the different

2. The historical development of the scope of these general issues is given in the next two succeeding sections, taken from an earlier edition of the author.

general issues, in reference to the declarations which they respectively traverse.

#### § 434. Scope of general issue in assumpsit.

First, with respect to that in *Assumpsit*. The declaration in this action states that the defendant, upon a certain consideration therein set forth, made a certain promise to the plaintiff. The general issue, in this action, states that the defendant "did not promise and undertake in manner and form," etc. This, at first sight, would appear to put in issue, merely the fact of his having made a promise such as alleged. A much wider effect, however, belongs in practice, to this plea; and was originally allowed (as it would appear), in reference to the following distinction. It has been already stated, in a former part of the work, that the law will always *imply* a promise, in consideration of an existing debt or liability; and that the action of assumpsit may be consequently founded on a promise either *express* or *implied*. When the promise relied upon was of the *latter kind*, and the defendant pleaded the general issue, the plaintiff's mode of maintaining the affirmative of this issue, on the trial, was, of course, by proving that debt or liability on which the implied promise would arise;—and in such case, it was evidently reasonable that the defendant also should, under his plea denying the promise, be at liberty to show any circumstance by which the debt or liability was disproved; such, for example, as performance, or a release. Accordingly, in actions on *implied* assumpsits, this effect was, on the principle here mentioned, allowed to the general issue. But it was at first allowed, in the case of implied assumpsits *only*; and where an *express* promise was proved, the defendant in conformity with the language and strict principle of his plea, was permitted, under the general issue, only to contest the fact of the promise; or, at most, to show that, on the ground of some illegality, it was a promise void in law. (*Fits v. Freestone*, 1 Mod. 310; *Abbot v. Chapman*, 2 Lev. 81; Vin. Ab. Evidence (Z. a.); 1 Chitty, 471, 1st Ed. This practice, however, was by relaxation gradually applied to those on *express* promises also; and at length, in *all* actions of assumpsit, without distinction, the defendant was, under the general

issue, permitted not only to contend that no promise was made, or to show facts impeaching the validity of the promise, but (with some few exceptions) to prove any matter of defence whatever, which tends to deny his debt or liability; for example, a release or performance. And such is the present state of the practice.

This is a great deviation from principle; for it will be observed, that many of these matters of defence are such (in the case of express promise) as ought regularly to be pleaded in *confession and avoidance*. Thus, if the defendant be charged with an express promise, and his case be, that, after making such promise, it was *released* or *performed*, this plainly *confesses and avoids* the declaration. To allow the defendant, therefore, to give this in evidence under the general issue, which is a plea by way of *traverse*, is to lose sight of the distinction between the two kinds of pleading. And even where the matters of defence thus admitted in evidence, are *not* such as would have been pleadable by way of confession and avoidance, but are in the nature of a traverse of the declaration, yet they are almost always inconsistent with the form and language of the general issue in this action; which (as has been seen) consists of a denial of the *promise* only, and purports to traverse no other part of the declaration. Thus, in an action which has become, of all others, the most frequent and general in its application, the science of pleading has been, in a great measure, superseded, by an innovation of practice, which enables the parties to come to issue upon the plea (the second step in the series of allegations) in a great variety of cases, which would formerly have led to much remoter or more specific issues. This important inroad on the ancient dominion of pleading, has been effected for more than a century past; and was probably first encouraged by the judges, in consequence of a prevalent opinion, that the rules of this science were somewhat more strict and subtle than is consistent with the objects of justice; and that, as the general issue tended to abbreviate its process, and proportionably to emancipate the suitors from its restrictions, it was desirable to extend as much as possible, the use and application of that plea.

### § 435. Scope of general issue in trespass on the case.

Next in order, is the general issue, which belongs to the action of *Trespass on the case in general*. The declaration in this ac-

tion, sets forth specifically the circumstances which form the subject of complaint. The general issue, *not guilty*, is a mere traverse, or denial of the facts so alleged; and therefore, on principle, should be applied only to cases in which the defence rests on such denial. But here a relaxation has taken place, similar to that which prevails in *assumpsit*; for, under the plea now in question, a defendant is permitted, not only to contest the truth of the declaration, but (with certain exceptions) to prove any matter of defence that tends to show that the plaintiff has no right of action, though such matters be in confession and avoidance of the declaration; as, for example, a release given, or satisfaction made. This latitude was no doubt originally allowed, in the same view that prompted the encouragement of the general issue in *assumpsit*. It is not, however, easy to conceive, by what artifice of reasoning, the relaxation was, in this case, held to be reconcilable with the principles of pleading, to which it stands in apparent variance: and perhaps the truth is, that the practice in question, was first applied to the general issue in trespass on the case in general, without regard to any principle, beyond that of a forced analogy to the similar practice in trespass on the case in *assumpsit*. (See, however, Lord Mansfield's explanation of the reason for allowing this practice in trespass on the case. *Bird v. Randall*, 3 Burr. 1353; 1 Chitty, 486, 1st Ed.)

“Thus, in *assumpsit* [debt on simple contract], and trespass on the case in general, the defendant is allowed, under the general issue, to give in evidence matters which do not fall within the strict principle of that plea, and, among these, matters in confession and avoidance. It is to be observed, however, with respect to matters of this latter description, that, though allowed, he is in no case obliged to take that course, but may still bring forward, by way of special plea in confession and avoidance, all such allegations as properly fall within the principle of such pleadings, that is, all which confess what is adversely alleged, but repel or obviate its legal effect. Thus the defendant may in *assumpsit* and other actions to trespass on the case, plead a release, though it is also competent to him to rely upon it in evidence under the general issue. As this course is allowable, so there are reasons of convenience which sometimes dictate its adoption; but

the general issue, where capable of being applied, is much the more usual form of plea, and that which, from its generality, is commonly the most advantageous to the defendant.”

[What is provable under the general issues in different actions in Virginia has already been pointed out in the preceding chapters treating such actions. It may be proper to add that such defences as are allowed only by virtue of § 3299 of the Code cannot be set up under the general issues of *nil debit* and *non assumpsit*. It has also been held recently in Virginia that in a proceeding by motion on a contract under § 3211 of the Code, the defendant may rely upon a set-off to the plaintiff's demand, although his only plea was *non assumpsit*, and no list or plea of set-offs or payment was filed; that the plaintiff's remedy was to call for a statement of the grounds of defence under § 3249. It appeared, however, that the plaintiff was apprised of the defence at an early stage of the proceedings.]<sup>4</sup>

### § 436. Special pleas.

On the subject of general issues, it remains only to remark, that other pleas are ordinarily distinguished from them by the appellation of *special pleas*; and when resort is had to the latter kind, the party is said to plead *specially*, in opposition to pleading the *general issue*.(e) So the *issues* produced upon special pleas, as being usually more specific and particular than those of *not guilty*, etc., are sometimes described in the book as *special issues*, by way of distinction from the others, which were called *general issues*;(f) the latter term having been afterwards applied, not only to the issues themselves, but to the pleas which tendered and produced them.

(e) These terms, it may be remarked, have given rise to the popular denomination of the whole science to which this work relates, which, though properly described as that of *pleading*, is generally known by the name of *special pleading*.

(f) Co. Litt. 126a; Heath's Maxims, 53; Com. Dig., Pleader (R. 2).

4. Whitley v. Booker Brick Co., 113 Va. 434, 74 S. E. 160.

### § 437. Traverse de injuria.

There is another species of traverse, which varies from the common form, and which though confined to particular actions, and to a particular stage of pleading, is of frequent occurrence. It is the traverse *de injuria sua propria absque tali causa*; or (as it is more compendiously called) the traverse *de injuria*. It always *tenders issue*; but on the other hand, differs (like many of the general issues) from the common form of a traverse, by denying in general and summary terms, and not in the words of the allegation traversed. The following is an example:

#### PLEA.

#### *Of son assault demesne.*

In Trespass for Assault and Battery.

And for a further plea in this behalf, the defendant says, that the said plaintiff, just before the said time, when, etc., to wit, on the day and year aforesaid, with force and arms, made an assault upon him, the said defendant, and would then and there have beaten and ill treated him, the said defendant, if he had not immediately defended himself against the said plaintiff, wherefore the said defendant did then and there defend himself against the said plaintiff, as he lawfully might, for the cause aforesaid; and in so doing did necessarily and unavoidably a little beat, wound, and ill treat the said plaintiff; doing no unnecessary damage to the said plaintiff on the occasion aforesaid. And so the said defendant saith, that if any hurt or damage then and there happened to the said plaintiff, the same was occasioned by the said assault so made by the said plaintiff on him the said defendant, and in the necessary defence of himself the said defendant against the said plaintiff; which are the supposed trespasses in the introductory part of this plea mentioned, and whereof the said plaintiff hath above complained. And this the said defendant is ready to verify.

#### REPLICATION.

And as to the said plea by the said defendant last above pleaded in bar to the said several trespasses in the introductory part of that plea mentioned, the said plaintiff says, that the said defendant at the said time when, etc., *of his own wrong, and without the cause in his said last-mentioned plea alleged*, committed the said several trespasses in the introductory part of that plea mentioned, in manner and form as the said plaintiff hath above complained; and this he prays may be inquired of by the country. (g)

(g) 2 Chitty, 523, 642.

This species of traverse occurs in the *replication* in actions of *Trespass* and *Trespass on the case*; but is not used in any other stage of the pleading. In these actions, it is the *proper* form when the plea consists merely of matter of *excuse*. But when it consists of, or comprises matter of *title* or *interest* in the land, etc., or the *commandment* of another—or *authority* derived from the opposite party—or matter of *record*—in any of these cases, the replication *de injuriâ* is generally improper; (*h*) and the traverse of any of these matters should be in the common form; that is, in the words of the allegation traversed.

### § 438. Special traverse.

There is still another species of traverse, which differs from the common form, and which will require distinct notice. It is known by the denomination of a *special traverse*. (*i*) Though formerly in very frequent occurrence, this species has now fallen, in great measure, into disuse; but the subtlety of its texture, its tendency to illustrate the general spirit and character of pleading, and the total dearth of explanation in all the reports and treatises with respect to its principle, seem to justify the consideration of it at greater length, and in a more elaborate manner, than its actual importance in practice demands. Of the special traverse the following is an example:

\* \* \* \* \*

#### DECLARATION.

[A declaration in covenant for the non-payment of rent, brought by the heir of the lessor against the lessee, alleged that one, E. B., was seized in fee, and while so seized, in his lifetime, demised the premises to the defendant, and that the defendant covenanted that he would pay the rent, and then entered upon the premises; that afterwards the lessor died and that the reversion descended to the plaintiff as his son and heir, who

(*h*) *Crogate's Case*, 8 Rep. 67a; Doct. Pl. 113, 115. See the law on this subject more fully explained, and the exceptions noticed. 1 Chitty, 578; 1 Arch. 238; 2 Saund. 295, n. (1); 1 Saund. 244, c. n. (7). And see the nature of this replication fully considered in the late case of *Selby v. Bardons*, 3 Barn. & Ald. 2, 9 Bing. 756.

(*i*) It is also called a *formal traverse*; or a *traverse with an absque hoc*.

thereupon became seized in fee of the reversion of the premises, and that C. D. was in arrears for the rent and had refused to pay the same. To this declaration the defendant filed the following plea:]

PLEA.

And the said defendant, by ———, his attorney, says that the said E. B. deceased, at the time of the making of the said indenture, was seized in his demesne, as of freehold for the term of his natural life, of and in the said demised premises, with the appurtenances, and continued so seized thereof until and at the time of his death; and that after the making of the said indenture, and before the expiration of the said term, to wit, on the ——— day of ———, in the year of our Lord ———, at ——— aforesaid, the said E. B. died; whereupon the term created by the said indenture wholly ceased and determined: *Without this, that*, after the making of the said indenture, the reversion of the said demised premises belonging to the said E. B. and his heirs, in manner and form as the said declaration alleged. (j) [And this the said defendant is ready to verify. Wherefore he prays judgment if the said plaintiff ought to have or maintain her action aforesaid against him.]

The substance of this plea is, that the father was seized for life only, and therefore that the term determined at his death; which involves a denial of the allegation in the declaration, that the reversion belonged to the father in fee. The defendant's course was, therefore, to traverse the declaration. But it will be observed that he does not traverse it in the common form. If the *common* traverse were adopted in this case, the plea would be—"The said C. D. by ——— his attorney, says, that after the making of the said indenture, the said reversion of the said demised premises did not belong to the said E. B. and his heirs, in manner and form as the said plaintiff hath in his said declaration alleged. And of this the said defendant puts himself upon the country;" But instead of this simple denial, the defendant adopts a *special* traverse. This first sets forth the new *affirmative matter*, that E. B. was seized for life, etc.;— and then annexes to this the denial that the reversion belonged to him and his heirs by that peculiar and barbarous formula,

(j) 2 Chitty, 500. And see *Brudnell v. Roberts*, 2 Wils. 143; *Palmer v. Elkins*, Lord Ray. 1550.

*Without, this, that*, etc., concluding [with a *verification* and *prayer of judgment*]. The *affirmative* part of the special traverse is called its *inducement*; (*k*) the negative is called the *absque hoc* (*l*)—those being the Latin words formerly used, and from which the modern expression *without this*, is translated. The different parts and properties here noticed are all essential to a special traverse; which must always thus consist of an inducement, a denial and a conclusion to the country [formerly a verification].

\*                    \*                    \*                    \*                    \*

### § 439. Use and object of special traverse.

The *use and object* of a special traverse is the next subject for consideration. Though this relic of the subtle genius of the ancient pleaders has now fallen (as above stated) into comparative disuse, it is still of occasional occurrence; and it is remarkable, therefore, that no author should have hitherto offered any explanation of the objects for which it was originally devised, and in a view to which, it continues to be, in some cases, adopted. The following remarks are submitted, as those which have occurred to the writer of this work, on a subject thus barren of better authority. The general design of a special traverse, as distinguished from a common one, is to *explain or qualify the denial*, instead of putting it in the direct and absolute form; and there were several different views, in reference to one or other of which, the ancient pleaders seem to have been induced to adopt this course.

First. A simple or positive denial may, in some cases, be rendered improper, by its opposition to some general rule of law. Thus, in the example of special traverse above given, it would be improper to traverse in the common form; viz. “that after the making of the said indenture, the reversion of the said demised premises did not belong to the said E. B. and his heirs,” etc.; because by a rule of law a tenant is precluded (or, in the language of pleading, *estopped*) from alleging that his lessor

(*k*) Bac. Ab., Pleas, etc., H. 1.

(*l*) The denial, however, may be introduced by other forms of expression besides *absque hoc*. *Et non* will suffice. *Bennett v. Filkins*, 1 Saund. 21; *Walters v. Hodges*, Lut. 1625.

had no title in the premises demised; (*m*) and a general assertion that the reversion did not belong to him and his heirs, would seem to fall within the prohibition of that rule. But a tenant is not by law estopped to say that his lessor had only a *particular estate*, which has since expired. (*n*) In a case, therefore, in which the declaration alleged a seizin in fee in the lessor, and the nature of the defence was, that he had a particular estate only (e. g. an estate for life,) since expired, the pleader would resort, as in the example given, to a special traverse—setting forth the lessor's limited title by way of inducement, and traversing his seizin of the reversion in fee under the *absque hoc*. He thus would avoid the objection that might otherwise arise on the ground of estoppel.

Secondly. A common traverse may sometimes be inexpedient as involving in the issue in *fact*, some question which it would be desirable rather to develop, and submit to the judgment of the court, as an issue in *law*. This may be illustrated by the example of a lease not expressing any certain term of demise, which had been brought to the ordinary for his confirmation, which he had accordingly confirmed in that shape under his seal; and where the instrument was afterwards filled up as a lease for fifty years. The party relying upon this lease states that the demise was to the defendant for the term of fifty years—and that the ordinary, “ratified, approved, and confirmed, his estate and interest in the premises.” (*o*) If the opposite party were to traverse in the common form—“that the ordinary did not ratify, approve and confirm his estate and interest in the premises, etc.,” and so tender issue in fact on that point,—it is plain that there would be involved in such issue the following question of *law*; viz whether the confirmation by the ordinary of a lease in which the length of the term is not, at the time, expressed, be valid? This question would, therefore, fall under the de-

(*m*) *Blake v. Foster*, 8 T. R. 487.

(*n*) *Ibid*.

(*o*) This case would seem to have arisen before the restraining statutes; since which a lease by ecclesiastical persons, even with confirmation, is good for no longer period than twenty-one years, or three lives. 2 Bl. Com. 320.

cision of the jury, to whom the issue in fact is referred; subject to the direction of the judge presiding at *nisi prius*, and the ultimate revision of the court in bank. Now it may, for many reasons, be desirable that, without going to a trial, this question should rather be brought before the court in the first instance; and that for this purpose an issue in *law* should be taken. The pleader, therefore, in such a case, would state the circumstances of the transaction in an inducement—substituting a special for a common traverse. As the whole facts thus appear on the face of the pleading, if his adversary means to contend that the confirmation was, under the circumstances, valid in point of law, he is enabled by this plan of special traverse to raise the point by demurring to the replication; on which demurrer an issue in law arises for the adjudication of the court.

By these reasons, and sometimes by others also, which the reader, upon examination of different examples, may, after these suggestions, readily discover for himself, the ancient pleader appears to have been actuated in his frequent adoption of an inducement of new affirmative matter, tending to explain or qualify the denial. But though these reasons seem to show the purpose of the *inducement*, they do not account for the other distinctive feature of the special traverse—viz, the *absque hoc*. For it will naturally suggest itself, that the affirmative matter might, in each of the above cases, have been pleaded *per se* without the addition of the *absque hoc*. This latter form was dictated by another principle. The direct denial under the *absque hoc* was rendered necessary by this consideration that the affirmative matter, taken *alone*, would be only an *indirect* (or, as it is called in pleading, *argumentative*) denial of the precedent statement: and by a rule which will be considered in its proper place hereafter, all *argumentative* pleading is prohibited. In order, therefore, to avoid this fault of *argumentativeness*, the course adopted was, to follow up the explanatory matter of the inducement with a *direct* denial. (*p*) Thus, to allege, as in the example given that E. B. was seized for life, would be to deny by impli-

(*p*) 3 Reeves' Hist. 432; Bac. Ab., Pleas, etc., H. 1; Courtney v. Phelps, Sid. 301; Herring v. Blacklow, Cro. Eliz. 30; 10 Hen. 6, 7, Pl. 21.

cation *only*, that the reversion belonged to him in fee; and therefore, to avoid argumentativeness, a direct denial that the reversion belonged to him in fee is added under the formula of *absque hoc*.

\*            \*            \*            \*            \*

[The conclusion with a verification, instead of to the country, was rendered necessary by another rule of pleading to be hereafter discussed, declaring it improper for a plea which introduces new matter to tender issue, and hence it was necessary for it to conclude with a verification.]

#### § 440. Essentials of special traverse.

\*            \*            \*            \*            \*

First, it is a rule, *that the inducement should be such as in itself amounts to a sufficient answer in substance to the last pleading.*(*q*) For (as has been shown) it is the use and object of the inducement to give an explained or qualified denial; that is, to state such circumstances as tend to show that the last pleading is not true; the *absque hoc* being added merely to put that denial in a positive form, which had previously been made in an indirect one. Now an indirect denial amounts in substance to an answer; and it follows, therefore, that an inducement, if properly framed, must always in itself contain without the aid of the *absque hoc*, an answer, in substance, to the last pleading. Thus, in the example given the allegation that E. B. was seized for life, and that that estate is since determined, is in itself, in substance, a sufficient answer, as denying by implication that the fee descended from E. B. on the plaintiff. That sort of special traverse containing no new matter in the inducement, \* \* \* is no exception to this rule. Thus, to say, \* \* \* that the defendant, *of his own wrong* made an assault, etc., is of itself an answer; for it indirectly denies that notice was given of the warrant.

It follows from the same consideration, as to the object and use of a special traverse, that the answer given by the induce-

(*q*) Bac. Ab. (H.) 1; Com. Dig., Pleader (G. 20); Anon., 3 Salk. 353; Dike *v.* Ricks, Cro. Car. 336.

ment can properly be of *no other* nature than that of an indirect denial. Accordingly we find it decided, in the first place, *that it must not consist of a direct denial.*

Thus, the plaintiff, being bound by recognizance to pay J. Bush £300 in six years, by £50 *per annum*, at a certain place, alleged that he was ready every day at that place to have paid to Bush the said £50, but that Bush was not there to receive it. To this the defendant pleaded, that J. Bush was ready at the place to receive the £50, *absque hoc* that the plaintiff was there ready to have paid it. The plaintiff demurred, on the ground that the inducement of this traverse alleging Bush to have been at the place ready to receive, contained a direct denial of the plaintiff's precedent allegation that Bush was *not* there, and should therefore have concluded to the country without the *absque hoc*; and judgment was given accordingly for the plaintiff.<sup>(r)</sup> Again, as the answer given by the inducement must not be a *direct denial*, so it must not be *in the nature of a confession and avoidance.*<sup>(s)</sup> Thus, if the defendant makes title as assignee of a term of years of A., and the plaintiff in answer to this, claims under a prior assignment to himself from A. of the same term, this is a confession and avoidance; for it admits the assignment to the defendant, but avoids its effect, by showing the prior assignment. Therefore, if the plaintiff pleads such assignment to himself by way of inducement, adding, under an *absque hoc*, a denial that A. assigned to the defendant, this special traverse is bad.<sup>(t)</sup> The plaintiff should have pleaded the assignment to himself, as in confession and avoidance, without the traverse.

Again, it is a rule with respect to special traverses, that the opposite party has no right to traverse the inducement,<sup>(u)</sup> or (as the rule is more commonly expressed) *that there must be no traverse upon a traverse.*<sup>(v)</sup> Thus, in the example given,

(r) *Hughes v. Phillips*, Yelv. 38; and see 36 Hen. 6, 15.

(s) Com. Dig., Pleader (G. 3); *Lambert v. Cook*, Lord Ray. 238; *Helier v. Whytier*, Cro. Eliz. 650.

(t) Com. Dig., Pleader (G. 3); *Helier v. Whytier*, Cro. Eliz. 650.

(u) Anon., 3 Salk. 353.

(v) Com. Dig., Pleader (G. 17); Bac. Ab., Pleas, etc. (H. 4); *The King v. Bishop of Worcester*, Vaughan, 62; *Digby v. Fitzharbert*, Hob. 104.

if the replication, instead of taking issue on the traverse, were to traverse the inducement, either in the common or the special form, denying that E. B. at the time of making the indenture was seized in his demesne as of freehold, for the term of his natural life, etc., such replication would be bad, as containing a traverse upon a traverse. The reason of this rule is clear and satisfactory. By the first traverse, a matter is denied by one of the parties, which had been alleged by the other, and which, having once alleged it, the latter is bound to maintain, instead of prolonging the series of the pleading, and retarding the issue, by resorting to a new traverse. However, this rule is open to an important exception, viz, *that there may be a traverse upon a traverse, when the first is a bad one;*(*w*) or (in other words,) if the denial under the *absque hoc* of the first traverse be insufficient in law, it may be passed by, and a new traverse taken on the inducement. Thus, in an action of prohibition, the plaintiff declared that he was elected and admitted one of the common-council of the city of London; but that the defendants delivered a petition to the court of common-council complaining of an undue election, and suggesting that they themselves were chosen; whereas (the plaintiff alleged) the common-council had no jurisdiction to examine the validity of such an election, but the same belonged to the court of the mayor and aldermen. The defendants pleaded that the common-council, time out of mind, had authority to determine the election of common-councilmen; and that the defendants being duly elected, the plaintiff intruded himself into the office; whereupon the defendants delivered their petition to the common-council, complaining of an undue election; *without this, that* the jurisdiction to examine the validity of such election belonged to the court of the mayor and aldermen. The plaintiff replied by traversing the inducement; that is, he pleaded that the common-council had no authority to determine the election of common-councilmen, concluding to the country. To this the defendant demurred, and the court adjudged that

(*w*) Com. Dig., Pleader (G. 18, 19); *Thrale v. Bishop of London*, 1 H. Bl. 376; *Richardson v. Mayor of Oxford*, 2 H. Bl. 186; *King qui tam v. Bolton*, Stra. 116; *Cross v. Hunt*, Carth. 99.

the first traverse was bad; because the question in this prohibition was not whether the court of aldermen had jurisdiction, but whether the common-council had; and that the first traverse being immaterial, the second was well taken.(x)

As the inducement cannot, when the denial under the *absque hoc* is sufficient in law, be *traversed*, so, for the same reasons, it cannot be answered by a *pleading in confession and avoidance*. But, on the other hand, if the denial be insufficient in law, the opposite party has then a right to plead in confession and avoidance of the inducement, or (according to the nature of the case) to traverse it; or he may *demur* to the whole traverse, for the insufficiency of the denial.

As the inducement of a special traverse, when the denial under the *absque hoc* is sufficient, can neither be traversed nor confessed and avoided, it follows that there is in that case *no* manner of *pleading* to the inducement. The only way, therefore, of answering a good special traverse is to join issue upon it. [i. e., plead to the *absque hoc*.] But though there can be no *pleading* to an inducement, when the denial under the *absque hoc* is sufficient, yet the inducement may be open in that case to exception in point of *law*. If it be faulty in any respect, as (for example) in not containing a sufficient answer in substance, or in giving an answer by way of direct denial, or by way of confession and avoidance, the opposite party may demur to the whole traverse, though the *absque hoc* be good for this insufficiency in the inducement.(y)

[The *effect* of the special traverse is to postpone the issue to one stage of the pleading later than it would be by traverse in the common form, and that was one reason for its adoption by defendants, but by the rules of court of Hilary Term, 1834, it was provided that the plea should conclude to the country, and by statute in Virginia, adopted many years ago, following the above rules, it is declared that "All special traverses, or traverses with an inducement of an affirmative matter, shall conclude to the country, but this regulation shall not preclude the opposite

(x) King *qui tam* v. Bolton, Stra. 117.

(y) Com. Dig., Pleader (G. 22); Foden v. Haines, Comb. 245.

party from pleading over to the inducement when the traverse is immaterial.”<sup>5</sup>

The greater portion of the author’s discussion of the special traverse is given (though much is omitted), more for the purpose of showing the subtlety of the ancient pleaders than on account of its present utility. It is not believed that it is necessary to resort to a special traverse in any case, though occasionally instances of it are found in practice, even at the present day.]<sup>6</sup>

### § 441. Traverses in general.

The *different kinds or forms of* traverse having been now explained, it will be proper next to advert to certain principles which belong to *traverses in general*.

The first of these that may be mentioned, is, that it is the nature of a traverse, to deny the allegations in the *manner and form* in which it is made; and, therefore, to put the opposite party to prove it to be true in *manner and form*, as well as in general effect. Accordingly it has been shown that he has often exposed at the trial to the danger of a *variance*, for a slight deviation in his evidence from his allegation. This doctrine of *variance*, we now perceive to be founded on the strict quality of the traverse here stated. On this subject of *variance*, or the degree of strictness with which in different instances, the traverse puts the fact in issue, there are a great number of adjudged cases involving much nicety of distinction; but it does not belong to this place to enter into it more fully, as it has been already sufficiently discussed in a preceding part of this work. The general principle is that which is here stated, that the traverse brings the fact into question, according to the *manner and form in which it is alleged*; and that the opposite party must consequently prove that in substance, at least, the allegation is *accurately true*. The existence of this principle is indicated by the *wording* of a traverse; which, when in the negative, generally denies the last pleading, *modo et forma*, “in manner and form as alleged.”(*xa*) This will be found

*xa*. But notwithstanding the words *modo et forma* it is enough to

5. Section 3267, Code.

6. See *Townsend v. Norfolk, etc.*, R. Co., 105 Va. 22, 52 S. E. 970.

to be the case in all the preceding examples, except in the general issue *non est factum*, and the replication *de injuria*,—which are almost the only negative traverses that are not pleaded *modo et forma*. These words, however, though usual, are said to be in no case strictly essential, so as to render their omission cause of demurrer. (*z*)

It is naturally a consequence of the principle here mentioned, that great accuracy and precision in adapting the allegation to the true state of the fact, are observed in all well drawn pleadings; the vigilance of the pleader being always directed to these qualities, in order to prevent any risk of *variance* or failure of proof at the trial, in the event of a traverse by the opposite party.

#### § 442. Traverse on matter of law.

Again, with respect to all traverses, it is laid down as a rule, that *a traverse must not be taken upon matter of law.* (*a*) For a denial of the law involved in the preceding pleading, is, in other words, an exception to the sufficiency of that pleading in point of law; and is, therefore, within the scope and proper province of a *demurrer*, and not of a *traverse*. Thus, where to an action of trespass for fishing in the plaintiff's fishery, the defendant plead that the *locus in quo* was an arm of the sea, in which every subject of the realm had the liberty and privilege of free fishing, and the plaintiff, in his replication, traversed that, in the said arm of the sea, every subject of the realm had the liberty and privilege of free fishing, this was held to be a traverse of a mere inference of *law*, and therefore bad. (*b*) Upon the same principle, if a matter be alleged in pleading, "by reason whereof" (*virtute cu-*

prove the *substance* of the allegation. See Litt. Sec. 483; Doct. Pl. 344; *Harris v. Ferrand*, Hardr. 39; *Pope v. Skinner*, Hob. 72; *Carrick v. Blagrave*, 1 Brod. & Bing. 536. As to the effect of these words, as covering the whole matter of the allegation traversed, see *Wetherill v. Howard*, 3 Bing. 135.

(*z*) Com. Dig., Pleader (G. 1); *Nevie and Cook's Case*, 2 Leo. 5.

(*a*) 1 Saund. 23; Doct. Pl. 351; *Kenicot v. Bogan*, Yelv. 200; *Priddle & Napper's Case*, 11 Rep. 10b; *Richardson v. Mayor of Oxford*, 2 H. Bl. 182.

(*b*) *Richardson v. Mayor of Oxford*, 2 H. Bl. 182; *Hobson v. Middleton*, 6 B. & C. 297.

*ius*) a certain legal inference is drawn, as that plaintiff "became seized," etc., or the defendant "became liable, etc., this *virtute cuius* is not traversable; (*c*) because, if it be intended to question the facts from which the seizin or liability is deduced, the traverse should be applied to the facts, and to those only; and if the legal inference be doubted, the course is to demur. But, on the other hand, where an allegation is *mixed of law and fact*, it may be traversed. (*d*) For example, in answer to an allegation, that a man was "taken out of prison by virtue of a certain writ of habeas corpus," it may be traversed that he was taken out of prison by "virtue of that writ." (*e*) So, where it was alleged in a plea, that, in consequence of certain circumstances therein set forth, it belonged to the wardens and commonalty of a certain body corporate, to present to a certain church, being vacant, in their turn, being the second turn—and this was answered by a special traverse—*without this, that* it belonged to the said wardens and commonalty to present to the said church at the second term, when the same become vacant, etc., in manner and form as alleged—the court held the traverse good, as not applying to a *mere* matter of law, "but to a matter of law," or rather "of right, resulting from facts." (*f*) So it is held, upon the same principle, that a traverse may be taken upon an allegation that a certain person obtained a certain church by simony. (*g*)

### § 443. Matter not alleged must not be traversed.

*It is also a rule, that a traverse must not be taken upon matter not alleged.* (*h*) The meaning of this rule will be sufficiently explained by the following cases. A woman brought an action of

(*c*) Doct. Pl. 351; Priddle & Napper's Case, 11 Rep. 10b.

(*d*) 1 Saund. 23, note 5, and see the instances cited; Bac. Ab., Pleas, etc., p. 380, note b (5th Ed.); Beal v. Simpson, 1 Lord Ray. 412; Grocer's Co. v. Archbishop of Canterbury, 3 Wils. 214.

(*e*) Beale v. Simpson, 1 Lord Ray. 412; Treby, C. J., cont.

(*f*) Grocer's Co. v. Archbishop of Canterbury, 3 Wils. 214.

(*g*) Ibid.; Rast. Ent. 532a; and see this subject copiously discussed in Lucas v. Nockells, 4 Bing. 729, and in 1 Mo. & Pa. 783 (in error). See also, Hume v. Liversedge, 1 Crompt. & Mel. 332.

(*h*) 1 Saund. 312d, note 4; Doct. Pl. 358; Cross v. Hunt, Carth. 99; Powers v. Cook, 1 Lord Ray. 63; 1 Salk. 298.

debt on a deed, by which the defendant obliged himself to pay her 200*l.* on demand if he did not take her to wife; and alleges in her declaration, that though she had tendered herself to marry the defendant he refused, and married another woman. The defendant pleaded, that after making the deed, he offered himself to marry the plaintiff, and she refused; *absque hoc*, "that he refused to take her for his wife, before she had refused to take him for her husband." The court was of the opinion that this traverse was bad; because there had been no allegation in the declaration, "that the defendant had refused before the plaintiff had refused;" and therefore the traverse went to deny what the plaintiff had not affirmed. (i) The plea in this case ought to have been in *confession and avoidance*; stating merely the affirmative matter, that before the plaintiff offered the defendant offered, and that the plaintiff had refused him; and omitting the *absque hoc*. Again, in an action of debt on bond against the defendant, as *executrix* of J. S., she pleaded in abatement, that J. S. died *intestate* and that *administration* was granted to her. On demurrer, it was objected, that she should have gone on to traverse, "that she meddled as executrix before the administration, granted;" because, if she so meddled, she was properly charged as executrix, notwithstanding the subsequent grant of letters of administration. But the court held the plea good in that respect. And Holt, C. J., said that if the defendant had taken such traverse, it had made her plea vicious; for it is enough for her to show that the plaintiff's writ ought to abate; which she has done, in showing that she is chargeable only by another name. Then, as to the traverse, that she did not administer as executrix before the letters of administration were granted, it would be to traverse what is not alleged in the plaintiff's declaration; which would be against a rule of law, "that a man shall never traverse that which the plaintiff has not alleged in his declaration." (j) There is, however, the following exception to this rule; viz, *that a traverse may be taken upon matter which, though not expressly alleged, is necessarily implied.* (k)

(i) *Cross v. Hunt*, Carth. 99.

(j) *Power v. Cook*, 1 Lord Ray. 63; 1 Salk. 298, S. C.

(k) 1 Saund. 312d, n. 4; *Gilbert v. Parker*, 2 Salk. 629; 6 Mod. 158, S. C.

Thus, in replevin for taking cattle, the defendant made cognizance (1) that A. was seized of the close in question, and by his command the defendant took the cattle damage feasant. The plaintiff pleaded in bar, that he himself was seized of one-third part, and put in his cattle, *absque hoc*, "that the said A. was seized, not that A. was *sole seized*." On demurrer, it was objected, that this traverse was taken on matter not alleged, the allegation being, that A. was *sole seized*. But the court held, that in the allegation of seizin, that of sole seizin was necessarily implied; and that whatever is necessarily implied is traversable as much as if it were expressed. Judgment for plaintiff. (2) The court, however, observed, that in this case the plaintiff was not *obliged* to traverse the sole seizin; and that the effect of merely traversing the *seizin modo et formâ*, as alleged, would have been the same on the trial as that of traversing the *sole seizin*.

#### § 444. Traversing the making of a deed.

Another rule relative to traverses (though of a more special and limited application than those hitherto considered), is the following: *that a party to a deed who traverses it, must plead non est factum, and should not plead that he did not grant, did not demise, etc.* This rule seems to depend on the doctrine of *estoppel*.

A man is sometimes precluded in law from alleging or denying a fact in consequence of his own previous act, allegation or denial to the contrary, and this preclusion is called an *estoppel*. (3)

(1) The action of *replevin* differs from other actions in the names of the pleadings. If the defendant pleads some matter confessing the taking, but showing lawful title or excuse, such pleading is not (as it would be in other actions) called a *plea in bar*, but an *avowry* or a *cognizance*; the former term applying to the case where the defendant sets up right or title in himself; the latter being used when he alleges the right or title to be in another person, by whose command he acted. Com. Dig., Pleader (3 K. 13, 14). The answer to the avowry or cognizance is called *plea in bar*; and then follow *replication*, *rejoinder*, etc., the ordinary name of each pleading being thus postponed by one step.

(2) *Gilbert v. Parker*, 2 Salk. 629; 6 Mod. 158, S. C.

(3) "An estoppel is when a man is concluded by his own act or acceptance to say the truth." Co. Litt. 352a.

It may arise either from matter of *record*, from the *deed* of the party, or from matter in *pais*, that is matter of *fact*. Thus, any confession or admission made in pleading in a court of record, whether it be express, or implied from pleading over, without a traverse, will preclude the party from afterwards contesting the same fact in the same suit. (*n*) This is an estoppel by matter of record. As an instance of an estoppel by *deed*, may be mentioned the case of a bond reciting a certain fact. The party executing that bond will be precluded from afterwards denying, in any action brought upon that instrument, the fact so recited. (*o*) An example of an estoppel by matter in *pais* occurs when one man has accepted rent of another. He will be estopped from afterwards denying, in any action with that person, that he was, at the time of such acceptance, his tenant. (*p*)

Now it is from this doctrine of estoppel, apparently, that the rule under consideration as to the mode of traversing deeds has resulted. For though a party, against whom a deed is alleged, may be allowed, consistently with the doctrine of estoppel, to say *non est factum*, viz, that the deed is not his, he is on the other hand precluded by that doctrine from denying its effect or operation; because, if allowed to say, *non concessit* or *non demisit*, when the instrument purports to grant, or to demise, he would be permitted to contradict his own deed. Accordingly, it will be found that in the case of a person not a party, but a *stranger* to the deed, the rule is reversed, and the form of traverse in that case is *non concessit*, (*pp*) etc.; the reason of which seems to be that estoppels do not hold with respect to strangers.

The doctrine of traverses being now discussed, the next subject for consideration is:

(*n*) Bract. 421a; Com. Dig., Estoppel (A. 1.)

(*o*) Bonner *v.* Wilkinson, 5 Barn. & Ald. 682. And see Baker *v.* Dewey, 1 Barn. & Cres. 704.

(*p*) Com. Dig., Estoppel (A. 3); Co. Litt. 352a.

(*pp*) Taylor *v.* Needham, 2 Taunt. 278. N. B. The court there lay it down that the plea of *non concessit*, etc., brings into issue the title of the grantor, as well as the operation of the deed. See also, Eden's Case, 6 Rep. 15; Hellyer's Case, 6 Rep. 25; Hynde's Case, 4 Rep. 71b; 43 Edw. 3, 1.

### § 445. Pleadings in confession and avoidance.

2. The nature and properties of pleadings in *confession* and *avoidance*.

First, with respect to their *division*. Of *pleas* in confession and avoidance, some are distinguished (in reference to their subject-matter) as pleas in *justification or excuse*, others as pleas in *discharge*.(q) The pleas of the former class show some justification or excuse of the matter charged in the declaration: those of the latter, some discharge or release of that matter. The effect of the former, therefore, is to show that the plaintiff never had any right of action, because the act charged was lawful; the effect of the latter, to show that though he had once a right of action, it is discharged or released by some matter subsequent. Of those in justification or excuse, the plea of son assault demesne is an example; of those in discharge, a release. This division applies to *pleas* only; for *replications and other subsequent pleadings*, in confession and avoidance, are not subject to any such classification.

As to the *form* of pleadings in confession and avoidance, it will be sufficient to observe, that, in common with all pleadings whatever, which do not tender issue, they always *conclude with a verification*, etc.

With respect to the *quality* of these pleadings it is to be observed, that it is of their essence (as the name itself imports) to *confess* the truth of the allegation which they propose to answer or avoid.

\* \* \* \* \*

The extent and nature of the admission required is defined by the following rule—that *pleadings in confession and avoidance should give color*.(u) *Color* is a term of the ancient rhetoricians, and was adopted at an early period into the language of pleading.(v) It signifies an *apparent* or *prima facie*

(q) Com. Dig., Pleader (3 M. 12).

(u) See Reg. Plac. 304; *Hatton v. Morse*, 3 Salk. 273; *Hallet v. Bryt*, 5 Mod. 252; *Holler v. Bush*, 1 Salk. 394; 1 Chitty 498.

(v) It occurs at least as early as the reign of Edward III. See Year Books, 38 Edw. III. 28; 40 Edw. III, 23.

right; and the meaning of the rule that pleadings in confession and avoidance should give color, is that they should confess the matter adversely alleged, to such an extent at least, as to admit some apparent right in the opposite party, which requires to be encountered and *avoided* by the allegation of the new matter. In the instances formerly given of the plea of release, and the replication of duress, in an action of covenant, the admission is absolute and unqualified—for the plea supposes that a deed of covenant had been executed, and that a breach of it had been committed; and the replication that a deed of release had been executed; so that there is at each step an apparent right admitted in the opposite party, which is avoided in the one case by the allegation of the release, and in the other by the allegation of duress. So where to an action of assumpsit, the defendant pleads in confession and avoidance that he did not promise within six years before the action brought, it is an absolute implied admission of the truth of the adverse allegation that he had at one time made such promise as alleged, and that there is therefore an apparent right in the plaintiff; and this right is avoided by relying on the lapse of time.

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#### § 446. Express color.

The kind of color to which these observations relate, being a latent quality, naturally inherent in the structure of all regular pleadings in confession and avoidance, has been called *implied* color, to distinguish it from another kind, which is in some instances formally inserted in the pleading, and is therefore, known by the name of *express* color.<sup>(w)</sup> It is the latter kind to which the technical term most usually is applied, and to this the books refer, when color is mentioned *per se*, without the distinction between express and implied. Color, in this sense, is defined to be “a feigned matter, pleaded by the defendant in an action of trespass, from which the plaintiff seems to have a good cause of action, whereas he has in truth only an appearance or color of cause.” [The doctrine of express color is simply a relic of the subtlety of ancient pleading, and is seldom, if ever,

(w) *Hatton v. Morse*, 3 Salk. 273; Reg. Plac. 304; Holt's Inst. 562.

used in practice. It is said that it may still be used in the actions of trespass and trespass on the case, but it is never necessary, and hence the author's discussion is omitted.]

\* \* \* \* \*

**§ 447. 3. The nature and properties of pleadings in general—without reference to their quality, as being by way of traverse, or confession and avoidance.**

First, it is a rule, *that every pleading must be an answer to the whole of what is adversely alleged.*(*x*)

Therefore, in an action of trespass for breaking a close, and cutting down 300 trees, if the defendant pleads as to cutting down all but 200 trees, some matter of justification or title, and as to the 200 trees says nothing, the plaintiff is entitled to sign judgment as by *nil dicit* against him in respect of the 200 trees, and to demur or reply to the plea as to the remainder of the trespasses. In such cases the plaintiff should take care to avail himself of his advantage in this (which is the only proper) course. For, if he demurs, or replies to the plea, without signing judgment for the part not answered, the whole action is said to be *discontinued.*(*y*) The principle of this is that the plaintiff, by not taking judgment as he was entitled to do for the part unanswered, does not follow up his entire demand; and there is consequently that sort of chasm or interruption in the proceedings, which is called in technical phrase a *discontinuance*. And such discontinuance will amount to error on the record.(*z*)<sup>7</sup>

(*x*) Com. Dig., Pleader (E. 1), (F. 4); 1 Saund. 28, n. 3; Herlaken-  
den's Case, 4 Reg. 62a.

(*y*) Com. Dig., Pleader (E. 1), (F. 4); 1 Saund. 28, n. 3; Herlaken-  
den's Case, 4 Rep. 62a.

(*z*) *Wats v. King Cro. Pac.* 353. Such error is cured, however,  
after verdict, by the statute of Jeofails, 32 H. 8, ch. 30; and after  
judgment by *nil dicit*, confession, or *non sum informatus*, by 4 Ann.,  
ch. 16.

7. This rule is technical, but was recognized in *Exchange Bank v Southall*, 12 Gratt. 314. It is doubtful, however, at this day when the courts are looking to the substance of things and not their form whether such a mere technicality should or will be enforced. It

It is to be observed, however, that as to the plaintiff's course of proceeding, there is a distinction between a case like this, where the defendant does not profess to answer the whole, and a case, where, by the commencement of his plea, he professes to do so, but, in fact, gives a defective and partial answer, applying to part only. The latter case amounts merely to insufficient pleading; and the plaintiff's course, therefore, is, not to sign judgment for the part defectively answered, but to *demur* to the whole plea.(a)<sup>8</sup> It is also to be observed, that where the part of the pleading, to which no answer is given, is immaterial, or such as requires no separate or specific answer, for example, if it be mere matter of *aggravation*, the rule does not in that case apply.(b)

Again, it is a rule, *that every pleading is taken to confess such*

(a) 1 Saund. 28, n. 3, *Thomas v. Heathorn*, 2 Barn. & C. 477.

(b) 1 Saund. 28, n. 3.

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is certainly not more serious than going to trial without any issue at all (*ante*, p. 356-7) and it not unfrequently happens that these partial defences are made at one term and the case continued to the next, and it would be a needless hardship on plaintiffs to dismiss their cases for the merest technicality which has done the defendant no harm. Indeed, it would simply encourage defendants to set a trap for unwary plaintiffs. In this connection, attention is called to § 3302 of the Code, which is as follows:

"If the defendant file a plea or account of set off, which covers or applies to part of the plaintiff's demand, judgment may be forthwith rendered for the part not controverted, and the costs accrued until the filing of the plea or account, and the case shall be proceeded with for the residue, as if the part for which judgment was rendered had not been included therein. And if, in addition to such plea or account, the defendant plead some other plea, going to the whole or residue of the demand, the case shall not be continued as to the part not controverted by the plea or account of set offs, unless good cause be shown for such continuance." This is merely declaratory of the common law except as to costs.

8. This rule has frequently been followed in Virginia. *Hunt v. Martin*, 8 Gratt. 578; *Merriman v. Cover*, 104 Va. 428, 51 S. E. 517. A plea which professes to go to the whole of the plaintiff's declaration containing two counts but at most only answers the cause of action set up in one count of the declaration is bad. *Staunton Tel. Co. v. Buchanan*, 108 Va. 810, 62 S. E. 928.

*traversable matters alleged on the other side as it does not traverse.*(c)<sup>9</sup> Thus, in the example of an action on an indenture of covenant, the plea of release, as it does not traverse the indenture, is taken to admit its execution; and the replication of duress, on the same principle, is an admission of the execution of the release. So the plea traversing the want of repair is an admission of the indenture of demise. The effect of such admission is extremely strong; for it concludes the party, even though the jury should improperly go out of the issue, and find the contrary of what is thus confessed on the record.(d) The rule, however, it will be observed, extends only to such matters as are *traversable*. For matters of *law* or any other matters, which are not fit subjects of traverse, are not taken to be admitted by pleading over.(f) It is to be remarked too, that the confession operates only to prevent the fact from being afterwards brought into question in the *same suit*, and that it is not conclusive as to the truth of the fact in any *subsequent action* between the same parties.(g)<sup>10</sup>

#### § 448. Exceptions to the rule.

Such are the doctrines involved in the general rule, *that the*

(c) Com. Dig., Pleader (G. 2); Bac. Ab., Pleas, etc., pp. 322, 386 (5th Ed.); Hudson *v.* Jones, 1 Salk. 91; Nicholson *v.* Simpson, 11 Mod. 336; Fort. 356.

(d) Bac. Ab., Pleas, etc., p. 322 (5th Ed.); Wilcox *v.* Servant of Skipwith, 2 Mod. 5.

(f) 10 Ed. 4, 12; The King *v.* The Bishop of Chester, 2 Salk. 561.

(g) It would formerly conclude in a subsequent action also (if between the same parties), unless the pleader made use of a particular formula, called a *protestation*. But by the late rule of court, Hil. 4, W. 4, "no protestation shall hereafter be made in any pleadings, but either party shall be entitled to the same advantage in that or other action, as if a protestation had been made."

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9. This rule does not apply in equity. Matters not denied by the answer are not taken as admitted in equity, but must be proved by the plaintiff. Clinch River Min. Co. *v.* Harrison, 91 Va. 122, 21 S. E. 660.

10. By § 3266 of the Code of Virginia it is declared that "no party shall be prejudiced by omitting a protestation in any pleading."

party must either demur, or plead by way of traverse, or by way of confession and avoidance. It remains, however, to notice:

Certain *exceptions* to which that branch of the rule is subject, which relates to *pleading*; and which requires a party to plead either by way of *traverse*, or by way of *confession and avoidance*.

(1) First, there is an exception in the case of *dilatory pleas*;<sup>11</sup> for a plea of this kind merely opposes a matter of form to the declaration, and does not tend either to deny or to confess its allegations. But *replications* and *subsequent pleadings*, following on dilatory pleas, are not within this exception.

(2) Again, the rule is not applicable to the case of *pleadings in estoppel*.

These are pleadings which, without confessing or denying the matter of fact, adversely alleged, rely merely on some matter of estoppel as a ground for excluding the opposite party from the allegation of the fact. Like pleadings in abatement, they have formal *commencement and conclusion*, to mark their special character and quality, and to distinguish them from pleadings in bar. Of this the following is an example:

#### REPLICATION.

And the said plaintiff saith, that the said defendant *ought not to be admitted or received* to plead the plea by him above pleaded, because he saith, etc. (And then after stating the previous act, allegation, or denial of the opposite party, upon which the estoppel is alleged to arise, the pleading concludes thus:) Wherefore he prays judgment, if the said defendant *ought to be admitted or received to his said plea*, contrary to his own acknowledgment and the said record, etc. (*or as the case may be*).<sup>(h)</sup>

(3) Another exception to that branch of the general rule, which requires the pleader either to traverse, or to confess and avoid, arises in the case of what is called a *new assignment*.

It has been seen that the declarations are conceived in very general terms; a quality which they derive from their adherence to the tenor of those simple and abstract formulæ—the original writs—by which all suits were in ancient times commenced.

(h) 2 Chitty, 416, 590.

11. As to dilatory pleas and the time of filing the same, see *ante*, § 183.

The effect of this is that, in some cases, the defendant is not sufficiently guided by the declaration to the real cause of complaint; and is, therefore, led to apply his plea to a different matter from that which the plaintiff has in view. A new assignment is a method of pleading to which the plaintiff in such cases is obliged to resort in his replication, for the purpose of setting the defendant right. An example shall be given in an action for assault and battery. A case may occur in which the plaintiff has been *twice assaulted* by the defendant; and one of these assaults may have been justifiable, being committed in self-defense, while the other may have been committed without legal excuse. Supposing the plaintiff to bring his action for the *latter*, it will be found by referring to the example formerly given of a declaration for an assault and battery, that the statement is so general, as not to indicate to which of the two assaults the plaintiff means to refer.<sup>(i)</sup> The defendant may, therefore, suppose, or affect to suppose, that the *first* is the assault intended, and will plead *son assault demesne*. This plea the plaintiff cannot safely *traverse*; because, as an assault was in fact committed by the defendant, under the circumstances of excuse here alleged, the defendant would have a right under the issue joined upon such traverse, to prove those circumstances, and to presume that such assault, and no other, is the cause of action. And it is evidently *reasonable* that he should have this right; for, if the plaintiff were, at the trial of the issue, to be allowed to set up a different assault, the defendant might suffer by mistake into which he had been led by the generality of the plaintiff's declaration. The plaintiff, therefore, in the case supposed, not being able safely to traverse, and having no ground either for demurrer, or for pleading in confession and avoidance, has no course, but by a new pleading to correct the mistake occasioned by the generality of the declaration, and to declare that he brought his action, not for the *first*, but for the *second*

(i) As for the *day* and *place*, alleged in the declaration, it will be shown hereafter that they are not considered as material to be proved in such a case, and are consequently alleged without much regard to the true state of fact.

assault; and this is called a *new assignment*. Its form, in the example chosen, would be as follows:

REPLICATION.

*To the Plea of Son Assault Demesne.*

By Way of New Assignment.

And the said plaintiff says, that he brought this action, not for the trespasses in the said second plea acknowledged to have been done, but for that the said defendant heretofore, to wit, on the \_\_\_\_\_ day of \_\_\_\_\_, in the year of our Lord \_\_\_\_\_, with force and arms, upon another and different occasion, and for another and different purpose than in the second plea mentioned, made another and different assault upon the said plaintiff than the assault in the said second plea mentioned, and then and there beat, wounded, and illtreated him in manner and form as the said plaintiff hath above thereof complained; which said trespasses above newly assigned are other and different trespasses than the said trespass in the said second plea acknowledged to have been done. And this the said plaintiff is ready to verify. [Wherefore, inasmuch as the said defendant hath not answered the said trespass above newly assigned, he, the said plaintiff prays judgment, and his damages by him sustained by reason of the committing thereof, to be adjudged to him, etc.]

The mistake being thus set right by the new assignment, it remains for the defendant to plead such matter as he may have in answer to the assault last mentioned, the first being now out of question.

\* \* \* \* \*

As the object of a new assignment is to correct a mistake occasioned by the generality of the *declaration*, it always occurs in answer to a *plea*, and is, therefore, in the nature of a *replication*. It is not used in any other part of the pleading, because the statements subsequent to the declaration are not in their nature such, when properly framed, as to give rise to the kind of mistake which requires to be corrected by a new assignment.

A new assignment chiefly occurs in an action of *trespass*, but it seems to be generally allowed in all actions in which the form of declaration makes the reason of the practice equally applicable. (*j*)

(*j*) 1 Chitty, 602; Vin. Ab., Novel Assignment, 4, 5; 3 Went. 151; Batt v. Bradley, Cro. Jac. 141.

*Several* new assignments may occur in the course of the same series of pleading. Thus, in the above example, if it be supposed that *three* different assaults had been committed, two of which were justifiable, the defendant might plead as above to the declaration, and then, by way of plea to the new assignment, he might again justify in the same manner another assault; upon which it would become necessary for the plaintiff to new assign a third, and this upon the same principle by which the first new assignment was required. (*k*)

A new assignment is said to be *in the nature of a new declaration*. (*l*) It seems however to be more properly considered as a repetition of the declaration (*ll*) differing only in this, that it distinguishes the true ground of complaint, as being different from that which is covered by the plea. Being in the nature of a new or repeated declaration, it is consequently to be framed with as much *certainty*, or specification of circumstances, as the declaration itself. (*m*) In some cases, indeed, it should be even *more* particular, so as to avoid the necessity of *another* new assignment.

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The rule under consideration and its exceptions being now discussed, the last point of remark relates to an inference or deduction to which it gives rise. It is implied in this rule, that as the proceeding must either be by demurrer, traverse, or confession and avoidance, so *any* of these forms of opposition to the last pleading is in itself *sufficient*.

There is, however, an exception to this, in a case which the books consider to be anomalous and solitary. It is as follows: If in debt on a bond conditioned for the performance of an award, the defendant pleads that no award was made, and the plaintiff in reply alleges, that an award was made, setting it forth, it is held that he must also proceed to state a *breach* of the award; and that without stating such breach, the replication is insuffi-

(*k*) 1 Chitty, 614; 1 Saund. 299c.

(*l*) Bac. Ab. Trespass (I), 4, 2; 1 Saund. 299c.

(*ll*) *Vide* 1 Chitt. 602.

(*m*) Bac. Ab., *ubi supra*; 1 Chitty, 610.

cient.(n) This, as has been observed, is an anomaly, for, as by alleging and setting forth the award, he fully *traverses* the plea which denied the existence of an award, the replication would seem, according to the general rule under consideration, to be sufficient without the specification of any breach. And in accordance with that rule, it is expressly laid down that in all other cases, "if the defendant pleads a special matter that admits and excuses a non-performance, the plaintiff need only answer and falsify the special matter alleged; for he that excuses a non-performance supposes it, and the plaintiff need not show that which the defendant hath supposed and admitted."

## RULE II.

### § 449. Upon a traverse issue must be tendered.

In the account given in another place of traverses, it was shown, that [except in the case of a special traverse] the different forms all involve a *tender of issue*. The rule under consideration prescribes this as a necessary, incident to them, and establishes it as a general principle, that wherever a traverse takes place, or, in other words, wherever a denial or contradiction of fact occurs in pleading, issue ought at the same time to be tendered on the fact denied. The reason is that as, by the contradiction, it sufficiently appears what is the issue or matter in dispute between the parties, it is time that the pleading should now close, and that the method of deciding this issue should be adjusted.

The formulæ of tendering the issue *in fact* vary of course according to the mode of trial proposed.

The tender of an issue to be tried by *jury* is by a formula called the *conclusion to the country*. This conclusion is in the following words when the issue is tendered by the *defendant*: "And of this the said defendant puts himself upon the country." When it is tendered by the *plaintiff*, the formula is as follows: "And this the said plaintiff prays may be inquired of by the

(n) 1 Saund. 103; Meredith *v.* Alleyn, 1 Salk. 138; Carth. 116, S. C. Though this is considered as a solitary case (*vide* 1 Salk. 138), it may be observed that another analogous one is to be found. Gayle *v.* Betts, 1 Mod. 227.

country.”(o) It is held, however, that there is no material difference between these two modes of expression, and that if *ponit se* be submitted for *petit quod inquiratur*, or *vice versa*, the mistake is unimportant.(p) Of the tender of issue thus concluding to the country, several examples have already been given in this work, and to these it will now be sufficient to refer.

The form of tendering an issue to be tried by *record* is this:

PLEA.

*Of Judgment Recovered.*

In Assumpsit.

And the said defendant, by ——— his attorney, says that the said plaintiff heretofore, to wit, in ——— term, in the ——— year of the reign of our lord the now king, in the court of our said lord the king, before the king himself, the same court then and still being holden in Westminster, in the county of Middlesex, impleaded the said defendant in a certain plea of trespass on the case on promises, to the damage of the said plaintiff of ——— pounds, for the not performing the same identical promises and undertakings in the said declarations mentioned. And such proceedings were thereupon had in the same court in that plea, that afterwards, to wit, in that same term, the said plaintiff by the consideration and judgment of the said court recovered in the said plea against the said defendant ——— pounds for the damages which he had sustained, as well by reason of the not performing of the same promises and undertakings in the said declaration mentioned, as for the costs and charges by him about his suit in that behalf expended, whereof the said defendant was convicted, as by the record and proceedings thereof, remaining in the said court of our said lord the king, before the king himself, at Westminster aforesaid, more fully appears, which said judgment still remains in full force and effect, not in the least reversed, satisfied or made void. And this the said defendant is ready to verify by the said record. [Wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action against him.]

REPLICATION.

And the said plaintiff says, that there is not any record of the said supposed recovery remaining in the said court of our said

(o) Heath's Maxims, 68; *Weltale v. Glover*, 10 Mod. 166; Bract. 57; Ry. Plac. Parl. 146.

(p) *Weltale v. Glover*, 10 Mod. 166.

lord the king, before the king himself, in manner and form as the said defendant hath above in his said plea alleged. And this he, the said plaintiff, is ready to verify, when, where and in such manner as the court here shall order, direct or appoint.(q)

\*            \*            \*            \*            \*

With respect to the *extraordinary* methods of trial, their occurrence is too rare to have given rise to any illustration of the rule in question.<sup>12</sup> It refers chiefly to traverses of such matters of fact as are triable by the *country*; and, therefore, we find it propounded in the books most frequently in the following form: *that, upon a negative and affirmative, the pleading shall conclude to the country; but otherwise with a verification.*(r) [Thus where the declaration averred the giving of a good and sufficient deed for certain lands, according to the tenor of the agreement between the parties, and the plea negatived the fact almost *totidem verbis* and concluded with a verification, the plea was held bad, because it should have concluded to the country.]

To the rule, in whatever form expressed, there is the following exception: *that when new matter is introduced, the pleading should always conclude with a verification.*(s)<sup>13</sup>

A traverse may sometimes involve the allegation of new matter; and in such instances the conclusion must be with a verification, and not to the country. An illustration of this is afforded

(q) 2 Chitty, 438, 602.

(r) Com. Dig., Pleader (E. 32); 1 Saund. 103, n. 1.

(s) 1 Saund. 103, n. 1, and the authorities there cited; Cornwallis v. Savery, 2 Burr. 772; Vent. 121; Vere v. Smith, 2 Lev. 5; Sayre v. Minns, Cowp. 575.

12. The author doubtless refers to *wager of battel* in which the person accused fought with his accuser under the apprehension that Heaven would give the victory to him who was in the right; and to *wager of law* by which a defendant in an action of debt gave a gage or sureties that he would *make his law*, that is he would make an oath in open court that he did not owe the debt and would at the same time bring eleven of his neighbors (called compurgators) who would swear that they believed that he told the truth. This was regarded as equivalent to the verdict of a jury who, formerly were the witnesses. If the defendant did this he was relieved from payment of the debt.

13. Va. F. & M. Ins. Co. v. Saunders, 84 Va. 210, 4 S. E. 584.

by a case of very ordinary occurrence, viz, where the action is in debt on a bond conditioned for performance of covenants. If the defendant pleads generally, performance of the covenants, and the plaintiff in his replication relies on a breach of them, he must show specially in what that breach consists, for to reply generally that the defendant did not perform them, would be too vague and uncertain. His replication, therefore, setting forth, as it necessarily does, the circumstances of the breach, discloses new matter; and consequently, though it is a direct denial or traverse of the plea, it must not tender issue, but must conclude with a verification. So in another common case, in an action of debt on bond conditioned to indemnify the plaintiff against the consequences of a certain act, if the defendant pleads *non damnificatus*, and the plaintiff replies alleging a damnification, he must, on the principle just explained, set forth the circumstances, and the new matter thus introduced will make a verification necessary. To these it may be useful to add another example. The plaintiff declared in debt, on a bond conditioned for the performance of certain covenants by the defendant, in his capacity of clerk to the plaintiff; one of which covenants was to account for all the money that he should receive. The defendant pleaded performance. The plaintiff replied that on such a day such a sum came to his hands, which he had not accounted for. The defendant rejoined that he *did* account and in the following manner: That thieves broke into the counting-house and stole the money, and that he acquainted the plaintiff of the fact; and he concluded with a verification. The court held that though there was an express affirmative that he did account, in contradiction to the statement in the replication that he did not account, yet that the conclusion with a verification was right; for the *new matter* being alleged in the rejoinder, the plaintiff ought to have liberty to come in with a surrejoinder, and answer it by traversing the robbery.(t)

The application, however, to particular cases, of this exception, as to the introduction of *new matter*, is occasionally nice and doubtful; and it becomes difficult sometimes to say whether there is any such introduction of new matter as to make the

(t) *Vete v. Smith*, 2 Lev. 5; Vent. 121.

tender of issue improper. Thus, in debt on a bond conditioned to render a full account to the plaintiff, of all such sums of money and goods as were belonging to W. N. at the time of his death, the defendant pleaded that no goods or sums of money came to his hands. The plaintiff replied that a silver bowl, which belonged to the said W. N. at the time of his death, came to the hands of the defendant, viz, on such a day and year: "and that he is ready to verify," etc. On demurrer, it was contended that the replication ought to have concluded to the country, there being a complete negative and affirmative; but the court thought it well concluded, as new matter was introduced. However, the learned judge who reports the case thinks it clear that the replication was *bad*; and Mr. Serjeant Williams expresses the same opinion, holding that there was *no* introduction of new matter, such as to render a verification proper.<sup>(u)</sup>

To the same exception formerly belonged the case of special traverses, which always concluded, until the rule of Hil. T. 4 Wil. 4, with a verification. But by that rule it is provided (as stated in a former part of this work) that they should henceforth conclude to the country.

### RULE III.

#### § 450. Issue, when well tendered, must be accepted.<sup>(v)</sup>

If issue be well tendered both in point of substance and in point of form, nothing remains for the opposite party, but to accept or join in it; and he can neither demur, traverse, nor plead in confession and avoidance.

The acceptance of the issue, in case of a conclusion to the country, i. e., of trial by *jury*, may (as explained in the first chapter) either be added in making up the issue, or may be delivered before that transcript is made up. It is in both cases called the *similiter*; and in the latter case a *special similiter*. The form of a special *similiter* is thus: "And the said plaintiff,

<sup>(u)</sup> Hayman *v.* Gerrard, 1 Saund. 102. But see Cornwallis *v.* Savery, 2 Burr. 772. See, also, Sayre *v.* Minns, Cowp. 575.

<sup>(v)</sup> Bac. Ab., Pleas, etc., p. 363 (5th Ed.); Digby *v.* Fitzharbert, Hob. 104, "In all pleadings wherever a traverse was first properly taken, the issue closed." Gib. C. P. 66.

(or "defendant") as to the plea" (or "replication"), etc., "of the said defendant" (or "plaintiff"), "whereof he hath put himself upon the country" (or "whereof he hath prayed it may be inquired by the country"), "doth the like." The similiter, when added in making up the issue or paper-book, is simply this: "And the said plaintiff" (or "defendant") "doth the like."

As the party has no option in accepting the issue, when well tendered, and as the similiter may in that case be added for him, the acceptance of the issue when well tendered may be considered as a mere matter of *form*. It is a form, however, which should be invariably observed; and its omission has sometimes formed a ground of successful objection, even after verdict. (w)

The rule expresses that the issue must be accepted only when it is *well* tendered. For if the opposite party thinks the *traverse* bad in substance or in form, or objects to the *mode of trial* proposed, in either case he is not obliged to add the similiter, but may *demur*; and if it has been added for him, may strike it out and demur.

The similiter, therefore, serves to mark the acceptance both of the question itself and the mode of trial proposed. It seems originally, however, to have been introduced in a view to the *latter* point only. The resort to a jury, in ancient times, could in general be had only by the mutual *consent* of each party. It appears to have been with the object of expressing such consent, that the similiter was, in those times, added, in drawing up the record, and from the record it afterwards found its way into the written pleadings. Accordingly, no similiter, or other acceptance of issue is necessary, when recourse is had to any of the *other modes* of trial; and the rule in question does not extend to these. Thus, when issue is tendered to be tried by the *record*, the plaintiff is entitled to consider the issue as complete upon such tender; (x) and no acceptance of it on the other side is essential.

The rule in question extends to an issue in *law* as well as an issue in *fact*; for by analogy (as it would seem) to the similiter,

(w) Griffith v. Crockford, 3 Brod. & Bing. 1. But see 2 Saund. 319, n. 6, and Tidd, 956 (8th Ed.).

(x) Tipping v. Johnson, 3 Bos. & Pul. 302.

the party whose pleading is opposed by a demurrer is required formally to accept the issue in law which it tenders, by the formula called a *joinder in demurrer*; of which an example was given in the first chapter. However, it differs in this respect from the similitur that whether the issue in law be well or ill-tendered, that is, whether the demurrer be in proper form or not, the opposite party is equally bound to join in demurrer. For it is a rule, *that there can be no demurrer upon a demurrer*; (y) because the first is sufficient, notwithstanding any inaccuracy in its form, to bring the record before the court for their adjudication; and as for *traverse* or *pleading in confession and avoidance*, there is of course no ground for them, while the last pleading still remains unanswered, and there is nothing to oppose but an exception in point of law.

(y) Bac. Ab., Pleas, etc. (n.), 2.

## CHAPTER L.

### RULES WHICH TEND TO SECURE THE MATERIALITY OF THE ISSUE.

#### RULE I.

§ 451. *All pleadings must contain matter pertinent and material.*

In a view to the materiality of the issue, it is of course necessary that at each step of the series of pleadings by which it is to be produced, there should be some pertinent and material allegation or denial of fact. On this subject, therefore, a general rule may be propounded in the following form:

#### RULE I.

§ 451. **All pleadings must contain matter pertinent and material.**

Thus, if to an action of assumpsit against an administratrix, laying promises by the intestate, she pleads that she, the *defendant* (instead of the intestate) did not promise, the plea is obviously immaterial and bad.

\* \* \* \* \*

#### SUBORDINATE RULES.

With respect to *traverses* in particular, this general doctrine is illustrated in the books by subordinate rules of a more special kind. Thus it is laid down:

1. *That traverse must not be taken on an immaterial point.*(a)

This rule prohibits first the taking of a traverse on a point wholly immaterial. Thus, where to an action of trespass for assault and battery the defendant pleaded that a judgment was recovered, and execution issued thereupon against a third person, and that the plaintiff, to rescue that person's goods from the execution, assaulted the bailiffs; and that in aid of the bailiffs, *and by their command*, the defendant *molliter manus imposuit*

(a) Com. Dig., Pleader (R. 8), (G. 10); Bac. Ab., Pleas, etc. (H.), 5.

upon the plaintiff, to prevent his rescue of the goods, it was holden that a traverse of the *command of the bailiffs* was bad. For even without their command, the defendant might lawfully interfere to prevent a rescue, which is a breach of the peace.<sup>1</sup>

So, by this rule a traverse is not good when taken on matter, the allegation of which was premature, though in itself not immaterial to the case. Thus, if in debt on bond, the plaintiff should declare that at the time of sealing and delivery, the defendant was of full age, the defendant should not traverse this, because it was not necessary to allege it in the declaration; though if in fact he was a minor, this would be a good subject for a plea of infancy to which the plaintiff might then well reply the same matter, viz, that he was of age.

Again, this rule prohibits the taking of a traverse of matter of *aggravation*; that is, matter which only tends to increase the amount of damages, and does not concern the right of action itself. Thus, in trespass for chasing sheep, *per quod* the sheep died, the dying of the sheep being aggravation only, is not traversable. So it is laid down that in general, traverse is not to be taken on matter of *inducement*, that is, matter brought forward only by way of explanatory introduction to the main allegations;<sup>2</sup> but this is open to many exceptions, for it often happens that introductory matter is in itself essential, and of the substance of the case, and in such instances, though in the nature of inducement, it may nevertheless be traversed.

While it is thus the rule that traverse must not be taken on an immaterial point, it is on the other hand to be observed, *that where there are several material allegations, it is in the option of the pleader to traverse which he pleases.*(b) Thus, in trespass, if the defendant pleads that A. was seised and demised to him, the plaintiff may traverse either the seisin or the demise.(c)

(b) Com. Dig., Pleader (G. 10); Read's Case, 6 Rep. 24; Doct. Pl. 365; Bac. Ab., Pleas, etc. (H.), 5, p. 392 (5th Ed.); Baker v. Blackman, Cro. Jac. 682; Young v. Rudd, Carth. 347; Young v. Ruddle, Salk. 627.

(c) Com. Dig., Pleader (G. 10); Moore v. Pudsey, Hardr. 317.

1. Bowman v. Bowman, 153 Ind. 498, 55 N. E. 422.

2. Garland v. Davis, 4 How. 131.

Again, in trespass, if the defendant pleads that A. was seised, and enfeoffed B., who enfeoffed C., who enfeoffed D., whose estate the defendant hath; in this case the plaintiff may traverse which of the feoffments he pleases. (*d*)

The principle of this rule is sufficiently clear, for it is evident that where the case of any party is built upon several allegations, each of which is essential to its support, it is as effectually destroyed by the demolition of any one of these parts, as of another.

It is also laid down,

2. *That a traverse must not be too large, nor on the other hand too narrow.* (*e*)

As a traverse must not be taken on an immaterial allegation, so when applied to an allegation that is material, it ought in general to take in no more and no less of that allegation than is material. If it involves *more*, the traverse is said to be *too large*; if less, *too narrow*.

A traverse may be too large by involving in the issue, quantity, time, place, or other circumstances, which, though forming part of the allegation traversed are immaterial to the merits of the cause. Thus, in an action of debt on bond conditioned for the payment of £1550, the defendant pleaded that part of the sum mentioned in the condition, to wit, £1500, was won by gaming, contrary to the statute in such case made and provided; and that the bond was consequently void. The plaintiff replied that the bond was given for a just debt, and traversed that the £1500 was won by gaming, in manner and form as alleged. On demurrer it was objected that the replication was ill, because it made the precise sum parcel of the issue, and tended to oblige the defendant to prove that the whole sum of £1500 was won by gaming; whereas the statute avoids the bond, if *any part* of the consideration be on that account. The court was of opinion that there was no color to maintain the replication; for that the material part of the plea was, that *part* of the money, for which the bond was given, was won by gaming; and that the words, "to wit, £1500," were only form, of which the replication ought not to have taken any no-

(*d*) Doct. Pl. 365.

(*e*) 1 Saund. 268, n. 1, 269, n. 2; Com. Dig. Pleader (G. 15), (G. 16).

tice.(f) So where the condition of a bond was that the obligor should serve the obligee half a year, and in an action of debt on the bond, the defendant pleaded that he had served him half a year at D., in the county of K., and the plaintiff replied that he had not served him half a year *at D. in the county of K.*; this was adjudged to be a bad traverse, as involving the *place*, which was immaterial.

\*            \*            \*            \*            \*

[So where the plaintiff sued the defendant for cutting down his mill dam, and the defendant pleaded that the plaintiff's dam was erected without authority of law, and obstructed a public road and ford, and that the defendant in order to abate the nuisance peaceably cut down and removed a part of said dam, the replication of the plaintiff that the mill dam did not *entirely obstruct* the public road and ford, and that citizens were not altogether prevented from using the same, was *held* to be too large a traverse as it tended to raise an immaterial issue upon the extent of the obstruction when any obstruction at all was illegal and justified the defendant's conduct.<sup>3</sup>

In an action of debt against three or more defendants, if the breach alleged is that the defendants have not, nor hath either of them, paid the debt in the declaration mentioned, the breach is too small, as two of them together may have paid it. If the breach is that the defendants have not, nor hath any, nor hath either of them, *nor hath any other person* paid the debt in the declaration mentioned, the breach is too large, in that it includes persons not liable for the debt, though at the present day this would probably be treated as surplusage.]

Again: a traverse may be too large, by being taken in the *conjunctive*, instead of the *disjunctive*, where it is not material that the allegation traversed should be proved conjunctively. Thus, in an action of assumpsit, the plaintiff declared on a policy of insurance, and averred, "that the ship insured did not arrive in safety; but that the said ship, tackle, apparel, ordnance, munition, artillery, boat, and other furniture, were sunk and destroyed

(f) *Colborne v. Stockdale*, Str. 493; 8 Mod. 58, S. C.

3. *Dimmett v. Eskridge*, 6 Munf. 308.

in the said voyage." The defendant pleaded with a traverse, "Without this, that the said ship, her tackle, apparel, ordnance, munition, artillery, boat, and other furniture, were sunk and destroyed in the voyage, in manner and form as alleged." Upon demurrer, this traverse was adjudged to be bad; and it was held that the defendant ought to have denied disjunctively that the ship, *or* tackle, etc., was sunk or destroyed; because in this action for damages the plaintiff would be entitled to recover compensation for any part of that which was the subject of insurance, and had been lost: whereas (it was said,) if issue had been taken in the conjunctive form, in which the plea was pleaded, "and the defendant should prove, that only a cable or anchor arrived in safety, he would be acquitted of the whole."(*g*)

On the other hand, however, *a party may, in general, traverse a material allegation of title or estate, to the extent to which it is alleged, though it need not have been alleged to that extent; and such traverse will not be considered as too large.*(*h*) For example: in an action of replevin, the defendant avowed the taking of the cattle, as damage feasant in the place in which, etc.; the same being the freehold of Sir F. L. To this the plaintiff pleaded, that he was seized in his demesne, as of fee, of B. close, adjoining to the place in which, etc.; that Sir F. L. was bound to repair the fence between B. close and the place in which, etc.; and that the cattle escaped, through a defect of that fence. The defendant traversed, that the plaintiff *was seized in his demesne, as of fee, of B. close; and on demurrer, the court was of opinion that it was a good traverse; for though a less estate than a seizin in fee would have been sufficient to sustain the plaintiff's case, yet as the plaintiff, who should best know what estate he had, had pleaded a seizin in fee, his adversary was entitled to traverse the title so laid.*

\* \* \* \* \*

(*g*) *Goram v. Sweeting*, 2 Saund. 206.

(*h*) Com. Dig., Pleader (G. 16); *Sir Francis Leke's Case*, Dy. 365; 2 Saund. 207a, n. 24; *Wood v. Buddin*, Hob. 119; *Tatem v. Perient*, Yelv. 195; *Carvick v. Blgrave*, 1 Brod. & Bing. 531; 1 Chitty, 586. 2 Str. 818, is apparently *contra*; but from the report of the same case, Ld. Ray. 1550, it may be reconciled with the other authorities.

## CHAPTER LI.

### RULES WHICH TEND TO PRODUCE SINGLENES OR UNITY IN THE ISSUE.

#### RULE I.

§ 452. *Pleadings must not be double.*

§ 453. Several demands.

§ 454. Several defendants.

§ 455. Illustrations.

§ 456. Several counts.

§ 457. Several pleas.

§ 458. Several replications.

#### RULE II.

§ 459. *It is not allowable both to plead and to demur to the same matter.*

\* \* \* \* \*

#### RULE I.

**§ 452. Pleadings must not be double.**(a)<sup>1</sup>

This rule applies both to the declaration and subsequent pleadings. Its meaning with respect to the former is that the declaration must not, in support of a single demand, allege several distinct matters, by any one of which that demand is sufficiently supported. With respect to the subsequent pleadings, the meaning is that none of them is to contain several distinct answers to that which preceded it; and the reason of the rule in each case is that such pleading tends to several issues in respect of a single claim.(b)

The rule, it may be observed, in its terms points to *doubleness* only; as if it prohibited only the use of *two* allegations, or answers, of this description; but its meaning, of course, equally

(a) Com. Dig., Pleader (c. 33), (E. 2), (F. 16); Bac. Ab., Pleas, etc. (K.); *Humphreys v. Bethily*, 2 Vent. 198, 222; Doct. Pl. 135.

(b) *La cause est pur ceo, que deux issues purroient estr pris sur les plees*. Per Fincheden, 40 Ed. 3, 45. See also, 15 Ed. 4, 1.

1. See *ante*, § 199.

extends to the case of more than two, the term *doubleness*, or *duplicity*, being applied (though with some inaccuracy) to either case.

\* \* \* \* \*

[The following are examples of duplicity in a *declaration*: The plaintiff in the same count of his declaration charged negligence on the part of defendant in the employment of its servants, and also negligence on the part of the servants themselves, thus stating two separate and distinct causes of action in a single count.<sup>2</sup> In an action of trespass the plaintiff claimed damages in the same count for trespassing on certain land in his possession, and for assaulting and beating his person, "on or about" a specified date. It was held that the count was bad for duplicity, that it failed to show that the two trespasses were the same transaction.<sup>3</sup>

The plaintiff declared in slander in a single count upon three sets of words spoken at different times on the same day to the same persons concerning the plaintiff's intemperance, his insolvency, and his failure to prevent boys under his control from stealing apples. The count was held bad for duplicity. So also it has been held that a count averring both simple negligence and wanton and wilful wrong is bad for duplicity.<sup>4</sup>

The following is an example of duplicity in a *plea in abatement*: A plea in abatement of the writ set forth (a) That one H., a co-defendant of the G company, was not a citizen of the city of L, and hence, that the writ against the G company could not be sent out of the city for service, and (b) that the persons on whom service was made were not agents of the G company. It was held that the plea was bad for duplicity, as it stated two distinct and separate defences, either of which if true would necessitate a finding in favor of the defendant tendering the plea.<sup>5</sup>

The following is an example of duplicity in a *plea in bar*: In an action of debt on a bond the defendant set up two distinct

2. Southern R. Co. v. Simmons, 105 Va. 651, 55 S. E. 459.

3. Henry v. Carleton, 113 Ala. 636, 21 South. 225.

4. Anniston Electric Co. v. Rosen, 159 Ala. 195, 48 South. 798.

5. Guarantee Co. v. First Nat. Bank, 95 Va. 480, 28 S. E. 909.

grounds of defence in a single plea, (a) breach of warranty, and, (b) partial failure of consideration. The plea was held bad for duplicity.<sup>6</sup>

Duplicity occurs only where two or more causes of action are set up in a single count of a declaration, or two or more defences are set up in a single plea. It is easily avoided by setting out the different causes of action in separate counts of the declaration, or setting up the different defences by separate pleas. Duplicity is a matter of form only, and could be taken advantage of, even at common law, only by special demurrer. In Virginia special demurrers have been abolished except as to pleas in abatement, and it has been doubted whether the objection of duplicity to a plea in bar can be raised at all. It has been distinctly held that duplicity is not a ground of objection to a declaration.<sup>7</sup> It has been pointed out, however, that the objection on account of duplicity to a plea, or other subsequent pleading, may be made by a motion to exclude when offered, or to strike out after it has been received.<sup>8</sup>]

### § 453. Several demands.

The object of this rule being to enforce a single issue, upon a *single subject of claim*, admitting of several issues, where the claims are *distinct*, the rule is accordingly carried no further than this in its application. The *declaration* therefore may, in support of *several demands*, allege as many distinct matters as are respectively applicable to each.

\*                     \*                     \*                     \*                     \*

### § 454. Several defendants.

Again, if there be *several defendants*, the rule against duplicity is not carried so far as to compel each of them to make the same answer to the declaration. Each defendant is at liberty to use such plea as he may think proper for his own defence, and they

6. *Cunningham v. Smith*, 10 Gratt. 255.

7. *Southern Ry. Co. v. Simmons*, 105 Va. 651, 55 S. E. 459.

8. *Ante*, § 199; *C. & O. v. Rison*, 99 Va. 18, 37 S. E. 420, 6 Va. Law Reg. 655, and note.

may either join in the same plea or sever, at their discretion. (c) But if the defendants have once united in the plea, they cannot afterwards sever at the rejoinder, or other later stage of the pleading.

Where in respect of several subjects or several defendants a severance has thus taken place in the pleading, this may of course lead to a corresponding severance in the whole subsequent series; and (as the ultimate effect) to the production of *several issues*. And where there are several issues, they may respectively be decided in favor of different parties, and the judgment will follow the same division.

Such being in general the nature of duplicity, the following rules or points of remark will tend to its further illustration.

### § 455. Illustrations.

1. *A pleading will be double that contains several answers, whatever be the class or quality of the answer.* Thus, it will be double by containing several matters in abatement, or several matters in bar; (d) or by containing one matter in abatement and another in bar. (e) So a pleading will be double by containing several matters in confession and avoidance, or several answers by way of traverse; or by combining a traverse with a matter in confession and avoidance. (f)

2. *Matter may suffice to make a pleading double though it be ill-pleaded.* Thus in trespass for assault and battery, the defendant pleaded that he committed the trespasses in the moderate correction of the plaintiff as his servant; and further pleaded, that since that time the plaintiff had discharged and released to him the said trespasses, without alleging, as he ought to have done, a release *under seal*. The court held that this plea was double, the

(c) Co. Litt. 303a. It is said, however, *Essington v. Boucher*, Hob. 245, that they cannot sever in *dilatory* pleas. Sed qu.? See *Cuppel-dick v. Terwhit*, Hob. 250.

(d) Com. Dig., Pleader (E. 2); and see the cases already cited on the subject of duplicity.

(e) *Semb.* Com. Dig., Pleader (E. 2); *Bleeke v. Grove*, 1 Sid. 176.

(f) Com. Dig., Pleader (E. 2); Bac. Ab., Pleas, etc. (K.); and see the cases already cited.

moderate correction and the release being each a matter of defence; and though the release was insufficiently pleaded, yet as it was a matter, that a material issue might have been taken upon, it sufficed to make the plea double.(g)

[In an action against the Comptroller of Public Accounts of Florida and his sureties on his official bond for a breach of the condition of the bond, the defendants pleaded the performance of all his duties as comptroller, and also the tender in warrants on the treasurer of the Territory of Florida. It was held that this plea was double, notwithstanding the fact that the defence of tender was not well pleaded, in as much as the treasury notes mentioned were not legal tenders. In other words, that the tender was material and rendered the plea double, although ill-pleaded.]<sup>9</sup>

On the other hand, it seems that:

3. *Matters immaterial cannot operate to make a pleading double.*(h) Thus, in an action by the executors of J. G. on a bond conditioned that the defendant should warrant to J. G. a certain meadow, the defendant pleaded that the said meadow was copyhold of a certain manor, and that there is a custom within the manor that if the customary tenants fail in payment of their rents and services, or commit waste, then the lord for the time being may enter for forfeiture; and that the said J. G., during his life peaceably enjoyed the meadow; which descended after his death to one B. his son and heir; who, of his own wrong, entered without the admission of the lord, against the custom of the manor; and because three shillings of rent were in arrear on such a day, the lord entered into the meadow as into lands forfeited. On demurrer it was objected, among other things, that the plea was double, because in showing the forfeiture to have occurred by the heir's own wrongful act two several matters are alleged: First, that

(g) Bac. Ab., Pleas, etc. (K.), 2; Bleeke v. Grove, Sid. 175.

(h) Bac. Ab., Pleas, etc. (K.), 2; 1 Hen. 7, 16; Countess of Northumberland's Case, 5 Rep. 98a; Executors of Grenelefe, Dyer, 42b.; Doct. Pl. 138.

9. Bemis v. State, 3 Florida 16.

he entered without admission, against the custom; secondly, that three shillings of rent were in arrear. But the judges held, that the only sufficient cause of forfeiture was the non-payment of rent; that there being no custom alleged for forfeiture in respect of entry without admission, the averment of such entry was mere surplusage, and could not therefore avail to make the plea double.(i) It is, however, to be observed, that the plea seems to *rely* on the non-payment of the rent as the only ground of forfeiture; for it alleges, that "because three shillings of the rent were in arrear the lord entered," and the court noticed this circumstance. The case, therefore, does not explicitly decide that where two several matters are not only pleaded, but *relied upon*, the immateriality of one of them shall prevent duplicity; but the manner in which the judges express themselves seems to show that the doctrine goes to that extent; and there are other authorities the same way.(j)

This doctrine that a plea may be rendered double by matter *ill-pleaded*, but not by *immaterial* matter, quite accords with the *object* of the rule against duplicity, as formerly explained. That object is the avoidance of several issues. Now whether a matter be well or ill-pleaded, yet if it be sufficient in substance, so that the opposite party may go to issue upon it, if he chooses to plead over, without taking the formal objection, such matter tends to the production of a separate issue; and is on that ground held to make the pleading double. On the other hand, if the matter be immaterial, no issue can properly be taken upon it: it does not tend, therefore, to a separate issue, nor, consequently, fall within the rule against duplicity.

4. *No matter will operate to make a pleading double, that is pleaded only as necessary inducement to another allegation.* Thus, it may be pleaded without duplicity that after the cause of action accrued, the plaintiff (a woman) took husband, and that the husband afterwards released the defendant; for though the coverture is itself a defence, as well as the release, yet the averment of the coverture is a necessary introduction to that of the

(i) Executors of Grenelefe, Dyer, 42, b.

(j) Bac. Ab., Pleas, etc. (K.), 2.

release. (k) This exception to the general rule is prescribed by an evident principle of justice; for the party has a right to rely on any single matter that he pleases in preference to another, as in this instance, on the release in preference to the coverture; but if a necessary inducement to the matter on which he relies, when itself amounting a defence, were held to make his pleading double, the effect would be to exclude him from this right, and compel him to rely on the inducement only.

5. *No matters, however multifarious, will operate to make a pleading double, that together constitute but one connected proposition or entire point.*

\*            \*            \*            \*            \*

[Thus in an action of debt to recover the price of fertilizer, the defendant filed a special plea by way of set-off in which he averred (1) that the plaintiff warranted the fertilizer to be as good a fertilizer and as well adapted to potatoes as any other on the market at a like price, and (2) that the fertilizer was as good a potato special as any other on the market. It was objected that the plea was bad for duplicity, but it was held that the matters alleged constituted but one entire and indivisible contract of warranty, and that it would have been bad pleading to split up the causes of action. The above rule of the text was cited.<sup>10</sup> Again, a plea to the jurisdiction negating every ground of jurisdiction given by the statute was objected to as bad for duplicity; it was held that not only was the plea not bad, but the averments were essential in order to make the plea good.<sup>11</sup> In an action on an insurance policy the defendant pleaded a breach of warranty of the value of the property insured. The plaintiff replied that she estimated the cost, that the company's agent then and there inspected the property, was as well informed as to its value as she was, concurred in her estimate and inserted it in her application. The defendant objected to this replication as being bad for duplicity,

(k) Bac. Ab., Pleas, etc. (K.), 2; Com. Dig., Pleader (E. 2). See also, *Rowles v. Rusty*, 4 Bing. 428.

10. *Reese v. Bates*, 94 Va. 221, 26 S. E. 865.

11. *Deatrick v. Insurance Co.*, 107 Va. 602, 59 S. E. 489.

but it was held that the matters stated, though multifarious, constituted but one connected proposition or entire point, and hence did not operate to make the pleading double.]<sup>12</sup>

6. "*The general issue as construed has become in truth a double plea.* In some cases the *general issues* appear to partake of the nature of these cumulative traverses. For some of them are so framed as to convey a denial, not of any particular fact, but generally of the whole matter alleged—as *not guilty*, in trespass or trespass on the case, and *nil debet*, in debt. And in *assumpsit* the case is the same in effect, according to a relaxation of practice formerly explained, by which the defendant is permitted, under the general issue, in that action, to avail himself (with some few exceptions) of any matter tending to disprove his liability. The consequence is that under these general issues the defendant has the advantage of disputing, and therefore of putting the plaintiff to the proof of, every averment in the declaration. Thus, by pleading *not guilty* in trespass *quare clausum fregit*, he is enabled to deny at the trial both that the land was the plaintiff's and that he committed upon it the trespass in question, and the plaintiff must establish both these points in evidence. Indeed, besides this advantage of double *denial*, the defendant obtains, under the general issue in *assumpsit* and other actions of trespass on the case, the advantage of double *pleading in confession and avoidance*. For as, upon the principles formerly explained, he is allowed in these actions to bring forward, upon the general issue, almost any matters (though in the nature of confession and avoidance) which tend to disprove his debt or liability, so he is not limited (as he would be in special pleading) to a reliance on any single matter of this description, but may set up any number of these defences. While such is the effect of many of the general issues in mitigating or evading the rule against duplicity, the remark does not apply to all. Thus the general issue of *non est factum* raises only a single question, namely, whether the defendant executed a valid and genuine deed such as is alleged in the declaration. The defendant may, under this plea, insist that the deed was not executed by him, or that it was executed under circum-

12. *Virginia Fire & Marine Ins. Co. v. Saunders*, 86 Va. 969, 11 S. E. 794.

stances which annul its effect as a deed, but can set up no other kind of defence."<sup>13</sup>

### § 456. Several counts.

The rule against duplicity in pleading being now explained, it is necessary in the next place to advert to certain *modes of practice*, by which the effect of that rule is materially qualified. These are the use of *several counts* and the allowance of *several pleas*; the former being grounded on ancient practice, the latter on the stat. 4 Anne, c. 16.

First shall be considered the subject of *several counts*.

Where a plaintiff has several distinct causes of action, he is allowed to pursue them cumulatively in the same suit, subject to certain rules which the law prescribes as to joining such demands only as are of similar quality or character. (1) Thus, he may join a claim of debt on bond with a claim of debt on simple contract, and pursue his remedy for both by the same action of debt. So if several distinct trespasses have been committed, these may all form the subject of one declaration in trespass, but, on the other hand, a plaintiff cannot join in the same suit a claim of debt on bond, and a complaint of trespass; these being dissimilar in kind. Such different claims or complaints, when capable of being joined, constitute different parts or sections of the declarations; and are known in pleading by the description of *several counts*.

[*Joinder of Actions*.—The general rule is that demands against the same party may be joined when they are all of the same nature and the same judgment has to be given in each, notwithstanding the pleas may be different. Each demand, however, must be set out in a separate count in the declaration. Thus, several demands in the nature of debt may be joined, although some of the evidences of debt are under seal and others not. Several actions of tort may be joined in the same action of trespass, but tort and contract cannot be united, nor can several *species* of action be united in one declaration, although they may all be *ex contractu* or *ex delicto*; thus, at common law trespass could not be united

(1) Upon this subject, see Bac. Ab., Actions (c).

13. Andrews Stephen's Pleading (2nd Ed.), § 183.

with case, but in Virginia it is declared by statute that wherever trespass would like case may be brought.<sup>14</sup> Common law and statutory slander may be united in the same declaration but cannot be blended in the same count, and if it is intended to sue under the statute, as for insult, it must in some way be made to appear in the declaration that the plaintiff is proceeding under the statute.<sup>15</sup> It may also be observed that where the causes of action might have been united in a single action, but the plaintiff has brought several actions, he may be compelled to consolidate them, and to pay the *extra* costs.

As the same judgment must be given in all, it is manifest that demands against a party personally cannot be united with demands against him in a fiduciary capacity, as the judgment in one case would be a personal judgment, and in the other, to be paid out of the estate of the decedent in the hands of the defendant to be administered. While it is provided by § 2855 of the Virginia Code that the personal representative of a deceased partner, or other joint obligor, may be sued in the same manner as such representative might have been charged, if those bound jointly, or as partners had been bound severally as well as jointly, otherwise than as partners, they cannot be sued together in separate counts in the same declaration in an ordinary action at law, but separate actions must be brought against each. This, however, is not true if, instead of a common law action, the proceeding be by motion, for it is also provided by statute that a person entitled to obtain judgment for money on motion, may, as to any, or the personal representatives of any person liable for such money, move severally against each, or jointly against all, or jointly against any intermediate number \* \* \* provided that judgment against such personal representatives shall in all cases be several.]<sup>16</sup>

In order to give the unlearned reader an exact idea of the nature of several counts, it may be useful to lay before him an example.

If the plaintiff has to complain of several assaults, he may thus frame his declaration:

14. Code, § 2901.

15. *Hogan v. Wilmoth*, 16 Gratt. 80.

16. Code, § 3212.

## DECLARATION IN TRESPASS.

*For an Assault and Battery.*

In the King's Bench.

The —— day of ——, in the year of our  
Lord ——.

—— to wit, A. B. (the plaintiff in this suit,) by E. F., his attorney, complains of C. D. (defendant in this suit,) who has been summoned to answer the said plaintiff in an action of trespass: *For that* the said defendant heretofore, to wit, on the —— day of ——, in the year of our Lord, ——, with force and arms, made an assault upon the said plaintiff, and beat, wounded, and ill-treated him, so that his life was despaired of. *And also for that* the said defendant heretofore to wit, on the day and year aforesaid, with force and arms, at —— aforesaid, in the county aforesaid, made another assault upon the said plaintiff, and again beat, wounded, and ill-treated him, so that his life was despaired of, and other wrongs to him then and there did, against the peace of our said lord the king, and to the damage of the said plaintiff of —— pounds; and therefore he brings his suit, etc.

When several counts are thus used the defendant may, according to the nature of the defence, demur to the whole, or plead a single plea applying to the whole; or may demur to one count, and plead to another, or plead a several plea to each count; and in the two latter cases the result may be a corresponding severance in the subsequent pleadings, and the production of *several issues*. But whether one or more issues be produced, if the decision, whether in law or fact, be in the plaintiff's favor as to any one or more counts, he is entitled to judgment *pro tanto*, though he fail as to the remainder.

It is to be observed that several causes of action do not always form the subject of several counts, but are sometimes thrown, for the sake of brevity and convenience, into one; and in the actions of debt and assumpsit the claims of most frequent occurrence, viz, those for *goods sold*, for *work done*, for *money lent*, for *money paid*, for *money received to the use of the plaintiff*, for *money due on an account stated*, are always condensed (when they occur in the same action) into a single count, pursuant to a form lately promulgated by rule of court.

§ 457. **Several Pleas.**<sup>17</sup>

The next subject for consideration is that of *several pleas*.

It has been already stated, that the rule against duplicity does not prevent a defendant from giving distinct answers to different complaints on the part of the plaintiff. To several counts, or to distinct parts of the same count, he may therefore plead several pleas, viz, one to each. Thus, in an action of trespass for two assaults and batteries, he may plead as to the first count not guilty, and as to the second the statute of limitations, viz, that he was not guilty within four years; and the following is an example of the form in which this may be done:

## PLEAS.

*In Trespass for Assault and Battery.*

And the said defendant, by — his attorney, as to the *first count* of the said declaration says, that he is not guilty of the said trespass therein mentioned, or any part thereof, in manner and form as the said A. B. hath above thereof complained. And of this the said C. D. puts himself upon the country. And as to the *second count* of the said declaration, the said defendant says, that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says that he the said defendant was not, at any time within four years next before the commencement of this suit, guilty of the said trespasses in the second count mentioned, or any part thereof, in manner and form as the said plaintiff hath above complained. And this the said defendant is ready to verify. Whereupon he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him.

Nor is the defendant in pleading different pleas to different parts of the declaration, confined to pleas of the *same kind*. Thus it is laid down, that he may plead in abatement to part and in bar to the residue.

But it may also happen that a defendant may have several distinct answers to give to the *same* claim or complaint. Thus to an action of trespass for two assaults and batteries, he may have ground to deny both the trespass, and also to allege that they

17. For the present state of the law in Virginia, see *ante*, § 198.

were neither of them committed within four years. Anterior, however, to the regulation which will be presently mentioned, it was not competent for him to plead these several answers to both trespasses, as that would have been an infringement of the rule against duplicity. The defendant was therefore obliged to elect between his different defences, where more than one thus happened to present themselves, and to rely on that, which in point of law or fact he might deem most impregnable. But as a mistake in that selection might occasion the loss of the cause, contrary to the real merits of the case, this restriction against the use of several pleas to the same matter, after being for ages observed in its original severity, was at length considered as contrary to the true principles of justice, and was accordingly relaxed by legislative enactment. The stat. 4 Anne, c. 16, s. 4, provides, that "it shall be lawful for any defendant or tenant in any action or suit, or for any plaintiff in replevin in any court of record, with leave of the court to plead as many several matters thereto as he shall think necessary for his defence." Under this act the course is for the defendant, if he wishes to plead several matters to the same subject of demand or complaint, to apply previously for a rule of court permitting him to do so, and upon this, a rule is accordingly drawn up for that purpose. The form of pleading several pleas, where leave is thus granted, will appear by the following example :

PLEAS.

*In Trespass for Assault and Battery.*

And the said defendant, by — his attorney, says, that he is not guilty of the said trespasses above laid to his charge, or any part thereof, in manner and form as the said plaintiff hath above thereof complained. And of this the said defendant puts himself upon the country. *And for a further plea* in this behalf, the said defendant says, that he, the said defendant, was not at any time within four years next before the commencement of this suit, guilty of the said trespasses in the said declaration mentioned, or any part thereof, in manner and form as the said plaintiff hath above complained. And this the said defendant is ready to verify.

When several pleas are pleaded either to different matters, or by virtue of the statute of Anne to the same matter, as in the

last example, the plaintiff may, according to the nature of his case, either demur to the whole, or demur to one plea and reply to the other, or make a several replication to each plea; and in the two latter cases the result may be a corresponding severance in the subsequent pleadings, and the production of *several issues*. But whether one or more issues be produced, if the decision, whether in law or fact, be in the defendant's favor as to any one or more pleas, he is entitled to judgment, though he fail as to the remainder—i. e., he is entitled to judgment in respect of that subject of demand or complaint to which the successful plea relates; and if it were pleaded to the whole declaration, to judgment generally, though the plaintiff should succeed as to all the other pleas.

The use of *several pleas* (though presumably intended by the statute to be allowed only in a case where there are really several grounds of defence),<sup>(m)</sup> is in practice sometimes carried further. For it was soon found that when there was a matter of defence by way of special plea, it was generally expedient to plead that matter in company with the general issue, whether there were any real ground for denying the declaration or not; because the effect of this is to put the plaintiff to the proof of his declaration, or some material part of it, before it can become necessary for the defendant to establish his special plea; and thus the defendant has the chance of succeeding, not on the strength of his own case, but by the failure of the plaintiff's proof. To this extent, therefore, is the use of several pleas now carried; and accordingly the form of pleading in the last of the above examples is in practice frequently adopted instead of that in the first, whether the truth of the case really warrants a denial of both counts or not. Some efforts, however, were at one time made to restrain this apparent abuse of the indulgence given by the statute. For that *leave of the court*, which the statute requires, was formerly often refused where the proposed subjects of plea appeared to be *inconsistent*; and on this ground leave has been refused to plead to the same trespass *not guilty*, and *accord and satisfaction*; or *non est factum* and *payment* to the same de-

(m) See Lord Clinton *v.* Morton, 2 Str. 1000.

mand.(n) But in modern practice, such pleas, notwithstanding the apparent repugnancy between them, are permitted;(o) and the only pleas, perhaps, which have been uniformly disallowed on the mere ground of inconsistency, are those of the general issue and a *tender*.

### § 458. Several replications.<sup>18</sup>

On the subject of several pleas it is to be further observed that the statute of Anne extends to the case of pleas *only*, and not to *replications or subsequent pleadings*. These remain subject to the full operation of the common law against duplicity; so that, though to each plea there may (as already stated) be a separate replication, yet there cannot be offered to the same plea, and in reference to the same matter of claim or complaint, more than a single replication, nor to the same replication more than one rejoinder, and so to the end of the series. The legislative provision allowing several matters of *plea* was confined to that case, under the impression, probably, that it was in that part of the pleading that the hardship of the rule against duplicity was most seriously and frequently felt; and that the multiplicity of issues which would be occasioned by a further extension of the enactment would have been attended with expense and inconvenience more than equivalent to the advantage. The effect, however, of this state of law is somewhat remarkable; for example, it empowers a defendant to plead to a declaration in assumpsit for goods sold and delivered, 1. *Non assumpsit*; 2. That the cause of action did not accrue within six years; 3. That he was an infant at the time of the contract. On the first plea the plaintiff has only to join issue; but with respect to each of the two last, he may have several answers to give. The case may be such as to afford either of these replications to the statute of limitations, viz, that the cause of action *did* accrue within six years, or that at the time the cause of action accrued, he was *beyond* sea, and

(n) Com. Dig., Pleader (E. 2).

(o) *Vide* 1 Sel. Practice, 299; 2 Chitty, 502; Rama Chitty v. Hume, 13 East, 255.

18. See ante, § 198.

that he commenced his suit within six years after his return. So to the plea of infancy, he may have ground for replying either that the defendant was *not* an infant, or that the goods for which the action is brought were *necessaries* suitable to the defendant's condition in life. Yet though the defendant had the advantage of his three pleas cumulatively, the plaintiff is obliged to make his election between these several answers, and can reply but one of them to each plea.

It is also to be observed that the power of pleading several matters extends to pleas in *bar* only, and not to those of the *dilatory* class, with respect to which, the leave of the court will not be granted. (*p*)

Again, it is to be remarked, that the statute does not operate as a total abrogation, even with respect to pleas in *bar*, of the rule against duplicity. For in the first place it is necessary (as we have seen) to obtain *the leave of the court* to make use of several matters of defence. And each defence must besides be distinctly pleaded as a *new* or *further* plea; so that notwithstanding the statute, and the leave of the court obtained in pursuance of it to plead several matters it would still be improper to incorporate several matters in *one plea*, in any case in which the plea would be thereby rendered double at common law.

By a very ancient relaxation of practice the rule against duplicity had, to a considerable extent, been evaded, by stating the same cause of action in various ways in the shape of several counts, and the same matter of defence in various ways in the shape of several pleas. But by the recent rule of Hil. T. 4 Will. 4, it is now provided that "several counts shall not be allowed unless a distinct subject-matter of complaint is intended to be established in respect of each, nor shall several pleas or avowries, or cognizances be allowed, unless a distinct ground of answer or defence is intended to be established in respect of each.

Such is the nature and extent of the rule against double pleading. Under this rule it remains only to observe that if, instead of demurring for duplicity, the opposite party passes the fault by, and pleads over, he is in that case bound to answer each matter

(*p*) See 1 Sel. Pract. 275.

alleged; and has no right, on the ground of the duplicity, to confine himself to any single part of the adverse statement. (*q*)

## RULE II.

### § 459. It is not allowable both to plead and to demur to the same matter. (*r*)

This rule depends on exactly the same principles as the last. As it is not allowable to *plead* double, lest several issues in fact in respect of the same matter should arise, so it is not permitted both to *plead and demur* to the same matter, lest an issue in fact and an issue in law, in respect of a single subject, should be produced. The party must, therefore, make his election.

The rule, however, it will be observed, only prohibits the pleading and demurring to *the same matter*. It does not forbid this course as applicable to *distinct statements*. Thus a man may plead to one count, or one plea, and demur to another. The reason of this distinction is sufficiently explained by the remarks already made on the subject of duplicity in pleading.

Lastly, it is to be remarked that the statute of Anne, which authorizes the pleading of *several pleas*, gives no authority for *demurring and pleading* to the same matter. The rule now in question, therefore, is not affected by that provision; but remains in the same state as at common law.<sup>19</sup>

[In Virginia it is provided by statute that the defendant in any action may plead as many several matters, whether of law or fact, as he may think necessary, and he may file pleas in bar at the same time with pleas in abatement, or within a reasonable

(*q*) *Botton v. Cannon*, 1 Vent. 272.

(*r*) *Bac. Ab., Pleas, etc. (K.), 1.*

19. In Virginia, while a defendant may both demur and plead to the same count in a declaration, the rule extends no further than the defendant's first pleading, and subsequent to this stage the pleader cannot demur and also answer in fact, but must make his election. *Ches. & O. R. Co. v. Bank*, 92 Va. 495, 23 S. E. 935, 1 Va. Law Reg. 825 and *note*. In West Va. the privilege of making more than one answer of law and fact is extended one stage farther, that is, to the replication. *W. Va. Code, § 3840; ante, § 198.*

time thereafter, but the issues on the pleas in abatement shall be first tried.<sup>20</sup> A similar statute prevails in West Virginia, except that if the defendant pleads *non est factum* he cannot, without the leave of the court, plead any other pleas inconsistent therewith.<sup>21</sup> In comparing the Virginia Statute with the Statute of Anne, Prof. Graves says, "It will be seen that this statute differs from the Statute of Anne in three particulars: In Virginia (1) No leave of the court is required (see this expressly declared by § 3270); (2) it extends to pleas in abatement as well as to pleas in bar, and several dilatory pleas may be pleaded at the same time, and dilatory and peremptory pleas together (4 Minor's Inst. 764); and (3) it permits the defendant to both demur and plead, for he may plead as many several matters, whether of law (demurrer) or fact (plea) as he shall think necessary."<sup>22</sup> Both the English statute and the Virginia statute, however, use the word "plead" in its technical sense, and hence the right to set up more than one matter does not extend to the plaintiff's replication, nor to any subsequent pleadings. While the defendant may plead as many matters of law and fact as he pleases, he must plead them in several pleas and not more than one in a single plea, unless the matter so pleaded constitutes but a single defence, otherwise the plea will be double.]<sup>23</sup>

20. Code, § 3264.

21. W. Va. Code, 1906, § 3840; *ante*, § 198.

22. Graves' Pleading (old), page 104.

23. See further on the subject of duplicity, *ante*, § 199.

## CHAPTER LII.

### RULES WHICH TEND TO PRODUCE CERTAINTY OR PARTICULARITY IN THE ISSUE.

#### RULE I.

§ 460. *The pleadings must have certainty of place.*

#### RULE II.

§ 461. *The pleadings must have certainty of time.*

#### RULE III.

§ 462. *The pleadings must specify quality, quantity, and value.*

§ 463. General statements of quantity and quality.

§ 464. Actions to which rule inapplicable.

§ 465. Allegation and proof.

#### RULE IV.

§ 466. *The pleadings must specify the names of persons.*

§ 467. Misnomer.

#### RULE V.

§ 468. *The pleadings must show title.*

§ 469. Derivation of title.

§ 470. Particular estates.

§ 471. Additional rules on derivation of title.

§ 472. Plea of *liberum tenementum*.

§ 473. Title of possession.

§ 474. When title of possession is applicable.

§ 475. When title of possession is sufficient.

§ 476. Alleging title in adversary.

§ 477. Title must be strictly proved.

§ 478. Estoppel to deny title.

#### RULE VI.

§ 479. *The pleadings must show authority.*

#### RULE VII.

§ 480. *In general whatever is alleged in pleading must be alleged with certainty.*

#### SUBORDINATE RULES.

§ 481. It is not necessary in pleading to state that which is merely matter of evidence.

§ 482. It is not necessary to state matter of which the court takes notice *ex officio*.

- § 483. It is not necessary to state matter which would come more properly from the other side.
- § 484. It is not necessary to allege circumstances necessarily implied.
- § 485. It is not necessary to allege what the law will presume.
- § 486. A general mode of pleading is allowed where great prolixity is thereby avoided.
- § 487. A general mode of pleading is often sufficient, where the allegation on the other side must reduce the matter to certainty.
- § 488. No greater particularity is required than the nature of the thing pleaded will conveniently admit.
- § 489. Less particularity is required when the facts lie more in the knowledge of the opposite party than of the party pleading.
- § 490. Less particularity is necessary in the statement of matter of inducement or aggravation, than in the main allegations.
- § 491. With respect to acts valid at common law, but regulated as to the mode of performance by statute, it is sufficient to use such certainty of allegation as was sufficient before the statute.

\* \* \* \* \*

#### RULE I.

### § 460. The pleading must have certainty of place. (a)

It was formerly explained that the nature of the trial by jury, while conducted in the form which first belonged to that institution, was such as to render particularity of *place* absolutely essential in all issues which a jury was to decide. Consisting, as the jurors formerly did, of witnesses, or persons in some measure cognizant of their own knowledge of the matter in dispute, they were of course in general, to be summoned from the particular place or neighborhood where the fact happened; (b) and in order

(a) Com. Dig., Pleader (C. 20); Ibid., Abatement (tt. 13); Co. Litt. 125a.

(b) Co. Litt. by Harg. 125a, n. 1. "The venire was to bring up the *paes* of the place where the fact was laid in order to try the issue; and originally every fact was laid in the place where it was really done; and therefore the written contracts bore date at a certain place." Gilb. Hist. C. P. 84.

to know into what county the *venire facias* for summoning them should issue, and to enable the sheriff to execute that writ, it was necessary that the issue, and therefore the pleadings out of which it arose, should show particularly what that place or neighborhood was. (c) Such place or neighborhood was called *the venue* or *visne* (from *vicinetum*); (d) and the statement of it in the pleadings obtained the same name; to allege the place being in the language of pleading, to *lay the venue*.

Until the change of system introduced by the late Rule of Court, Hil. 4 Will. 4, it was accordingly the rule that every allegation in the pleadings, upon which issue could be taken, that is, every material and traversable allegation (supposing it to be in the affirmative form) should be *laid* with a *venue*; that is, should state the place at which the alleged fact happened. This venue was to consist (according to the more rigorous and ancient practice at least) not only of the county, but also of the parish, town, or hamlet in the county. A venue was also laid in the *margin* of the declaration, at its commencement, by inserting there the name of the county in which the several facts mentioned in the body of the declaration, or some principal part of them, occurred. The venue so laid down in the margin was called the *venue in the action*, and the action was said to be *laid*, or brought *within that county*; because it was always the same county as that into which the original writ had issued at the commencement of the suit, and because the action was always tried by a jury of that county, unless a new and different venue happened to be laid in the subsequent pleadings.

Though the original object of thus laying a venue was to determine the place from which the *venire facias* should direct the jurors to be summoned, in case the parties should put themselves upon the country, that practice had nevertheless, so far as regarded the laying of a venue of the *body* of the pleadings, become an unmeaning form, the venue in the *margin* having been long found sufficient for all practical purposes. It may be convenient to explain here by what process this change took place.

(c) *Ilderton v. Ilderton*, 2 H. Bl. 161. Per Lord. Mansfield, *Mos-  
tyn v. Fabrigas*, Cowp. 176; Co. Litt. 125a, b. See 2 Hen. 7, 4.

(d) Bac. Ab., *Visne or Venue* (A.); 3 Bl. Com. 294.

The most ancient practice, as established at the period when juries were composed of persons cognizant of their own knowledge of the fact in dispute, was of course to summon the jury from that venue which had been laid to the particular fact *in issue*; and from the venue of *parish, town, or hamlet*, as well as county. (e) Thus, in an action of debt on bond, if the declaration alleged the contract to have been made at Westminster, in the county of Middlesex, and the defendant in his plea denied the bond, issue being joined on this plea, it would be tried by a jury from Westminster. Again, if he pleaded an affirmative matter, as, for example, a release, he would lay this new traversable allegation with a venue; and if this venue happened to differ from that in the declaration, being laid, for example, at Oxford, in the county of Oxford, and issue were taken on the plea, such issue would be tried by a jury from Oxford, and not from Westminster. (f) And it may be here incidentally observed, that as the place or neighborhood in which the fact arose and also the allegation of that place in the pleadings, was called the *venue*, so the same term was often applied to the jury summoned from thence. Thus it would be said in the case last supposed, that *the venue was to come from Oxford*. With respect to the *form* of the venire at this period, it was as follows: *venire facias duodecim liberos et legales homines, de vicineto de W.* (or O.) (i. e. the parish, town, or hamlet) *per quos rei veritas melius sciri poterit*, etc.

While such appears to have been the most ancient state of practice, it soon sustained very considerable changes. When the jury began to be summoned no longer as witnesses, but as judges, and instead of being cognizant of the fact on their own knowledge, received the fact from the testimony of others judicially examined before them, the reason for summoning them from the immediate neighborhood ceased to apply, and it was considered as sufficient if, by way of partial conformity with the original principle, a *certain number of the jury* came from the same

(e) Co. Litt. 125a; Bac. Ab., Visne or Venue (E). Illustrative Case, 43 Ed. III, I.

(f) Craft v. Boite, 1 Saund. 246b; Com. Dig., Action (N. 12); 45 Ed. III, 15; 3 Reeves, 110.

*hundred* in which the place laid for venue was situate, though their companions should be of the county only, and neither of the venue, nor even of the hundred. This change in the manner of executing the venire did not, however, occasion any alteration in its *form*, which still directed the sheriff, as in former times, to summon the whole jury from the particular venue. (*g*) The number of hundredors which it was necessary to summon, was different at different periods: in later times, no more than *two* hundredors were required in a personal action. (*h*)

In this state of the law, was passed the statute 16 and 17 Car. 2, c. 8. By this act (which is one of the statutes of jeofails) it is provided, "that after verdict, judgment shall not be stayed or reversed, for that there is no right to venue,—so as the cause were tried by a jury of the proper county or place *where the action is laid*." This provision was held to apply to the case (among others) where issue had been taken on a fact laid with a different venue from that *in the action*, but where the venire had improperly directed a jury to be summoned from the *venue in the action*, instead of the venue *laid to the fact in issue*. (*i*) This had formerly been matter of *error*, and therefore ground for arresting or reversing the judgment; (*j*) but by this act (passed with a view of removing what had become a merely formal objection) the error was cured, and the staying or reversal of the judgment disallowed. While such was its direct operation, it has had a further effect, not contemplated perhaps by those who devised the enactment. For what the statute only purported to cure as an error, it virtually established as regular and uniform practice; and issues taken on facts laid with a different venue from that *in the action* were afterwards constantly tried, not by a jury of the venue laid to the *fact in issue*, but by a jury of the *venue in action*. (*k*)

Another change was introduced by the statute 4 Ann. c. 16, § 6. This act provides that "every *venire facias* for the trial of any issue shall be awarded of the *body* of the proper county where

(*g*) 27 Eliz., ch. 6, § 1; Litt. 234.

(*h*) 27 Eliz., ch. 6, § 5.

(*i*) *Craft v. Boite*, 1 Saund. 247.

(*j*) 1 Saund. 247, n. 1; 2 Saund. 5, n. 3; *Bowyer's Case*, Cro. Eliz. 468; *Eden's Case*, 6 Rep. 15b; Co. Litt. by Harg. 125a, n. 1.

(*k*) 2 Saund. 5, n. 3.

such issue is triable," instead of being (as in the ancient form) awarded from the particular venue of parish, town, or hamlet. From this time, therefore, the form of the venire has been changed; and directs the sheriff to summon twelve good and lawful men, etc., "from the body of his county:" and they are accordingly, in fact, all summoned from the body of the county only, and no part of them necessarily from the hundred in which the particular place laid for venue is situate.

It thus appears, that by the joint effect of these two statutes, the venire, instead of directing the jury to be summoned from that venue which had been laid to the fact *in issue*, and from the venue of *parish, town, or hamlet*, as well as county, directed them in all cases to be summoned from the *body of the county in which the action is laid*, whether that be the county laid to the fact in issue or not, and without regard to the parish, town, or hamlet.

In this altered state of things it is evident that there was no longer any real utility in the practice of laying a venue to each traversable fact in the body of the pleadings. This practice however continued to be observed until the making of the *Regula Generalis* of Hil. T. 4 W. 4, above mentioned. But by that rule it is provided, that in "future the name of a county shall in all cases be stated in the margin of a declaration, and shall be taken to be the venue intended by the plaintiff, and no venue shall be stated in the body of the declaration or in any subsequent pleading."

On the whole, then, the rule of pleading as to the necessity of laying venue is now reduced to this, that the venue in the action, that is, the county in which the action is intended to be tried, and from the body of which the jurors are accordingly to be summoned, must be stated in the margin of the declaration; and that in the few cases in which the proceeding is still by original writ, this must be the same county into which the original writ is issued.

There is, however, another very important point still remaining to be considered, viz, how far it is necessary to lay the venue *truly*.

Before the change in the constitution of juries above mentioned, the venue was of course always to be laid in the true place where the fact arose, for so the reason of the law of venue evi-

dently required. But when, in consequence of that change, this reason ceased to operate, the law began to distinguish between cases in which the truth of the venue was material, or of the substance of the issue, and cases in which it was not so. A difference began now to be recognized between *local* and *transitory* matters. The former consisted of such facts as carried with them the idea of some certain place, comprising all matters relating to the *realty*, and hardly any others; the latter consisted of such facts as might be supposed to have happened any where, and therefore comprised debts, contracts, and generally all matters relating to the person or personal property. With respect to the former it was held, that if any local fact were laid in pleading at a certain place, and issue was taken on that fact, the place formed part of the substance of the issue, and must therefore be proved as laid, or the party would fail as for want of proof. But as to transitory facts the rule was, that they might be laid as having happened at one place, and might be proved on the trial to have occurred at another. (l)<sup>1</sup>

The late rule of Hil. T. 4 Will. 4, having abolished the allegation of venue, except as it regards the county in the margin of the declaration (or venue in the action), the present state of the law with respect to the necessity of laying the true venue, is accordingly as follows:

Actions are either *local* or *transitory*.<sup>2</sup> An action is local if all the principal facts on which it is founded be local; and transitory, if any principal fact be of the transitory kind. In a local action, the plaintiff must lay the venue in the action truly. In the transitory one, he may lay it in any county that he pleases.

From this state of the law it follows, first, that if an action be local, and the facts arose *out of the realm*, such action cannot be maintained in the English courts; (m) for as the venue in the action is to be laid truly, there is no county which, consistently

(l) Vin. Ab., Trial (m. f.); Co. Litt. 282a.

(m) Per Buller, J., *Doulson v. Matthews*, 4 T. R. 503.

1. Va. Code, § 3243.

2. The subjects of venue in Virginia, and of local and transitory actions, are treated *ante*, §§ 67, 186.

with that rule, can be laid in the margin of the declaration. But, on the other hand, if the action be transitory, then, though all the facts arose abroad, the action may be maintained in this country, because the venue in the action may be laid in any English county, at the option of the plaintiff.<sup>3</sup>

The same state of law also leads to the following inference, that in a transitory action the plaintiff may have the action tried in any county that he pleases; for (as we have seen) he may lay the venue in the action in any county, and upon issue joined, the venire issues into the county where the venue in the action is laid. And such accordingly is the rule, subject only to a check interposed by another regulation, viz, that which regulates the *changing of the venue*. The courts established about the reign (as it is said) of James I(*n*) a practice by which defendants were enabled to protect themselves from any inconvenience they might apprehend from the venue being laid contrary to the fact, and enforce, if they pleased, a compliance with the stricter and more ancient system. By this practice, when the plaintiff in a transitory action lays a false venue, the defendant is entitled to *move the court to have the venue changed*, i. e., altered to the right place; and the court, upon affidavit that the cause of action arose wholly in the county to which it is proposed to change the venue, will in most cases grant the application, and oblige the plaintiff to amend his declaration in this particular: unless he, on the other hand, will undertake to give at the trial some material evidence arising in the county where the venue was laid.<sup>4</sup>

Hitherto the rule as to alleging place in the pleadings has been considered exclusively in reference to the ancient and nearly extinguished learning of *venue*. But it is to be observed that in some cases place is alleged in pleading, without reference to the object of determining from whence the jurors are to come, and merely to give a reasonable certainty and clearness to the general

(*n*) Knight *v.* Farnaby, 2 Salk. 670.

3. See Va. Code, §§ 3214, 3215, 3220; *ante*, § 186.

4. In Virginia, the venue may be changed "for good cause shown" after twenty days notice, or without notice where the judge is so situated as to render it improper for him to sit in a cause. Code, §§ 3316, 3317.

statement of facts. Thus, where the plaintiff complains of a trespass to his close, or the defendant claims a right of way over the plaintiff's close, from one terminus to another, the declaration, for greater certainty, states the name of the close and of the parish and county where it is situate, and the plea sets forth the termini of the way.

The allegation of place in such cases was always necessary in point of due particularity, and as matter of local description; and it still continues to be so, notwithstanding the rule of court above cited, dispensing with *venue* in the body of the pleadings. For that rule contains an express proviso "that in cases where local description is now required, such local description shall be given."

It remains only to add, that where place is alleged as matter of *description*, and not as *venue*, it must in all cases be stated truly and according to the fact, under peril of variance, if the matter should be brought into issue.

## RULE II.

### § 461. The pleadings must have certainty of time. (o)

In personal actions, the pleadings must allege the *time*, that is, the day, month, and year when each traversable fact occurred; and when there is occasion to mention a continuous act, the period of its duration ought to be shown.

The necessity of laying a time extends to *traversable* facts only, and, therefore, no time need be alleged to matter of inducement or aggravation.

The time is considered in general as forming no material part of the issue, so that one time may be alleged and another proved. The pleader, therefore, assigns any time that he pleases to a given fact. This option, however, is subject to certain restrictions: 1. He should lay the time under a *videlicet* ("to wit," or "that is to say,") if he does not wish to be held to prove it strictly.<sup>5</sup>

(o) Com. Dig., Pleader (C. 19); *Halsey v. Carpenter*, Cro. Jac. 359; *Denison v. Richardson*, 14 East, 291.

5. If the time is material (for example, is descriptive) the *videlicet* will not avoid the necessity of proving it as laid. It is only when it is immaterial that the *videlicet* is of value.

[*The Use of Videlicet.*—Whenever a pleader desires to state time, place, distance, or any other fact which he is not required to prove, he prefaces it with a *videlicet*, or the words, “to wit,” or “that is to say.” For example, where a passenger sued for a personal injury in alighting from a train at a station, and alleged that no sufficient platform was provided for passengers to alight, she stated that in alighting she had to step down “a great distance, to wit, two feet.” It was held that it was not necessary for the plaintiff to prove the exact distance, and that proof that the distance was from 26 to 34 inches supported the allegation.<sup>6</sup> The office of a *videlicet* is to mark that the party does not undertake to prove precisely the circumstances alleged, and in such cases he is not required to prove them unless material to the issue.

It was formerly necessary in pleading to allege where a contract was made, or other act done, which was set forth in the pleadings, and if this place were different from the venue of the action, or place where the action was brought, it was alleged as of the true place, but with a *videlicet* of the county in which the action was brought, for instance, if an action were brought in Craig County, Virginia, on a note dated at Lynchburg, Virginia, the declaration would set forth that the note was made at Lynchburg, Virginia, to wit, in the county of Craig, Virginia. But it is now provided by statute, both in Virginia and West Virginia, that it shall not be necessary in any declaration, or other pleading, to set forth the place in which any contract was made, or act done, unless when, from the nature of the case, the place is material and traversable, and then the allegation may be, as to a deed, note, or other writing, bearing date at any place, that it was made at such place, or as to any other act according to the fact, without averring or suggesting that it was at or in the county or corporation in which the action is brought, unless it was in fact therein.]<sup>7</sup>

2. He should not lay a time that is *intrinsically impossible, or inconsistent with the fact to which it relates*. A time so laid would, in general, be sufficient ground for demurrer. But, on the other hand, there is no ground for demurrer where such time is laid to a fact not traversable, or where, for any other reason, the

6. C. & O. Ry. Co. v. Barger, 112 Va. 688, 72 S. E. 693.

7. Code, § 3242; W. Va. Code, § 3852.

allegation of time was unnecessarily made; for an unnecessary statement of time, though impossible or inconsistent, will do no harm, upon the principle that *utile per inutile non vitiatur*.(p)

3. Again, there are some instances in which time happens to form a *material point in the merits of the case*; and in these instances if a traverse be taken, the time laid is of the substance of the issue, and must be strictly proved, just as in statements of local description it is necessary to prove the alleged place. The pleader, therefore, with respect to all facts of this kind, must state the time truly, at the peril of failure as for a variance. And here the insertion of a *videlicet* will give no help. Thus, where the declaration stated an usurious contract, made on the 21st of December, 1774, for giving day of payment of a certain sum to the 23d of December, 1776, and the proof was, that the contract was on the 23d of December, 1774, giving day of payment for two years, it was held that the verdict must be for the defendant; the principle of this decision being, that the time given for payment, being of the substance of an usurious contract, such time must be proved as laid.(q) So, where the declaration stated an usurious agreement, on the 14th of the month, to forbear and give day of payment for a certain period, but it was proved that the money was not advanced till the 16th, the plaintiff was non-suited;(r) it being held by Lord Mansfield at the trial, and afterwards by the court in bank, that the day from whence the forbearance took place was material, though laid under a *videlicet*.(s)

Where the time needs not to be truly stated (as is generally the case), it is subject to the rule that the plea and subsequent pleadings should follow the day alleged in the writ and declaration;(t) and if in those cases *no time at all* be laid, the omission is aided

(p) This appears to be a correct general statement of the law with respect to demurrer for an impossible or inconsistent date; but the current of authorities is not quite clear and uniform on this subject. *Vide* Com. Dig., Pleader (c. 19); 2 Saund. 201c, n. (1); *ibid.* 171a, n. (1); *Ring v. Roxborough*, 2 Tyr. 468.

(q) *Carlisle v. Trears*, Cowp. 671.

(r) See 3 Bl. Com. 376.

(s) *Johnson v. Picket*, cited *Grimwood v. Barritt*, 6 T. R. 463; *Hardy v. Cathcart*, 5 Taunt. 2.

(t) 2 Saund. 5, n. 3; *Hawe v. Planner*, 1 Saund. 14.

after verdict, or judgment by confession or default, by the operation of the statute of jeofails.<sup>(u)</sup> But where in the plea or subsequent pleadings the time happens to be material, it must be alleged: and there the pleader may be obliged to depart from the day in the writ and declaration. [Thus, in an action for slander the declaration stated that the alleged slanderous words were uttered *about* the first of April, 1884. The defendant demurred on the ground that the time was not accurately stated. It was held that "In all personal actions the pleading must allege the time, that is, the day, month, and the year when each traversable fact occurred," and that in the present case there was not that certainty of time which the fundamental rules of pleading require to be alleged in reference to traversable facts.<sup>8</sup>

In another case the complaint that the plaintiff's intestate rendered certain legal services to defendant's intestate, at his request, between January 1, 1870, and October 11, 1883, for which he had not been paid. The defendant's demurrer to the complaint was sustained on the ground that the statements in the complaint were not alleged with sufficient certainty.<sup>9</sup>

Time is material and hence must be truly laid whenever it is descriptive, as in giving the date or time of payment of a note, or where it is of the essence of the right, in as an action for death by wrongful act.]

Certainty of time is said to be required in *personal* actions only, it being held, that in *real* and *mixed* actions it is in general not necessary to allege the day, month, and year, and that it is sufficient to show in what king's reign the matter arose.<sup>(v)</sup>

### RULE III.

#### § 462. The pleadings must specify quality, quantity, and value.

It is in general necessary, where the declaration alleges any in-

(u) *Higgins v. Highfield*, 13 East, 407.

(v) Com. Dig., Pleader (c. 19); *The King v. Bishop of Chester*, 2 Salk. 561; *Skin*, 600; 9 Hen. 6, 115, 116.

8. *Cole v. Babcock*, 78 Maine, 41, 2 Atl. 545.

9. *Wise v. Hogan*, 8 Pac. 784.

jury to *goods and chattels*, or any contract relating to them, that their *quality*, *quantity*, and *value* or *price* should be stated. And in any action brought for *recovery of real property* its *quality* should be shown; as, whether it consists of houses, lands, or other hereditaments; and in general it should be stated whether the lands be meadow, pasture, or arable, etc. And the *quantity* of the lands or other real estate must also be specified.<sup>10</sup> So in an action brought for *injuries* to real property, the *quality* should be shown, as whether it consists of houses, lands, or other hereditaments.

\*                    \*                    \*                    \*                    \*

So where, in an action of trespass the declaration charged the taking of cattle, the declaration was held to be bad, because it did not show of what species the cattle were. (*w*) So in an action of trespass where the plaintiff declared for taking goods generally, without specifying the particulars, a verdict being found for the plaintiff, the court arrested the judgment, for the uncertainty of the declaration. (*x*) So, in a modern case, where in an action of replevin the plaintiff declared that the defendant, "in a certain dwelling-house, took divers goods and chattels of the plaintiff," without stating what the goods were, the court arrested the judgment for the uncertainty of the declaration, after judgment by default, and a writ of inquiry executed. (*y*)

\*                    \*                    \*                    \*                    \*

[So, a declaration in trespass containing an allegation of the taking of "Documents and receipts to prove the plaintiff's claim for \$1,200.00 due from the British Government, sundry notes of hand, and accounts in five books, and other papers of the plaintiff," is defective in not stating the nature and kind of chattels taken, and is bad on a motion in arrest of judgment.

(*w*) *Dale v. Phillipson*, 2 Lutw. 1374.

(*x*) *Bertie v. Pickering*, 4 Burr. 2455; *Wait v. Essington, Ld. Ray.* 1410, S. P.

(*y*) *Pope v. Tillman*, 7 Taunt. 642.

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10. A smaller estate or a less quantity of land than was sued for may, however, be recovered in ejectment. See *ante*, § 125. So, also, in detinue less than the whole property sued for may be recovered. *Ante*, § 133.

*Foreign Money.*—Where an action is brought in one of the states to recover an indebtedness stated in the currency of a foreign country, the claim should be stated in money of the realm. The approved method is to state the indebtedness to be in foreign money (giving the amount) of the value of so much domestic money.]<sup>11</sup>

### § 463. General statements of quantity and quality.

The rule in question, however, is not so strictly construed, but that it sometimes admits the specification of *quality* and *quantity* in a *loose and general way*. Thus a declaration in trover for two *packs* of flax and two *packs* of hemp, without setting out the weight or quantity of a pack, is good after verdict, and as it seems, even upon special demurrer. (*z*) So a declaration in trover for a *library* of books has been allowed, without expressing what they were. So where the plaintiff declared in trespass for entering his house, and taking *several keys* for the opening of the doors of his said house, it was objected, after verdict, that the kind and number ought to be ascertained. But it was answered and resolved that the keys were sufficiently ascertained by reference to the house. (*a*) So it was held, upon special demurrer, that it was sufficient to declare in trespass for breaking and entering a house, damaging the goods and chattels, and wrenching and forcing open the doors, without specifying the goods and chattels or the number of doors forced open; for that the essential matter of the action was the breaking and entering of the house, and the rest merely aggravation. (*b*)

### § 464. Actions to which rule inapplicable.

There are also some *kinds of action* to which the rule requiring specification of quality, quantity, and value, does not apply in modern practice. Thus in actions of *debt* and *indebitatus assump-*

(*z*) 2 Saund. 74b, n. 1.

(*a*) Layton *v.* Grindall, 2 Salk. 643; also, 2 Saund. 74b, n. 1.

(*b*) Chamberlain *v.* Greenfield, 3 Wils. 292.

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11. George Campbell Co. *v.* Geo. Angus Co., 91 Va. 438, 22 S. E. 167.

*sit(c)* (where a more general form of declaration obtains than in most other actions) if the debt is claimed in respect of goods sold, etc., the quality, quantity, or value of the goods sold is never specified. The amount of the debt or sum of money due upon such sale must, however, be shown.<sup>12</sup>

### § 465. Allegation and proof.

As with respect to *time*, so with respect to *quantity* and *value*, it is not necessary when these matters are brought into issue, that the proof should correspond with the averment. The pleader may in general allege any quantity and value that he pleases (at least if it be laid under a *videlicet*), without risk from the variance, in the event of a different amount being proved.<sup>(d)</sup> But it is to be observed, that *a verdict cannot in general be obtained for a larger quantity or value than is alleged*.<sup>13</sup> The pleader, therefore, takes care to lay them to an extent large enough to cover the utmost case that can be proved. And it is also to be observed that, as with respect to *time*, so with respect to *quantity* or *value*, there may be instances in which it forms part of the substance of the issue; and there the amount must be strictly proved as laid. For example, to a declaration in *assumpsit* for 10*l.* 4*s.* and other sums, the defendant pleaded as to all but 4*l.* 7*s.* 6*d.* the general issue; and

(*c*) *Indebitatus assumpsit* is that species of the action of *assumpsit* in which the plaintiff first alleges a debt and then a promise in consideration of the debt. The promise so laid is generally an *implied* one only.

(*d*) *Crispin v. Williamson*, 8 Taunt. 107.

12. Full details can be obtained in Virginia and West Virginia by calling for a bill of particulars. Code, § 3249; Code, W. Va., § 3969.

13. The amount laid in the *ad damnum* clause, however, need not be large enough to cover the interest on the principal claimed. It is sufficient if covers the principal. *Ga. Home Ins. Co. v. Goode*, 95 Va. 761, 30 S. E. 366. It has been held, however, that after verdict the *ad damnum* may be increased by amendment to cover the recovery. *Brown v. Smith*, 24 Ill. 196; *Tomlins v. Earnshaw*, 112 Ill. 311; or a *remittitur* may be entered for the excess. *Crud v. Lackland*, 67 Mo. 619; *White v. Canadee*, 25 Ark. 41; *Andrew's Stephen* (2d Ed.) 468.

as to the *4l. 7s. 6d.* a tender. The plaintiff replied that, after the cause of action accrued and before the tender, the plaintiff demanded the said sum of *4l. 7s. 6d.* which the defendant refused to pay; and on issue joined it was proved that the plaintiff had demanded not *4l. 7s. 6d.* but the whole *10l. 4s.* This proof was held not to support the issue. (*e*)

With respect to the allegation of *quality*, this generally requires to be strictly proved as laid.

[This is because it is descriptive. The quality of a thing is its *kind*. Thus in detinue for a horse, the plaintiff would not be permitted to prove the detention of a cow. So time may be descriptive, as in the statement of the date or time of payment of a note; and place may be descriptive as where a note is described as payable at the First National Bank of Richmond, Va. In all such cases the time, quality and quantity are material, and must be proved as alleged.]

#### RULE IV.

### § 466. The pleadings must specify the names of persons. (*f*)

First, this rule applies to the *parties to the suit*.

The declaration must set forth accurately the christian name and surname both of the plaintiff and defendant. If either party have a name of *dignity*, such as *Earl*, etc., he must be described accordingly; and an omission or mistake in such description has the same effect as in the christian name and surname of any ordinary person. (*g*) A mistake or omission of the christian or surname of either party in actions real or personal was formerly ground for plea in abatement. But by 3 & 4 W. 4, c. 42, s. 11, no plea in abatement for a misnomer shall be allowed in any personal action; but in all cases in which a misnomer would, but for this act, have been pleadable in abatement, the defendant shall be at liberty to cause the declaration to be amended at the costs of

(*e*) *Rivers v. Griffith*, 5 Barn. & Ald. 630.

(*f*) Com. Dig., Abatement (E. 18), (E. 19), (F. 17), (F. 18); Com. Dig., Pleader (c. 18); Bract. 301b.

(*g*) Com. Dig., Abatement (E. 20), (F. 19).

the plaintiff, by inserting the right name.<sup>14</sup> This is to be done by taking out a summons before a judge, founded on an affidavit of the right name; and in case such summons shall be discharged, the costs of such application shall be paid by the party applying, if the judge shall think fit.

Secondly, the rule relates to persons *not* parties to the suit, of whom mention is made in the pleading.

The names of such persons, viz, the christian name and surname, or name of dignity, must in general be given; but if not within the knowledge of the party pleading, an allegation to that effect should be made, and such allegation will excuse the omission of name. (*h*)

### § 467. Misnomer.

A mistake in the name of a *party to the suit* cannot be objected to as a *variance* at the trial; but the name of a person *not* party, is a point on which the proof must correspond with the averment, under peril of a fatal variance. Thus, where a bill of exchange drawn by John *Couch* was declared upon as drawn by John *Crouch*, and the defendant pleaded the general issue, the plaintiff was non-suited. (*i*) So where the declaration stated that the defendant went before Richard Cavendish Baron Waterpark, of *Waterfork*, one of the justices, etc., for the county of Stafford, and falsely charged the plaintiff with felony, etc., and upon the general issue it appeared in evidence that the charge was made before Richard Cavendish Baron Waterpark, of *Waterpark*, this was held a fatal variance in the name of dignity. (*j*)

[It is correctly stated that pleadings should accurately set forth the christian names, as well as the surnames, of parties and third persons, yet the right to sue by initials has long been recognized, and though a loose practice, it is a very common one.

(*h*) *Buckley v. Rice* Thomas, Plow. 128; *Rowe v. Roach*, 1 M. & S. 304.

(*i*) *Whitwell v. Bennett*, 3 Bos. & Pul. 559. See, also, *Bowditch v. Mawley*, 1 Camp. 195; *Hutchinson v. Piper*, 4 Taunt. 810.

(*j*) *Walters v. Mace*, 2 Barn. & Ald. 756.

14. Similar statutes exist in Va. and W. Va. Va. Code, § 3258; W. Va. Code, § 3834.

While a misnomer of a third person will cause a fatal variance if not corrected, the courts are extremely liberal in the matter of allowing amendments, and if at the trial it is discovered that the pleader has made a mistake in the name of a person, he will generally be allowed to correct it on motion. Whether or not the opposite party should be granted a continuance when such an amendment is allowed, rests largely in the discretion of the trial court. If the mistake has caused no surprise, there is no necessity for a continuance. It sometimes happens that a bond or note is sued on and that the name of the party liable is not accurately given. Usually the evidence of debt is filed with the declaration, and where such is the case, mere mistakes in the names, and the like, are readily corrected without surprise or injustice to the defendant, and the adverse party is allowed to amend, as of course, and proceed with the trial as if no such mistake had been made.]

## RULE V.

§ 468. The pleadings must show title. (*k*)

When in pleading, any right or authority is set up in respect of property personal or real, some *title* to that property must of course be alleged in the party, or in some other person from whom he derives his authority. So if a party be charged with any *liability* in respect of property personal or real, his *title* to that property must be alleged.

It is proposed, first, to consider the case of a party's alleging title *in himself, or in another whose authority he pleads*; next, that of his alleging it *in his adversary*.

I. Of the case where a party alleges title *in himself, or in another whose authority he pleads*.

In this case the title must in general be fully and particularly alleged. With respect to the manner of its allegation, more specifically considered, it is to be observed, that there are certain forms used in pleading appropriate to each different kind of title, according to all the different distinctions as to *the tenure, the kind or quantity of estate, the time of enjoyment, the number of*

(*k*) Com. Dig., Pleader (3 m. 9); Bract. 372b, 373b; 2 Saund. 401.

owners, and the manner of derivation or acquisition.(l) These forms are too various to be here stated: and it will be sufficient to refer the reader to the copious stories in the printed precedents.(m)

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There are also certain general rules relative to the manner of showing title, in pleading, of which it will be useful to give some account.

### § 469. Derivation of title.

There is a leading distinction on this subject between *estates in fee simple* and *particular estates*.

In general it is sufficient to state a *seizin in fee simple—per se*; that is, simply to state (according to the usual form of alleging that title) that the party was “seized in his demesne as of fee of and in a certain messuage,” etc., without showing the *derivation*, or (as it is expressed in pleading) the *commencement* of the estate.(n) For if it were requisite to show from whom the present tenant derived his title, it might be required, on the same principle, to show from whom that person derived *his*, and so *ad infinitum*. Besides, as mere seizin will be sufficient to give an estate in fee simple, the estate may for anything that appears, have had no other commencement than the seizin itself, which is alleged. So, though the fee be *conditional* or *determinable* on a certain event, yet a seizin in fee may be alleged, without showing the commencement of the estate.(o)

However, it is sometimes necessary to show the derivation of the fee; viz, where in the pleading the seizin has already been alleged in another person, from whom the present party claims. In such case, it must of course be shown how it passed from one of these persons to the other. Thus, in debt or covenant brought on an indenture of lease by the heir of the lessor, the plaintiff having alleged that his ancestor was seized in fee, and made the

(l) *Vide* 2 Bl. Com. 103; 2 Chitty, 193, 232, 1st Ed.

(m) See 2 Chitty, *Ibid*.

(n) Co. Litt. 303b; *Savage v. Hawkins*, Cro. Car. 571.

(o) Doct. Pl. 287.

lease, must proceed to show how the fee passed to himself, viz, by descent. So if in trespass the defendant plead that E. F., being seized in fee demised to G. H., under whose command the defendant justifies the trespass on the land (giving color); and the plaintiff in his replication admits E. F.'s seizin, but sets up a subsequent title in himself to the same land and fee simple, prior to the alleged demise, he may show the derivation of the fee from E. F. to himself by conveyance antecedent to the lease under which G. H. claims.(p)

### § 470. Particular estates.

With respect to *particular estates* the general rule is *that the commencement of particular estates must be shown.*(q) If, therefore, a party sets up in his own favor an estate tail, an estate for life, a term of years, or a tenancy at will, he must show the derivation of that title from its commencement; that is, from the last seizin in fee simple; and if derived by alienation or conveyance, the substance and effect of such conveyance should be precisely set forth.

\* \* \* \* \*

To the rule *that the commencement of particular estates must be shown*, there is this exception, that it need not be shown where the title is alleged by way of *inducement* only.(r) Thus, if an action of debt or covenant be brought on an indenture of lease by the executor or assignee of a lessor, who had been entitled for a term of years, it is necessary in the declaration to state the title of the lessor, in order to show that the plaintiff is entitled to maintain the action as his representative or assignee. But as the title is in that case alleged by way of inducement only (the action being mainly founded on the lease itself), the particular estate for years may be alleged in the lessor, without showing its commencement.

(p) See Upper Bench Precedents, 196, cited 9 Went. —

(q) Co. Litt. 303b; Scilly v. Dally, 2 Salk. 562; Carth. 444, S. C.; Searl v. Bunnion, 2 Mod. 70; Johns v. Whitley, 3 Wils. 72; Hendy v. Stephenson, 10 East, 60; Rast. Ent. 656.

(r) Com. Dig., Pleader (E. 19), (C. 43); Blockley v. Slater, Lutw. 120; Searl v. Bunnion, 2 Mod. 70; Scilly v. Dally, Carth, 444.

### § 471. Additional rules on derivation of title.

On the subject of the *derivation of title*, the following additional rules may be collected from the books:

First, *Where a party claims by inheritance, he must in general show how he is heir, viz, as son or otherwise; (s) and if he claim by mediate, not immediate descent, he must show the pedigree; for example, if he claims as nephew, he must show how nephew. (t)*

Secondly, *Where a party claims by conveyance or alienation, the nature of the conveyance and alienation must in general be stated, as whether it be by devise, feoffment, etc. (u)*

Thirdly, *The nature of the conveyance or alienation should be stated according to its legal effect, rather than its form of words.* This depends on a more general rule, which we shall have occasion to consider in another place, viz, "that things are to be pleaded according to their legal effect or operation. For the present, the doctrine, as applicable to conveyances, may be thus illustrated: In pleading a conveyance for *life* with livery of seizin, the proper form is to allege it as a "demise" for life, (v) for such is its effect in proper legal description. So a conveyance in *tail*, with livery, is always pleaded on the same principle as a "gift" in tail; (w) and a conveyance of the fee, with livery, is described by the term "enfeoffed." (x) And such would be the form of pleading whatever might be the *words* of donation used in the instrument itself, which in all the three cases are often the same, viz, those of "give" and "grant." (y) So in a conveyance by lease and release, though the words of the deed of release be "grant, bargain, sell, alien, release, and confirm," yet it

(s) *Denham v. Stephenson*, 1 Salk. 355; *Duke of Newcastle v. Wright*, 1 Lev. 190; 1 Lord Raym. 202.

(t) *Dunsday v. Hughes*, 3 Bos. & Pul. 453; *Blackborough v. Davis*, 12 Mod. 619.

(u) See Com. Dig., Pleader (E. 23), (E. 24).

(v) Rast. Ent. 647a, 11d.

(w) See Co. Ent., tit. Formedon, etc.

(x) Upper Bench Prec. 196. See 2 Chitty, 214; Co. Litt. 9a. — 8 Repts. 82b.

(y) "Do or dedi is the aptest word of feoffment." Co. Litt. 9a.

should be pleaded as a *release* only, for that is the legal effect. (z) So a surrender (whatever words are used in the instrument) should be pleaded with *sursum reddidit* which alone in pleading describes the operation of a conveyance as a surrender.

Fourthly, *Where the nature of the conveyance is such that it would at common law be valid without deed or writing, there no deed or writing need be alleged in the pleading, though such document may in fact exist; but where the nature of the conveyance requires at common law a deed or other written instrument, such instrument must be alleged.* (a) Therefore a conveyance with livery of seizin, either in fee, tail, or for life, is pleaded without alleging any charter or other writing of feoffment, gift, or demise, whether such instrument in fact accompanied the conveyance or not. For such conveyance might at common law be made by parol only; (b) and though by the statute of frauds, 29 Car. II, c. 3, s. 1, it will not now be valid unless made in writing, yet the form of *pleading* remains the same as before the act of parliament. (c) On the other hand, a *devise* of lands (which at common law was not valid, and authorized only by the statutes 32 Hen. 8, c. 1, and 34 Hen. 8, c. 5), must be alleged to have been made in writing; (d) which is the only form in which the statutes authorize it to be made.

So if a conveyance by way of *grant* be pleaded, a deed must be alleged; (e) for matters that "lie in grant" (according to the legal phrase) can pass by deed only. (f)

There is one case, however, in which a deed is usually alleged in pleading, though not necessary at common law to the conveyance, and which, therefore, in practice at least, forms an exception to the above rule. For in making title under a lease for

(z) 2 Chitty, 220, note (i); 1 Arch. 127; 3 Went. 483, 515.

(a) Vin. Ab., *Faits or Deeds* (M. a, 11).

(b) Vin. Ab., *Feoffment* (Y.); Co. Litt. 121b.

(c) This depends upon a more general rule, viz, that regulations introduced by statute, do not alter the form of pleading at common law. This rule will be noticed hereafter in its proper place.

(d) 1 Saund. 276a, n. 2.

(e) Porter v. Gray, Cro. Eliz. 245; 1 Saund. 234, n. 3.

(f) Vin. Ab., *tit. Grants* (G. a.).

years by indenture, it is usual to plead the indenture, (g) though the lease was good at common law, by parol, and needs to be in writing only where the term is of more than three years duration, and then only by the statute of frauds.

On the other hand, in the case where a demise by husband and wife is pleaded, it seems that it is not necessary to show that it was by deed; and yet the lease, if without deed, is at common law void as to the wife, after the death of the husband, and is not within the stat. 32 Hen. 8, c. 28, s. 1, which gives efficacy to leases by persons having an estate in right of their wives, etc., only where such leases are "by writing indented under seal." The reason seems to be, that a lease by husband and wife, though without deed, is good during the life of the husband. (h)

### § 472. Plea of *liberum tenementum*.

Thus far with respect to the allegation of title in general. There are, however, certain excepted cases in which different and less precise modes of laying title are permitted.

1. It is occasionally sufficient to allege what may be called a *general freehold title*.

In a plea in trespass *quare clausum fregit*, or an avowry in replevin, (i) if the defendant claim an estate of freehold in the *locus in quo*, he is allowed to plead generally that the place is his "*close, soil, and freehold*." This is called the plea or avowry of *liberum tenementum*, and it may be convenient here to give the form of it.

#### PLEA.

#### *Of Liberum Tenementum.*<sup>15</sup>

#### In Trespass Quare Clausum Fregit.

And for a further plea in this behalf as to the breaking and

(g) 2 Chitty, 555, example.

(h) 2 Saund. 189a, n. (9); Wiscot's Case, 2 Rep. 61b; Dyer, 91b; Bateman v. Allen, Cro. Eliz. 438; Childs v. Wescott, id. 482.

(i) 1 Saund. 347d, n. 6.

15. In some states it is held that the plea of *liberum tenementum* must be specially plead to put the title in issue, and that the title

entering the said close, in which, etc., in the said declaration mentioned, and with feet in walking, treading down, trampling upon, consuming and spoiling the grass and herbage then and there growing, the said defendant says, that the said plaintiff ought not to have or maintain his aforesaid action thereof against him; because he says, that the said close in the said declaration mentioned, and in which, etc., now is, and at the several times, when etc., *was the close, soil, and freehold of him the said defendant*. Wherefore he the said defendant at the said several times when, etc., broke and entered the said close in which, etc., and with feet in walking trod down, trampled upon, consumed, and spoiled the grass and herbage then and there growing, as he lawfully might for the cause aforesaid, which are the same trespasses in the introductory part of this plea mentioned, and whereof the said plaintiff hath above complained. And this the said defendant is ready to verify. Wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him. (*j*)

This allegation of a *general freehold title* will be sustained by proof of *any* estate of *freehold*, whether in fee, in tail, or for life only, and whether in possession, or expectant on the determination of a term of years. (*k*) But it does not apply to the case of a freehold estate in remainder or reversion expectant on a particular estate of freehold, nor to copyhold tenure.

The plea of avowry of liberum tenementum is the only case of usual occurrence in modern practice in which the allegation of

(*j*) 2 Chitty, 551.

(*k*) See 5 Hen. 7, 10a, Pl. 2, which shows that where there is a lease for years, it must be replied in confession and avoidance, and is no ground for traversing the plea of *liberum tenementum*.

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cannot be drawn in issue by plea of not guilty in an action of trespass *quære clausum fregit*. The rule is otherwise in Virginia, though the question was decided by a divided court, two judges out of five holding that the title was not put in issue by a plea of not guilty. The majority of the court, however, held that the judgment in an action of trespass to recover the value of, or damages to, timber cut from the land was conclusive of the question of title to the land so far as it affected the plaintiff's right to recover such value or damages, even though no plea of *liberum tenementum* was filed, but only the plea of not guilty. *Douglas Land Company v. T. W. Thayer Company*, 113 Va. 238, 74 S. E. 215.

a *general freehold title*, in lieu of a *precise* allegation of title is sufficient. (1)<sup>16</sup>

This plea may appear at first sight opposed to principle, as giving no *color* to the plaintiff. It has been long ago decided, however, that it is not open to this objection; because, though it asserts the *freehold* to be in the defendant, it does not exclude the possibility of the plaintiff's being possessed of the premises for a *term of years*; and it leaves him, therefore, a sufficient color to maintain the action. The same doctrine is also held with respect to a plea that the defendant is *seized in fee*; for this, like the general plea of freehold, is compatible with the plaintiff's possession for a term of years. But (as we have elsewhere seen) a plea that J. S. was seized in fee, and demised to the defendant for years, is bad for want of color, unless express color be given.

In alleging a general freehold title, it is not necessary (as appears by the above example) to *show its commencement*.

### § 473. Title of possession.

2. It is often sufficient to allege a title of mere *possession*.

The form of laying a title of possession, in respect of *goods and chattels*, is either to allege that they were the "goods and chattels of the plaintiff," or that he was "lawfully possessed of them as of his own property." With respect to *corporeal hereditaments*, the form is, either to allege that the close, etc., was the "close of" the plaintiff, or that he was "lawfully possessed of a certain close," etc. With respect to *incorporeal hereditaments*, a title of possession is generally laid, by alleging that the plaintiff was possessed of the corporeal thing, in respect of which the right is claimed, and by reason thereof was entitled to the right at the time in question; for example, that he "was possessed of a certain messuage, etc., and by reason thereof, during all the time aforesaid, of right ought to have had common of pasture, etc.

(1) See 1 Saund. 347d, n. 6. This form of allegation occurred, however, in the now disused actions of assize, the count or plaint in which lays only a general freehold title. Dock. Pl. 289.

16. Fort Dearborn Lodge v. Klein, 115 Ill. 177, 3 N. E. 272.

**§ 474. When title of possession is applicable.**

A title of possession is *applicable* that is, will be sufficiently sustained by the proof in all cases where the interest is of a present and immediate kind. Thus when a title of possession is alleged with respect to *goods and chattels*, the statement will be supported by proof of any kind of *present interest* in them, whether that interest be temporary and special, or absolute in its nature—as for example, whether it be that of a carrier or finder only, or that of an owner and proprietor.<sup>(m)</sup> So, where a title in possession is alleged in respect of *corporeal or incorporeal hereditaments*, it will be sufficiently maintained by proving any kind of *estate in possession*, whether fee simple, fee tail, for life, for term of years, or otherwise. On the other hand, with respect to any kind of property, a title of possession would not be sustained in evidence, by proof of an interest in *remainder* or *reversion* only: and therefore, when the interest is of that description, the preceding forms are inapplicable; and title must be laid in remainder or reversion according to the fact.

**§ 475. When title of possession is sufficient.**

Where a title of possession is *applicable*, the allegation of it is in many cases *sufficient* in pleading, without showing title of a superior kind. The rule on this subject is as follows—that *it is sufficient to allege possession as against a wrongdoer*;<sup>(n)</sup> or, in other words, that it is enough to lay a title of possession against a person, who is stated to have committed an injury to such possession, having as far as it appears no title himself. Thus, if the plaintiff declares in trespass, for breaking and entering his close, or in trespass on the case, for obstructing his right of way, it is enough to allege in the declaration, in the first case, that it is the “close of the plaintiff,” in the second case, that “he was possessed of a certain messuage, etc., and by reason of such possession, of right ought to have had a certain way,” etc. For if the case was,

(m) 2 Saund. 47a, n. 1.

(n) Com. Dig., Pleader (C. 39), (C. 41); Taylor v. Eastwood, 1 East. 212; Grimstead v. Marlowe, 4 T. R. 717; Greenhow v. Ilsley, Willes 619; Waring v. Griffiths, 1 Burr. 440; Langford v. Webber, 3 Mod. 132.

that the plaintiff being possessed of the close, the defendant having himself no title, broke and entered it, or, that the plaintiff being possessed of a messuage and right of way, the defendant being without title, obstructed it, then whatever was the nature and extent of the plaintiff's title in either case, the law will give him damages for the injury to his possession; and it is the possession therefore, only, that needs to be stated. It is true that it does not yet appear that the defendant had no title, and, by his plea, he may possibly set up one superior to that of the plaintiff; but as on the other hand, it does not yet appear that he *had* title, the effect is the same; and till he pleads, he must be considered as a mere *wrongdoer*; that is, he must be taken to have committed an injury to the plaintiff's possession without having any right himself. Again, in an action of trespass for assault and battery, if the defendant justifies on the ground that the plaintiff wrongfully entered his house, and was making a disturbance there, and that the defendant gently removed him, the form of the plea is that "the defendant was lawfully possessed of a certain dwelling-house, etc., and being so possessed the said plaintiff was unlawfully in the said dwelling-house," etc.; and it is not necessary for the defendant to show any title to the house, beyond this of mere possession. (*o*) For the *plaintiff* has at present set up no title at all to the house, and on the face of the plea he has committed an injury to the defendant's possession, without having any right himself. So in an action of trespass for seizing cattle, if the defendant justifies on the ground that the cattle were damage-feasant on his close, it is not necessary for him to show any title to his close except that of mere possession. (*p*)

[So, in an action of trespass on the case to recover damages for injury caused by the overflow of surface water upon a certain lot of the plaintiff's, where the declaration alleged that A C was seized, and together with the plaintiff, M C, her husband, has been during all of that time, and still is, possessed of a lot of ground, it was held to be a sufficient allegation of the plaintiff's

(*o*) 2 Chitty, 529.

(*p*) 1 Saund. 221, n. (1); 2 Saund. 285, n. 3; Anon., 2 Salk. 643; Searl v. Bunnion, 2 Mod. 70; Langford v. Webber, 3 Mod. 132; Osway v. Bristow, 10 Mod. 37; 2 Bos. & Pul. 361, n. (a).

title, as possession alone is sufficient to maintain trespass or case against a wrongdoer.]<sup>17</sup>

It is to be observed however, with respect to this rule, as to alleging possession against a wrongdoer, that it seems not to hold in *Replevin*. For in that action it is held not to be sufficient to state a title of possession, even in a case where it would be allowable in Trespass, by virtue of the rule above mentioned. Thus, in replevin, if the defendant by way of avowry, pleads that he was possessed of a messuage, and entitled to common of pasture as appurtenant thereto, and that he took the cattle damage-feasant, it seems that this pleading is bad; and that it is not sufficient to lay such mere title of possession in this action. (q) It is to be observed too, that this rule has little or no application in *real* or *mixed actions*; for in these, an injury to the possession is seldom alleged; the question in dispute being, for the most part, on the *right of possession*, or the *right of property*.

#### § 476. Alleging title in adversary.

II. Having discussed the case where a party alleges title *in himself*, or *some other whose authority he pleads*, next is to be considered the case where a party alleges title *in his adversary*.

The rule on this subject appears in general to be *that it is not necessary to allege title more precisely than is sufficient to show a liability in the party charged, or to defeat his present claim*. Except as far as these objects may require, a party is not compellable to show the precise estate which his adversary holds, even in a case where, if the same person were pleading in his own title, such precise allegation would be necessary. The reason of this difference is, that a party must be presumed to be ignorant of the particulars of his adversary's title, though he is bound to know his own. (r)

To answer the purpose of showing a liability in the party

(q) *Hawkins v. Eccles*, 2 Bos. & Pul. 359, 361, n. a; 2 Saund. 285, n. 3; *Saunders v. Hussey*, 2 Lut. 1231; Carth. 9; 1 Lord Raym. 332, S. C.; 1 Saund. 346e, n. (2).

(r) *Rider v. Smith*, 3 T. R. 766; *Derisley v. Custance*, 4 T. R. 77; *Att'y-General v. Meller*, Hardr. 459.

17. *Clay v. St. Albans*, 43 W. Va. 539, 27 S. E. 368.

charged, according to the rule here given, it is in most cases sufficient to allege a *title of possession*; the forms of which are similar to those in which the same kind of title is alleged in favor of the party pleading.

A title of possession, however (as shown under a former head) cannot be sustained in evidence, except by proving some *present interest* in chattels or *actual possession* of land. If, therefore, the interest be by way of reversion or remainder, it must be laid accordingly, and the title of possession is *inapplicable*. So there are cases, in which to charge a party with mere possession, would not be *sufficient* to show his liability. Thus, in declaring against him in debt for rent, as assignee for a term of years, it would not be sufficient to show that he was possessed, but it must be shown that he was possessed as assignee of the term.

Where a title of possession is thus inapplicable or insufficient, and some other or superior title must be shown, it is yet not necessary to allege the title of an adversary with as much precision as in the case where a party is stating his own,<sup>(s)</sup> and it seems sufficient that it be laid fully enough to show the liability charged. Therefore, though it is the rule with respect to a man's own title *that the commencement of particular estates should be shown*, unless alleged by way of *inducement*, yet in pleading the title of an adversary, it seems that this is in general not necessary. So in cases where it happens to be requisite to show whence the adversary derived his title, this may be done with less precision than where a man alleges his own. And in general it is sufficient to plead such a title by a *que estate*, that is, to allege that the opposite party has the same estate, as has been precedently laid in some other person, without showing in what manner the estate passed from the one to the other. Thus in debt, where the defendant is charged for rent as the assignee of the term after several mesne assignments, it is sufficient, after stating the original demise, to allege, that "after making the said indenture, and during the term thereby granted, to wit, on the — day of —, in the year —, all the estate and interest of the said E. F." (the original lessee) "of and in the said demised premises, by

<sup>(s)</sup> Com. Dig., Pleader (C. 42); *Hill v. Saunders*, 4 Barn. & Cres. 536.

assignment, came to and vested in the said C. D.," without further showing the nature of the mesne assignments.(*t*) But if the case be reversed, that is, if the plaintiff, claiming as assignee of the reversion, sue the lessee for rent, he must precisely show the conveyances, or other media of title, by which he became entitled to the reversion; and to say generally that it came by assignment, will not, in this case, be sufficient, without circumstantially alleging all the mesne assignments.(*u*) Upon the same principle, if title be laid in an adversary, by descent, as, for example, where an action of debt is brought against an heir on the bond of his ancestor, it is sufficient to charge him as *heir*, without showing *how* he is heir, viz, as son or otherwise;(v) but if a party entitle *himself* by inheritance, we have seen that the mode of descent must be alleged.

### § 477. Title must be strictly proved.

The manner of showing title both where it is laid in the party himself, or the person whose authority he pleads, and where it laid in his adversary, having been now considered, it may next be observed that the title so shown must in general, when issue is taken upon it, be strictly *proved*. With respect to the allegations of *time*, *quantity*, and *value*, it has been seen that they in most cases, do not require to be proved as laid, at least if laid under a videlicet. But with respect to *title*, it is ordinarily of the substance of the issue; and therefore, according to the general principle stated in the first chapter of this work, requires to be maintained accurately by the proof. Thus in an action on the case, the plaintiff alleged in his declaration that he demised a house to the defendant for seven years, and that during the term, the defendant so negligently kept his fire that the house was burned down; and the defendant having pleaded *non demisit modo et forma*, it appeared in evidence that the plaintiff had demised to the defendant several tenements, of which the house

(*t*) 1 Saund. 112, note 1; Atty.-Gen. *v.* Meller, Hardr. 459; Duke of Newcastle *v.* Wright, 1 Lev. 190; Derisley *v.* Custance, 4 T. R. 77; 2 Chitty, 196.

(*u*) 1 Saund. 112, note 1; Pitt *v.* Russell, 3 Lev. 19; Dyer, 172, a.

(*v*) Denham *v.* Stephenson, 1 Salk. 355.

in question was one; but that with respect to this house, it was by an exception in the lease, demised at will only. The court held, that though the plaintiff might have declared against the defendant as tenant at will only, and the action would have lain, yet having stated a demise for seven years, the proof of a lease at will was a variance, and *that* in substance, not in form only; and on the ground of such variance, judgment was given for the defendant. (*w*)

### § 478. Estoppel to deny title.

The rule which requires that title should be shown, having been now explained, it will be proper to notice an exception to which it is subject. This exception is, that no title need be shown where the opposite party is *estopped* from denying the title. Thus in an action for goods sold and delivered, it is unnecessary, in addition to the allegation that the plaintiff sold and delivered them to the defendant, to state that they were the goods *of the plaintiff*; (*x*) for a buyer who has accepted and enjoyed the goods cannot dispute the title of the seller. So in debt or covenant brought by the lessor against the lessee on the covenants of the lease, the plaintiff need allege no title to the premises demised, because a tenant is estopped from denying his landlord's title. On the other hand, however, a tenant is not bound to admit title to any extent greater than might authorize the lease; and therefore if the action be brought not by the lessor himself, but by his heir, executor, or other representative or assignee, the title of the former must be alleged, in order to show that the reversion is now legally vested in the plaintiff, in the character in which he sues. Thus, if he sue as heir, he must allege that the lessor was seized in fee, for the tenant is not bound to admit that he was seized in fee; and unless he was so, the plaintiff cannot claim as heir.

Another exception to the general rule requiring title to be shown, has been introduced by statute, and is as follows: In making avowry or cognizance in replevin upon distresses for rents, quit-rents, reliefs, heriots, or other services, the defendant is

(*w*) *Cudlip v. Rundle*, Carth. 202.

(*x*) Bull. N. P. 139.

enabled by the provisions of the act, 11 Geo. 2, c. 19, s. 22, "to avow or make cognizance generally, that the plaintiff in replevin, or other tenant of the lands and tenements, whereon such distress was made, enjoyed the same, under a grant or demise, at such a certain rent, during the time wherein the rent distrained for incurred; which rent was then and still remains due; or that the place where the distress was taken, was parcel of such certain tenements held of such honor, lordship, or manor, for which tenements the rent, relief, heriot, or other services distrained for, was at the time of such distress, and still remains due; without further setting forth the grant, tenure, demise, or title of such landlord or landlords, lessor or lessors, owner or owners of such manor; any law or usage to the contrary notwithstanding."

#### RULE VI.

#### § 479. The pleadings must show authority. (y)

In general when a party has occasion to justify under a writ, warrant or precept, or any other authority whatever he must set it forth particularly in his pleading. And he ought also to show that he has substantially pursued such authority.

\* \* \* \* \*

So in all cases where the defendant justifies under judicial process, he must set it forth particularly in his plea; and it is not sufficient to allege *generally* that he committed the act in question by virtue of a certain writ or warrant directed to him. But on this subject there are some important distinctions as to the degree of particularity which the rules of pleading in different cases require: 1. It is not necessary that any person justifying under judicial process should set forth *the cause of action* in the original suit in which that process issued. 2. If the justification be by the officer executing the writ, he is required to plead such *writ* only, and not the *judgment* on which it was founded; for his duty obliged him to execute the former, without inquiring about

(y) "Regularly, whensoever a man doth anything by force of a warrant or authority, he must plead it." Co. Litt. 283a; Ibid. 303b; Com. Dig., Pleader (E. 17); 1 Saund. 298, n. 1; Lamb v. Mills, 4 Mod. 377; Matthews v. Cary, 3 Mod. 137; Collet v. Lord Keith, 2 East, 260; Selw. N. P. 826; Rich. v. Woolley, 7 Bing. 651.

the validity or existence of the latter. But if the justification be by a party to the suit, or by any stranger, except an officer, the judgment as well as the writ must be set forth. 3. Where it is an officer who justifies, he must show that the writ was *returned*, if it was such as it was his duty to return. But in general a writ of execution need not be returned; and therefore, no return of it need in general be alleged. However, it is said that "if any ulterior process in execution is to be resorted to, to complete the justification, there it may be necessary to show to the court the return of the prior writ, in order to warrant the issuing of the other." Again, there is a distinction as to this point between a principal and a subordinate officer. "The former shall not justify under the process, unless he has obeyed the order of the court in returning it; otherwise it is of one who has not the power to procure a return to be made." 4. Where it is necessary to plead the judgment, that may be done (if it was a judgment of a superior court) without setting forth any of the previous proceedings in the suit. 5. Where the justification is founded on process issuing out of an inferior English court, or, as it seems, a court of foreign jurisdiction, the nature and extent of the jurisdiction of such court ought to be set forth; and it ought to be shown that the cause of action arose within that jurisdiction; though a justification founded on process of any of the superior courts need not contain such allegations. And in pleading a judgment of inferior courts, the previous proceedings are in some measure stated. But it is allowable to set them forth with a *taliter processum est*, thus, that A. B. at a certain court, etc., held at, etc., levied his plaint against C. D. in a certain plea of trespass on the case or debt, etc. (as the case may be) for a cause of action arising within the jurisdiction, and *thereupon such proceedings were had*, that afterwards, etc., it was considered by the said court that the said A. B. should recover against the said C. D., etc.

Notwithstanding the general rule under consideration, it is allowable, where an authority may be constituted verbally and generally, to plead it in general terms. Thus, in replevin, where the defendant makes cognizance, confessing the taking of the goods or cattle as bailiff of another person for rent in arrear or

as damage feasant, it is sufficient to say, that "as bailiff of the said E. T. he well acknowledges the taking, etc., as for and in the name of a distress, etc.," without showing any warrant for that purpose.

The allegation of *authority*, like that of *title*, must in general be strictly proved as laid.

The above-mentioned particulars of *place, time, quality, quantity*, and *value, names of persons, title, and authority*, though in this work made the subjects of distinct rules, in a view to convenient classification and arrangement, are to be considered but as examples of that infinite variety of circumstances, which it may become necessary in different cases and forms of action to particularize for the sake of producing a certain issue; for it may be laid down as a comprehensive rule, that,

#### RULE VII.

### § 480. In general whatever is alleged in pleading must be alleged with certainty. (z)

This rule being very wide in its terms, it will be proper to illustrate it by a variety of examples.

In pleading *the performance of a condition or covenant*, it is a rule, though open to exceptions that will be presently noticed, that the party must not plead generally that he performed the covenant or condition, but must show specially the time, place, and manner of performance; and even though the subject to be performed should consist of several different acts, yet he must show in this special way the performance of each.<sup>18</sup>

\* \* \* \* \*

Thus, in debt on a bond conditioned for the performance of several specific things, "the defendant pleaded *performavit omnia*, etc." Upon demurrer it was adjudged an ill plea; for the particulars being expressed in the condition, he ought to plead to each particular by itself.

(z) Com. Dig., Pleader (C. 17), (C. 22), (E. 5), (F. 17).

18. This rule is cited with approval in Norfolk, etc., R. Co. v. Suffolk R. Co., 92 Va. 413, 23 S. E. 737, and the facts of that case well illustrate the rule.

Yet this rule requiring performance to be specially shown admits of relaxation where the subject comprehends such multiplicity of matter as would lead to great prolixity; and a more general mode of allegation is in such cases allowable. It is open also to the following exceptions. Where the condition is for the performance of matters set forth in another instrument, and these matters are in an affirmative and absolute form, and neither in the negative nor the disjunctive, a general plea of performance is sufficient. And where a bond is conditioned for indemnifying the plaintiff from the consequence of a certain act, a general plea of *non damnificatus*, viz, that he has not been damaged, is proper, without showing how the defendant has indemnified him. These variations from the ordinary rule and the principles on which they are founded will be explained hereafter.

When in any of these excepted cases, however, a general plea of performance is pleaded, the rule under discussion still requires the *plaintiff* to show particularly in his replication in what way the covenant or condition has been *broken*; for otherwise no sufficiently certain issue would be attained. Thus, in an action of debt on a bond conditioned for performance of affirmative and absolute covenants contained in a certain indenture, if the defendant pleads generally (as in that case he may) that he performed the covenants according to the condition, the plaintiff cannot in his replication tender issue with a mere traverse of the words of the plea, viz, that the defendant did not perform any of the covenants, etc.; for this issue would be too wide and uncertain; but he must assign a breach showing specifically in what particular, and in what manner the covenants have been broken. (a)

Not only on the subject of *performance*, but in a variety of other cases, the books afford illustrations of this general rule.

\* \* \* \* \*

Thus where, to a declaration on a promise to pay the debt of a third person, the defendant pleads that there was no agreement or memorandum or note thereof in writing signed by the defendant or any person by him lawfully authorized, as required

(a) *Flower v. Ross*, 5 Taunt. 386. Per Lord Mansfield, *Sayre v. Minnis*, Cowp. 578; Com. Dig., Pleader (F. 14).

by the statute of frauds, and the plaintiff replies that there was such an agreement, concluding to the country, it seems that this replication is insufficient, and that it ought to set the agreement forth.

So in debt on bond, the defendant pleaded that the instrument was executed in pursuance of a certain corrupt contract made at the time and place specified between the plaintiff and defendant, whereupon there was reserved above the rate of 5*l.* for the forbearing of 100*l.* for a year, contrary to the statute in such case made and provided. To this plea there was a demurrer, assigning for cause that the particulars of the contract were not specified, nor the time of forbearance, nor the sum to be forborne, nor the sum to be paid for such forbearance. And the court held that the plea was bad for not setting forth particularly the corrupt contract and the usurious interest; and Bayley, J., observed, that he had "always understood that the party who pleads a contract must set it out, if he be a party to the contract."(*b*)

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In an action of trover for taking a ship, the defendant pleaded that he was captain of a certain man-of-war, and that he seized the ship, mentioned in the declaration, as prize; that he carried her to a certain port in the East Indies; and that the admiralty court there gave sentence against the said ship as prize. Upon demurrer it was resolved that it was necessary for the plea to show some special cause for which the ship became a prize; and that the defendant ought to show who was the judge that gave sentence, and to whom that court of admiralty did belong. And for the omission of these matters the plea was adjudged insufficient.(*c*)

In an action of debt on bond, conditioned to pay so much money yearly, while certain letters-patent were in force, the defendant pleaded that from such a time to such a time he did pay; and that then the letters-patent became void and of no force. The plaintiff having replied, it was adjudged, on demurrer to

(*b*) *Hill v. Montagu*, 2 M. & S. 377; *Hinton v. Roffey*, 3 Mod. 35, S. P.

(*c*) *Beak v. Tyrell*, Carth. 31.

the replication, that the plea was bad; because it did not show *how* the letters-patent became void. (*d*)

Where the defendant justified an imprisonment of the plaintiff, on the ground of a contempt committed *tam factis quam verbis*, the plea was held bad upon demurrer because it set forth the contempt in this general way without showing its nature more particularly. (*e*)

With respect to all points on which certainty of allegation is required, it may be remarked, in general, that the allegation, when brought into issue, requires to be proved in substance as laid; and that the relaxation of the ordinary rule on this subject, which is allowed with respect to *time*, *quantity*, and *value* does not, generally speaking, extend to other particulars.

Such are the principal rules which tend to certainty; but it is to be observed, that these receive considerable *limitation* and *restriction* from some other rules of a subordinate kind, to the examination of which it will now be proper to proceed.

#### SUBORDINATE RULES.

#### § 481. 1. It is not necessary in pleading to state that which is merely matter of evidence. (*f*)

In other words, it is not necessary in alleging a fact; to state such circumstances as merely tend to prove the truth of the fact. This rule may be illustrated by the following cases.

\*            \*            \*            \*            \*

[Thus, in an action by a servant against the master to recover damages for injuries received while constructing a pier, where the declaration set forth the circumstances under which the injury was received with sufficient certainty to enable the defendant to fairly present his grounds of defence, it was held that it was unnecessary to give in detail the methods employed

(*d*) *Lewis v. Preston*, 1 Show. 290; *Skin*. 303, S. C.

(*e*) *Collett v. Baliffs of Shrewsbury*, 2 Leo. 34.

(*f*) "Evidence shall never be pleaded because it tends to prove matter in fact; and therefore the matter in fact shall be pleaded." *Dowman's Case*, 9 Rep. 9b; and see 9 Ed. 3, 5b, 6a, there cited; *Eaton v. Southby*, *Willes*, 131; *Jedmy v. Jenny*, *Raym.* 8; *Groenvelt v. Burnell*, *Carth.* 491; *Digby v. Alexander*, 8 *Bing.* 416; *Martin v. Smith*, 6 *East.* 563.

by the defendant in the construction of the pier, as that was a mere matter of evidence.<sup>19</sup> So where a telegraph company filed a bill to restrain the operation of electric light wires which had been placed so close to complainant's wires as to interfere with and injuriously affect the working of the latter, but did not state the distance at which an electric current on one wire will affect another, it was held that this was a mere matter of evidence, and it was not necessary to state it in the pleadings.<sup>20</sup> Again, where the declaration in a case for negligent killing alleged that the intestate and the driver of the team were in the exercise of due care at the time of the accident, the defendant, by two special pleas, set out the various facts and circumstances tending to show that they were not in the exercise of due care. The pleas were held bad for alleging that which was merely a matter of evidence.]<sup>21</sup>

The reason of this rule is evident, if we revert to the general object which all the rules tending to certainty contemplate, viz, the attainment of a certain issue. This implies (as has been shown), a development of the question in controversy in a specific shape; and the *degree* of specification with which this should be developed, it has been elsewhere attempted, in a general way, to define. But, so that that object be attained, there is, in general, no necessity for further minuteness in the pleading; and therefore those subordinate facts which go to make up the evidence by which the affirmative or negative of the issue is to be established, do not require to be alleged, and may be brought forward, for the first time, at the trial, when the issue comes to be decided.

\* \* \* \* \*

This is a rule, so elementary in its kind and so well observed in practice, as not to have become frequently the subject of illustration by decided cases; and (for that reason probably) is little if at all noticed in the digests and treatises. It is, however,

19. C. & O. Ry. Co. v. Hoffman, 109 Va. 44, 63 S. E. 432.

20. Western Union Tel. Co. v. Los Angeles Electric Co., 76 Fed. 178.

21. Boyden v. Fitchburg R. Co., 70 Vermont 125, 39 Atl. 77. In this connection, compare Ches. & O. R. Co. v. Mathews (Va.), 76 S. E. 288.

a rule of great importance, from the influence which it has on the general character of English pleading; and it is this, perhaps, more than any other principle of the science, which tends to prevent that minuteness and prolixity of detail, in which the allegations, under other systems of judicature, are involved.

Another rule, that much conduces to the same effect is, that:

**§ 482. 2. It is not necessary to state matter of which the court takes notice ex officio. (g)**

Therefore it is unnecessary to state *matter of law*; (h) for this the judges are bound to know, and can apply for themselves to the facts alleged. Thus, if it be stated in pleading that an officer of a corporate body was removed for misconduct by the corporate body at large, it is unnecessary to aver that the power of removal was vested in such corporate body; because that is a power by law incidental to them, unless given by some charter, by-law, or other authority, to a select part only. (i) Nor is it the principles of the *common law* alone which it is unnecessary to state in pleading. The *public statute law* falls within the same reason and the same rule; as the judges are bound, officially, to notice the tenor of every public act of parliament. (j) It is, therefore, never necessary to set forth a public statute. (k) The case, however, of *private* acts of parliament is different; for these the court does not officially notice; (l) and, therefore, where a party has occasion to rely on an act of this description, he must set forth such parts of it as are material. (m)<sup>22</sup>

(g) Co. Litt. 303b; Com. Dig., Pleader (C. 78); Deybel's Case, 4 Barn. & Ald. 243.

(h) Doct. Pl. 102; Per Buller, J., *The King v. Lyme Regis*, Doug. 159.

(i) *The King v. Lyme Regis*, Doug. 148.

(j) 1 Bl. Com. 85.

(k) *Boyce v. Whitaker*, Doug. 97; *Partridge v. Strange*, Plow. 84.

(l) 1 Bl. Com., *Ibid.*; *Platt v. Hill*, Ld. Ray. 381.

(m) *Boyce v. Whitaker*, Doug. 97.

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22. It is provided by statute in Va. and W. Va. that private acts may be given in evidence without being specially pleaded, and an appellate court shall take judicial notice of such as appear to have been relied on in the court below. Va. Code, § 3328; W. Va. Code, § 3922.

It may be observed, however, that though it is in general unnecessary to allege matter of law, yet there is some times occasion to make mention of it, for the convenience or intelligibility of the statement of fact. Thus, in an action of assumpsit it is very common to state that the defendant, under the particular circumstances set forth in the declaration, *became liable* to pay; and being so liable, in consideration thereof promised to pay. So it is sometimes necessary to refer to a public statute in general terms, to show that the case is intended to be brought within the statute; as for example, to allege that the defendant committed a certain act *against the form of the statute in such case made and provided*; but the reference is made in this general way only, and there is no need to set the statute forth.<sup>23</sup>

This rule, by which matter of law is omitted in the pleadings, by no means prevents (it will be observed) the attainment of the requisite certainty of issue. For even though the dispute between the parties should turn upon matter of law, yet they may evidently obtain a sufficiently specific issue of that description, without any *allegation* of law; for *ex facto jus oritur*, that is, every question of law necessarily arises out of some given state of facts; and therefore nothing more is necessary than for each party to state alternately his case in point of fact; and upon demurrer to the sufficiency of some one of these pleadings, the issue in law must at length (as formerly demonstrated) arise.

As it is unnecessary to allege matter of law, so if it *be* alleged, it is improper (as it has been elsewhere stated) to make it the subject of traverse.

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[*Foreign Law*.—The laws of other states and countries are regarded as facts and when relied on as a ground of action or defence must be alleged in the pleadings and proved as other facts. The construction and application of such laws, however, are for the court and not for the jury, though upon this subject there is conflict of authority. Courts of the States take judicial notice

<sup>23</sup>. In an action for insulting words under Va. Code, § 2897, it must in some way be made to appear that the plaintiff is suing under the statute and not for common law slander. *Hogan v. Wilmouth*, 16 Gratt. 80.

of what States have the common law as the basis of their jurisprudence, but in the absence of any proof of what the common law of another State is the trial court refuses to recognize that it is different from the law of the forum unaffected by statute.<sup>24</sup>

Matters of fact of which the court takes judicial notice stand in the place of evidence and generally need not be averred in the pleading unless necessary for a right understanding of the case.]

**§ 483. 3. It is not necessary to state matter which would come more properly from the other side.(n)**

This, which is the ordinary form of the rule, does not fully express its meaning. The meaning is, that it is not necessary to anticipate the answer of the adversary; which, according to Hale, C. J., is "like leaping before one comes to the stile."<sup>(o)</sup> It is sufficient that each pleading should in itself contain a good *prima facie* case, without reference to possible objection not yet urged. Thus, in pleading a devise of land by force of the statute of wills, 32 Hen. 8, c. 1, it is sufficient to allege that such an one was seized of the land in fee, and devised it by his last will, in writing, without alleging that such devisor was of full age. For though the statute provides that wills made by femmes covert, or persons within age, etc., shall not be taken to be effectual, yet if the devisor were within age, it is for the other party to show this in his answer<sup>(p)</sup> and it need not be denied by anticipation.

So in a declaration of debt upon a bond it is unnecessary to allege that the defendant was of full age when he executed it.<sup>(q)</sup>

(n) Com. Dig., Pleader (C. 81); *Stowell v. Lord Zouch*, Plow. 376; *Walsingham's Case*, id., 564; *St. John v. St. John*, Hab. 78; *Hotham v. East India Co.*, 1 T. R. 638; *Palmer v. Lawson*, 1 Sid. 333; *Lake v. Raw*, Cartli. 8; *Williams v. Fowler*, Str. 410.

(o) *Sir Ralph Bovy's Case*, Vent. 217.

(p) *Stowell v. Lord Zouch*, Plow. 376.

(q) *Walsingham's Case*, Plow. 564; *Sir Ralph Bovy's Case*, 1 Vent. 217.

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24. Gr. Ev. (16th Ed.), §§ 6b, 486, 487; *Minor Conflict of Laws*, § 214; *Frank v. Gump*, 104 Va. 306, 51 S. E. 358; *App v. App*, 106 Va. 253, 55 S. E. 672; *N. & W. Ry. Co. v. Denny*, 106 Va. 383, 56 S. E. 321; *Union Cent. L. Ins. Co. v. Pollard*, 94 Va. 146, 26 S. E. 421.

But where the matter is such that its affirmation or denial is essential to the apparent or *prima facie* right of the party pleading, there it ought to be affirmed or denied by him in the first instance, though it may be such as would otherwise properly form the subject of objection on the other side. Thus, in an action of trespass on the case brought by a commoner against a stranger for putting his cattle on the common, *per quod communiam in tam amplo modo habere non potuit*, the defendant pleaded a license from the lord to put his cattle there, but did not aver that there was sufficient common left for the commoners. This was held, on demurrer, to be no good plea; for though it may be objected that the plaintiff may reply that there was not enough common left, yet as he had already alleged in his declaration that his enjoyment of the common was obstructed, the contrary of this ought to have been shown by the plea. (†)

[It is held in Virginia, and by the weight of authority generally, that in an action for an injury negligently inflicted on the plaintiff by the defendant it is not necessary for the plaintiff to negative his contributory negligence.<sup>25</sup> So, where plaintiff sued the defendant for negligently keeping a horse as inn keeper and permitting him to escape, so that he was lost, the declaration failed to show the manner of keeping the horse and how he escaped. On exception, the declaration was held good, as this was matter lying more particularly in the defendant's knowledge, and would come more properly from him.]<sup>26</sup>

There is an exception to the rule in question, in the case of certain pleas which are regarded unfavorably by the courts, as having the effect of excluding the truth. Such are all pleadings in *estoppel(s)* and the plea of *alien enemy*. It is said that these must be *certain in every particular*; which seems to amount to this, that they must meet and remove by anticipation every possible answer of the adversary. Thus, in a plea of alien enemy, the defendant must state not only that the plaintiff was born in a

(†) *Smith v. Feverell*, 2 Mod. 6; 1 Freeman, 190, S. C.; *Greenhow v. Ilsley*, Willes, 619.

(s) Co. Litt. 352b, 303a; *Dovaston v. Payne*, 2 H. Bl. 530.

25. *Winchester v. Carroll*, 99 Va. 727, 40 S. E. 37; *Newport News Co. v. Beaumester*, 104 Va. 744, 52 S. E. 627, 29 Cyc. 575-6.

26. *Owens v. Geiger*, 2 Mo. 39.

foreign country, now at enmity with the king, but that he came here without letters of safe conduct from the king; (*t*) whereas, according to the general rule in question, such safe conduct, if granted, should be averred by the plaintiff in reply, and would not need in the first instance to be denied by the defendant.

**§ 484. 4. It is not necessary to allege circumstances necessarily implied. (*u*)**

Thus, in an action of debt on a bond conditioned to stand to and perform the award of W. R., the defendant pleaded that W. R. made no award. The plaintiff replied, that after the making of the bond, and before the time for making the award, the defendant, by his certain writing, revoked the authority of the said W. R., contrary to the form and effect of the said condition. Upon demurrer, it was held that this replication was good, without averring that W. R. had notice of the revocation; because, that was implied in the words "revoked the authority;" for there could be no revocation without notice to the arbitrator; so that if W. R. had no notice, it would have been competent to the defendant to tender issue, "that he did not revoke in manner and form as alleged." (*v*) So if a feoffment be pleaded, it is not necessary to allege livery of seizin, for it is implied in the word "enfeoffed." (*w*) So if a man plead that he is heir to A., he need not allege that A. is dead, for it is implied. (*x*)

[So where the plaintiff declared that the defendant negligently caused a bomb, or explosive, to be, or remain, in a public alley, so that as the proximate consequence of such negligence, the plaintiff was injured, it was objected that the declaration did not aver any duty owing by the defendant to the plaintiff, but the court

(*t*) *Casseres v. Bell*, 8 T. R. 166.

(*u*) *Vynior's Case*, 8 Rep. 81b; Bac. Ab., Pleas, etc. (1), 7; Com. Dig., Pleader (E. 9); Co. Litt. 303b; 2 Saund. 305a, n. 13; Reg. Plac. 101; *Sheers v. Brooks*, 2 H. Bl. 120; *Handford v. Palmer*, 2 Brod. & Bing. 361; *Marsh v. Bulteel*, 5 Barn. & Ald. 507.

(*v*) *Vynior's Case*, 8 Rep. 81b; *Marsh v. Bulteel*, 5 Barn. & Ald. 507, S. P.

(*w*) Co. Litt. 303b; Doct. Pl. 48, 49; 2 Saund. 305a, n. 13.

(*x*) 2 Saund. 305a, n. 13; Com. Dig., Pleader (E. 9); Dal. 67.

held that the law implied a duty and that it was not therefore necessary to aver it in terms in the complaint.<sup>27</sup>

Thus, in an action of slander for defamation of character, it is not necessary for the plaintiff to allege or prove that he is a man of good character, as the law will presume it. So, also, where a railway company demurred to the plaintiff's declaration because it failed to allege that the hotel business and saloon business, which the railway company was charged with injuring, was lawful, it was held that the allegation was unnecessary, as the law would presume that the plaintiff was conducting his business in a lawful manner.<sup>28</sup> And where a petition alleged a judgment of a court of general jurisdiction, and objection was made on the ground that the declaration did not allege that said judgment was "duly rendered," it was held that judgments of superior courts are presumed to be duly rendered, and the fact need not be alleged in the pleadings.]<sup>29</sup>

**§ 485. 5. It is not necessary to allege what the law will presume. (y)**

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**§ 486. 6. A general mode of pleading is allowed where great prolixity is thereby avoided. (z)**

It has been objected with truth that this rule is indefinite in its form. (a) Its extent and application however, may be col-

(y) *Wilson v. Hobday*, 4 M. & S. 125; *Chapman v. Pickersgill*, 2 Wils. 147; 1 Chitty. 226.

(z) Co. Litt. 303b; 2 Saund. 116b, 411, n. 4; Bac. Ab., Pleas, etc. (I) 3; *Jermy v. Jenny*, Raym. 8; *Aglionby v. Towerson*, id. 400; *Parks v. Middleton*, Lutw. 421; *Cornwallis v. Savery*, 2 Burr. 772; *Mints v. Bethil*, Cro. Eliz. 749; *Braban v. Bacon*, id. 916; *Church v. Brownwick*, 1 Sid. 334; *Cryps v. Baynton*, 3 Bulst. 31; *Banks v. Pratt*, Sty. 428; *Carth. 110*; *P'Anson v. Stuart*, 1 T. R. 753; *Hill v. Montagu*, 2 M. & S. 378.

(a) 1 Arch. 211.

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27. *Wells v. Gallagher*, 144 Ala. 363, 39 South. 519.

28. *Inter. & G. N. Ry. Co. v. Greenwood*, 2 Tex. Civ. App. 76, 21 S. W. 559.

29. *Terry v. Johnson*, 109 Ky. 589, 60 S. W. 300.

lected with some degree of precision from the examples by which it is illustrated in the books, and by considering the limitations which it necessarily receives from the rules tending to certainty, as enumerated in a former part of this section.

In assumpsit, on a promise by the defendant to pay for all such necessaries as his friend should be provided with by the plaintiff, the plaintiff alleged that he provided necessaries amounting to such a sum. It was moved in arrest of judgment that the declaration was not good, because he had not shown what necessaries in particular he had provided. But Coke, C. J., said, "this is good as is here pleaded, for avoiding such multiplicities of reckonings;" and Doddridge, J., "this general allegation that he had provided him with all necessaries is good, without showing in particular what they were." And the court gave judgment unanimously for the plaintiff.(b) So in assumpsit for labor, and medicines for curing the defendant of a distemper, the defendant pleaded infancy. The plaintiff replied that the action was brought for necessaries generally. On demurrer to the replication, it was objected that the plaintiff had not assigned in certain how or in what manner the medicines were necessary; but it was adjudged that the replication in this general form was good; and the plaintiff had judgment.(c) So in debt on a bond conditioned that the defendant shall pay from time to time the moiety of all such money as he shall receive and give account of it, he pleaded generally that he had paid the moiety of all such money, etc. *Et per curiam*, "This plea of payment is good without showing the particular sums; and that, in order to avoid stuffing the rolls with multiplicity of matter." Also, they agreed that, if the condition had been to pay the moiety of such money, as he should receive, without saying *from time to time*, the payment should have been pleaded specially.(d)

[The plaintiff sued a railroad company for its negligent failure to furnish them cars on demand, and set out in his declaration the general facts which constituted his cause of action. The de-

(b) *Cryps v. Baynton*, 3 Bulst. 31.

(c) *Huggins v. Wiseman*, Carth. 110.

(d) *Church v. Brownwick*, 1 Sid. 334; and see *Mints v. Bethil*, Cro. Eliz. 749.

fendant objected to the declaration, and insisted that each demand and refusal should be set out in a separate paragraph of the complaint, as it constituted a separate cause of action. These causes of actions, amounting to several hundred in number, covered a period of six years, and the plaintiff had inserted them in one paragraph. *Held*, that the declaration was good, and that to avoid prolixity the law allows general pleading where the subject comprehends a multiplicity of matters, and a great variety of facts.]<sup>30</sup>

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So in debt on bond conditioned that R. S. should render to the plaintiff a just account and make payment and delivery of all moneys, bills, etc., which he should receive as his agent, the defendant pleaded performance. The plaintiff replied that R. S. received as such agent divers sums of money amounting to £2,000, belonging to the plaintiff's business, and had not rendered a just account nor made payment and delivery of the said sum or any part thereof. The defendant demurred specially, assigning for cause, that it did not appear by the replication, from whom or in what manner, or in what proportions, the said sums of money amounting to £2,000 had been received. But the court held the replication "agreeable to the rules of law, and precedents." (e)

[If, however, a party be charged with fraud, he is entitled to know the particular instances on which fraud is founded, and to have them disclosed to him.<sup>31</sup>

In Virginia the pleading on an insurance policy is greatly shortened by virtue of the statutory provision allowing the party to file a complaint, together with the original policy, or a sworn copy thereof, and aver generally that he has performed all of the conditions of said policy and violated none of its prohibitions, and that it shall not be necessary to set forth every condition or proviso of said policy, nor to aver observance of, or compliance

(e) *Shum v. Farrington*, 1 Bos. & Pul. 640; and see a similar decision, *Burton v. Webb*, 8 T. R. 459.

30. *Chicago, etc., R. Co. v. Walcott*, 141 Ind. 267, 50 Am. St. Rep. 320. Compare *Moore v. Mauro*, 4 Rand. 488.

31. *J'Anson v. Stuart*, 2 Smith's Leading Cases 986.

therewith *seriatim*, but that a general averment to that effect shall suffice.]<sup>32</sup>

**§ 487. 7. A general mode of pleading is often sufficient, where the allegation on the other side must reduce the matter to certainty.(f)**

This rule comes into most frequent illustration in pleading *performance* in *actions of debt on bond*. It has been seen that the general rule as to certainty, requires that the time and manner of such performance should be specially shown. Nevertheless by virtue of the rule now under consideration, it may be sometimes alleged in general terms only; and the requisite certainty of issue is in such cases secured, by throwing on the plaintiff the necessity of showing a special breach in his replication. This course, for example, is allowed in cases where a more special form of pleading would lead to inconvenient prolixity.

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[At common law a penal bond with condition might be declared on in either of two ways: (1) the whole bond, including the condition, might be set out in the declaration and the breaches of the condition assigned, or, (2), the plaintiff might sue simply on the penal part of the bond, taking no notice of the condition whatever. In the latter case, the plaintiff could then crave oyer of the bond and of the condition thereunder written, and plead generally that he had well and truly kept and performed the conditions of the bond. The issue would then be made more specific by the replication of the plaintiff, setting out in what manner the defendant had violated the conditions of the bond. This latter course, while formerly allowed in Virginia, cannot now be adopted, as the statute requires that the *declaration* shall assign the specific breaches for which action shall be brought.]<sup>33</sup>

Another illustration is afforded by the plea of *non damnificatus*, in an action of debt on an indemnity bond, or bond conditioned

(f) Co. Litt. 303b; *Mints v. Bethil*, Cro. Eliz. 749; 1 Saund. 117, n. 1; 2 Saund. 416, n. 3; *Church v. Brownwick*, 1 Sid. 334.

32. Code, § 3251.

33. Code, § 3394.

“to keep the plaintiff harmless and indemnified,” etc. This is in the nature of a plea of performance; being used where the defendant means to allege that the plaintiff has been kept harmless and indemnified, according to the tenor of the condition; and it is pleaded in general terms without showing the particular manner of the indemnification. Thus, if an action of debt be brought on a bond, conditioned that the defendant “do from time to time acquit, discharge, and save harmless, the churchwardens of the parish of P., and their successors, etc., from all manner of costs and charges, by reason of the birth and maintenance of a certain child”—if the defendant means to rely on the performance of the condition, he may plead in this general form—“that the churchwardens of the said parish, or their successors, etc., from the time of making the said writing obligatory, were not in any manner damnified by reason of the birth or maintenance of the said child; (g) and it will then be for the plaintiff to show in the replication, how the churchwardens were damnified. But with respect to the plea of *non damnificatus*, the following distinctions have been taken: First, if, instead of pleading in that form, the defendant alleges affirmatively, that he has “saved harmless,” etc., the plea will in this case be bad, unless he proceeds to show specifically *how* he saved harmless. (h) Again, it is held that if the condition does not use the words “indemnify,” or “save harmless,” or some equivalent term, but stipulates for the performance of some *specific act*, intended to be by way of indemnity, such as the payment of a sum of money by the defendant to a third person, in exoneration of the plaintiff’s liability to pay the same sum,—the plea of *non damnificatus* will be improper;<sup>34</sup> and the defendant should plead performance specifically, as “that he paid the said sum,” etc. (i) It is also laid down that if the condition of the bond be to “discharge” or “acquit” the plaintiff from a particular thing, the plea of *non damnificatus* will not

(g) *Richard v. Hodges*, 2 Saund. 84; *Hays v. Bryant*, 1 H. Bl. 253; Com. Dig., Pleader (E. 25), 2 W. 33; *Manser’s Case*, 2 Rep. 4a; 7 Went. Index, 615; 5 Went. 531.

(h) 1 Saund. 117, n. 1; *White v. Cleaver*, Str. 681.

(i) *Holmes v. Rhodes*, 1 Bos. & Pul. 638.

34. *Archer v. Archer*, 8 Gratt. 539.

apply; but the defendant must plead performance specially, "that he discharged and acquitted," etc., and must also show the manner of such acquittal and discharge.(j) But, on the other hand, if a bond be conditioned to "discharge and acquit the plaintiff from any damage" by reason of a certain thing, *non damnificatus* may then be pleaded, because that is in truth the same thing with a condition to "indemnify and save harmless," etc.(k)

The rule under consideration is also exemplified in the case where the condition of a bond is for the performance of covenants, or other matters *contained in an indenture or other instrument collateral to the bond, and not set forth in the condition*; In this case also the law often allows (upon the same principle as in the last) a general plea of performance, without setting forth the manner.(l) Thus, in an action of debt on bond, where the condition is that T. J., deputy postmaster of a certain stage, "shall and will truly, faithfully, and diligently, do, execute, and perform all and every the duties belonging to the said office of deputy postmaster of the said stage, and shall faithfully, justly, and exactly observe, perform, fulfill, and keep all and every the instructions, etc., from his Majesty's postmaster-general," and such instructions are in an affirmative and absolute form, as follows: "you shall cause all letters and packets to be speedily and without delay carefully and faithfully delivered, that shall from time to time be sent unto your said stage, to be dispersed there, or in the towns and parts adjacent, that all persons receiving such letters may have time to send their respective answers," etc., it is sufficient for the defendant to plead (after setting forth the instructions) "that the said T. J., from the time of the making the said writing obligatory, hitherto hath well, truly, faithfully, and diligently done, executed, and performed, all and every the duties belonging to the said office of deputy postmaster of the said stage, and faithfully, justly, and exactly observed, performed, fulfilled, and kept all and every the instructions, etc., ac-

(j) 1 Saund. 117, n. 1; *Bret v. Audar*, 1 Leon, 71; *White v. Cleaver*, Str. 681; *Leneret v. Rivet*, Cro. Jac. 503; *Harris v. Prett*, 5 Mod. 243.

(k) 1 Saund. 117, n. 1; Carth. 375.

(l) *Mints v. Bethil*, Cro. Eliz. 749; Bac. Ab., Pleas, etc. (I.) 3; 2 Saund. 410, n. 3; 1 Saund. 117, n. 1; Com. Dig., Pleader (2 V. 13); *Earl of Kerry v. Baxter*, 4 East, 340.

ording to the true intent and meaning of the said instructions," without showing the manner of performance, as that he did cause certain letters or packets to be delivered, etc., being all that were sent. (*m*) So, if a bond be conditioned for fulfilling all and singular the covenants, articles, clauses, provisos, conditions, and agreements, comprised in a certain indenture, on the part and behalf of the defendant, which indenture contains covenants of an affirmative and absolute kind only, it is sufficient to plead (after setting forth the indenture) that the defendant always hitherto hath well and truly fulfilled all and singular the covenants, articles, clauses, provisos, conditions, and agreements, comprised in the said indenture, on the part and behalf of the said defendant. (*n*)

But the adoption of a mode of pleading so general as in these examples will be improper where the covenants or other matters mentioned in the collateral instrument are either in the *negative* or the *disjunctive* form; (*o*) and with respect to such matters, the allegation of performance should be more specially made, so as to apply exactly to the tenor of the collateral instrument. Thus, in the example above given, of a bond conditioned for the performance of the duties of a deputy-postmaster, and for observing the instructions of the postmaster-general, if, besides those in the *positive* form, some of these instructions were in the *negative*, as for example, "you shall not receive any letters or packets directed to any seaman, or unto any private soldier, etc., unless you be first paid for the same, and do charge the same to your account as paid," it would be improper to plead merely that T. J. faithfully performed the duties belonging to the office, etc., and all and every the instructions, etc. Such plea will apply sufficiently to the positive, but not to the negative part of the instructions. The form therefore should be as follows: "That the said T. J. from the time of making the said writing obligatory hitherto, hath well, truly, faithfully, and diligently executed and per-

(*m*) 2 Saund. 403b, 410, n. 3.

(*n*) Gainsford *v.* Griffith, 1 Saund. 117, n. 1; Earl of Kerry *v.* Baxter, 4 East, 340. See the form, 2 Chitty, 483.

(*o*) Earl of Kerry *v.* Baxter, 4 East, 340; Oglethorpe *v.* Hyde, Cro. Eliz. 233; Lord Arlington *v.* Merricke, 2 Saund. 410, and note 3, *Ibid.*

formed all and every the duties belonging to the said office of deputy-postmaster of the said stage, and faithfully, justly, and exactly observed, performed, fulfilled, and kept all and every the instructions, etc., according to the true intent and meaning of the said instructions. And the said defendant further says, that the said T. J. from the time aforesaid did not receive any letters or packets directed to any seaman or private soldier, etc., unless he, the said T. J. was first paid for the same, and did so charge himself in his account with the same as paid," etc. And the case is the same where the matters mentioned in the collateral instrument are in the *disjunctive* or *alternative* form; as where the defendant engages to do either one thing or another. Here also a general allegation of performance is insufficient, and he should show which of the alternative acts was performed. (*p*)

The reasons why the general allegation of performance does not properly apply to negative or disjunctive matters, are, that in the first case the plea would be indirect or *argumentative* in its form—in the second, equivocal; and would in either case, therefore, be objectionable in reference to certain rules of pleading, which we shall have occasion to consider in the next section.

It has been stated in a former part of this work that where a party founds his answer upon any matter not set forth by his adversary, but contained in a deed, of which the latter makes profert, he must demand *oyer* of such deed, and set it forth. In pleading performance, therefore, of the condition of a bond, where (as is generally the case) the plaintiff has stated in his declaration, nothing but the bond itself, without the condition, it is necessary for the defendant to demand *oyer* of the condition, and set it forth. (*q*) And where the condition is for performance of matters contained in a *collateral* instrument, it is necessary not only to do this, but also to make profert, and set forth the whole substance of the collateral instrument; for otherwise, it will not appear that the instrument did not stipulate for the performance of negative or disjunctive matters; (*r*) and in that case the general plea of performance of the matters therein contained would (as above shown) be improper.

(*p*) *Oglethrope v. Hyde*, Cro. Eliz. 233.

(*q*) 2 Saund. 410, n. 2.

(*r*) See *Earl of Kerry v. Baxter*, 4 East. 340.

**§ 488. 8. No greater particularity is required than the nature of the thing pleaded will conveniently admit.** (s)

Thus, though generally in an action for injury to goods, the *quantity* of the goods must be stated, yet if they cannot under the circumstances of the case be conveniently ascertained by number, weight, or measure, such certainty will not be required. Accordingly in trespass for breaking the plaintiff's close with beasts, and eating his peas, a declaration not showing the quantity of peas has been held sufficient, "because nobody can measure the peas that beasts can eat." So in an action on the case for setting a house on fire, *per quod* the plaintiff amongst divers other goods, *ornatus pro equis amisit*; after verdict for the plaintiff it was objected that this was uncertain; but the objection was disallowed by the court. And in this case Windham, J., said, that if he had mentioned only *diversa bona*, yet it had been well enough, as a man cannot be supposed to know the certainty of his goods when his house is burnt; and added, that to avoid prolixity, the law will sometimes allow such a declaration." (ss)

\* \* \* \* \*

[In an action against a railway company to recover for an injury negligently inflicted by the company's servants on plaintiff, the complaint, among other things, alleged that the engineer of the defendant negligently and "carelessly gave his engine steam and commenced to back the locomotive towards and upon the street car aforesaid." Defendant objected to this on the ground that the cause of action had not been sufficiently stated, in that it did not show more specifically how the defendant's engineer was negligent. The objection, however, was overruled and it was held that in this case the plaintiff could not well have made his charge of negligence more particular, owing to the nature of the wrong, and, it being thus inconvenient, no greater particularity would be required.<sup>35</sup>

(s) Bac. Ab., Pleas, etc. (B) 5, 5; and p. 409, 5th Ed.; Buckley v. Rice Thomas, Plow 118; Wimbish v. Tailbois, id. 54; Partridge v. Strange, id. 85; Hartly v. Herring, 3 T. R. 130.

(ss) Bac. Ab., Pleas, etc., 409.

35. Stephenson v. South. R. Co., 102 Cal. 143, 34 Pac. 618.

A more stringent rule appears to have been adopted in a case in Virginia. A count in a declaration against a railway company charged, in the language of the statute that the defendant failed to keep its right of way, at a public crossing where the injury was inflicted "sufficiently smooth and level to admit of safe and speedy travel over such crossing," but on the contrary, through its negligence, the public road at the crossing, and within the defendant's right of way, was rough, gullied and obstructed, and that, the plaintiff's horse becoming frightened, she was unable to control it as she otherwise could have done, and that the buggy in which she was riding was drawn by her horse with great violence against the crossing sign post of the defendant, the buggy broken, the plaintiff thrown out, and the injuries complained of inflicted. The count was held bad, on demurrer, because it failed to show the nature of the gullies and obstructions which it avers were in the highway, or how they prevented the plaintiff from controlling her horse, or such a state of facts as would show that the condition of the highway was the proximate cause of her injuries.]<sup>36</sup>

**§ 489. 9. Less particularity is required when the facts lie more in the knowledge of the opposite party than of the party pleading. (t)**

This rule is exemplified in the case of alleging title in an adversary, where (as formerly explained) a more general statement is allowed than when title is set up in the party himself. So in an action of covenant, the plaintiff declared, that the defendant by indenture demised to him certain premises, with a covenant that he, the defendant, had full power and lawful authority to demise the same according to the form and effect of the said indenture; and then the plaintiff assigned a breach, that the defendant had not full power and lawful authority to demise the said premises, according to the form and effect of the said indenture. After verdict for the plaintiff it was assigned for error, that he had not

(t) *Rider v. Smith*, 3 T. R. 766; *Derisley v. Custance*, 4 T. R. 77; *Atty.-Gen. v. Meller*, Hard. 459; *Denham v. Stephenson*, 1 Salk. 335; *Com. Dig., Pleader (C. 26)*; *Robert Bradshaw's Case*, 9 Rep. 60b; *Gale v. Read*, 8 East. 80.

36. *Norfolk & W. R. Co. v. Gee*, 104 Va. 806, 52 S. E. 572. But see *Penn. Foundry v. Probst*, 114 Va. —, 76 S. E. 323.

in his declaration shown "what person had right, title, estate or interest in the lands demised, by which it might appear to the court that the defendant had not full power and lawful authority to demise." But "upon conference and debate amongst the justices it was resolved, that the assignment of the breach of covenant was good, for he has followed the words of the covenant negatively; and it lies more properly in the knowledge of the lessor what estate he himself has in the land which he demises than the lessee, who is a stranger to it."(*u*)

\* \* \* \* \*

**§ 490. 10. Less particularity is necessary in the statement of matter of inducement or aggravation, than in the main allegations.**(*v*)

This rule is exemplified in the case of the derivation of title, where, though it is a general rule *that the commencement of a particular estate must be shown*, yet an exception is allowed if the title be alleged by way of *inducement* only.

\* \* \* \* \*

So in trespass, the plaintiff declared that the defendant broke and entered his dwelling-house, and "wrenched and forced open, or caused to be wrenched and forced open, the closet-doors, drawers, chests, cupboards, and cabinets of the said plaintiff." Upon special demurrer it was objected, that the number of closet-doors, drawers, chests, cupboards, and cabinets was not specified. But it was answered, "that the breaking and entering the plaintiff's house was the principal ground and foundation of the present action; and all the rest are not foundations of the action, but matters only thrown in to aggravate the damages, and on that ground need not be particularly specified." And of that opinion was the whole court, and judgment was given for the plaintiff.(*w*)

(*u*) Robert Bradshaw's Case, 9 Rep. 60b.

(*v*) Co. Litt. 303a; Bac. Ab., Pleas, etc., pp. 322, 348 (5th Ed.); Com. Dig., Pleader (C. 31), (C. 43), (E. 10), (E. 18); Doct. Pl. 283; Wetherell v. Clerkson, 12 Mod. 597; Chamberlain v. Greenfield, 3 Wils. 292; Alsope v. Sytwell, Yelv. 17; Riggs v. Bullingham, Cro. Eliz. 715; Woolaston v. Webb, Hob. 18; Bishop of Salisbury's Case, 10 Rep. 59b; 1 Saund. 274, n. 1.

(*w*) Chamberlain v. Greenfield, 3 Wils. 292.

**§ 491. 11. With respect to acts valid at common law, but regulated as to the mode of performance by statute, it is sufficient to use such certainty of allegation as was sufficient before the statute.(x)**

Thus, by the common law, a lease for any number of years might be made by parol only; but by the statute of frauds, 29 Car. 2, c. 3, s. 1, 2, all leases and terms for years made by parol, and not put into writing, and signed by the lessors or their agents authorized by writing, shall have only the effect of leases at will, except leases not exceeding the term of three years from the making. Yet in a declaration of debt for rent on a demise, it is sufficient (as it was at common law) to state a demise for any number of years, without showing it to have been in writing, though where the lease is by indenture, the instrument is in practice usually set forth. So, in the case of a promise to answer for the debt, default, or miscarriage, of another person (which was good by parol, at common law, but by the statute of frauds, § 4, is not valid unless the agreement, or some memorandum or note thereof be in writing, and signed by the party, etc.), the declaration on such promise need not allege a written contract.(y)

And on this subject the following difference is to be remarked that "where a thing is originally made by act of parliament, and required to be in writing, it must be pleaded with all the circumstances required by the act; as in the case of a will of lands, it must be alleged to have been made in writing; but where an act makes writing necessary to a matter where it was not so at the common law, as where a lease for a longer term than three years is required to be in writing by the statute of frauds, it is not necessary to plead the thing to be in writing, though it must be proved to be so in evidence."

As to the rule under consideration, however, a distinction has been taken between a *declaration* and a *plea*, and it is said, that though in the former, the plaintiff need not show the thing to be in writing, in the latter the defendant must. Thus, in an action of *indebitatus assumpsit*, for necessities provided for the de-

(x) 1 Saund. 276, n. 2; id. 211; Anon., Salk. 519; Birch v. Bellamy, 12 Mod. 540; Bac. Ab., Statute (L.) 3; 4 Hen. 7, 8.

(y) 1 Saund. 211; Anon., 2 Salk. 519.

fendant's wife, the defendant pleaded that before the action was brought, the plaintiff and defendant, and one J. B., the defendant's son, entered into a certain agreement, by which the plaintiff, in discharge of the debt mentioned in the declaration, was to accept the said J. B. as her debtor for £9, to be paid when he should receive his pay as lieutenant; and that the plaintiff accepted the said J. B. for her debtor, etc. Upon demurrer, judgment was given for the plaintiff, for two reasons; first, because it did not appear that there was any consideration for the agreement; secondly, that, admitting the agreement to be valid, yet by the statute of frauds, it ought to be in writing, or else the plaintiff could have no remedy thereon; "and though upon such an agreement, the plaintiff need not set forth the agreement to be in writing, yet when the defendant pleads such an agreement in bar, he must plead it so as it may appear to the court that an action will lie upon it; for he shall not take away the plaintiff's present action, and not give her another upon the agreement pleaded." (z)<sup>37</sup>

(z) Case *v. Barber*, Raym. 450. It is to be observed that the plea was at all events a bad one in reference to the first objection. The case is, perhaps, therefore, not decisive as to the validity of the second.

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37. See *Eaves v. Vial*, 98 Va. 134, 34 S. E. 978; 5 Va. Law Reg. 794.

## CHAPTER LIII.

### RULES WHICH TEND TO PREVENT OBSCURITY AND CONFUSION IN PLEADING.

#### RULE I.

§ 492. *Pleadings must not be insensible nor repugnant.*

#### RULE II.

§ 493. *Pleadings must not be ambiguous, or doubtful in meaning; and when two different meanings present themselves, that construction shall be adopted which is most unfavorable to the party pleading.*

§ 494. *Negative pregnant.*

#### RULE III.

§ 495. *Pleadings must not be argumentative.*

#### RULE IV.

§ 496. *Pleadings must not be in the alternative.*

#### RULE V.

§ 497. *Pleadings must not be by way of recital, but must be positive in their form.*

#### RULE VI.

§ 498. *Things are to be pleaded according to their legal effect or operation.*

#### RULE VII.

§ 499. *Pleadings should observe the known and ancient forms of expression, as contained in approved precedents.*

#### RULE VIII.

§ 500. *Pleadings should have their proper formal commencements and conclusions.*

§ 501. *Variations in forms.*

§ 502. *Improper commencements or conclusions.*

#### RULE IX.

§ 503. *A pleading which is bad in part is bad altogether.*

#### RULE I.

**§ 492. Pleadings must not be insensible nor repugnant. (a)**

First, if a pleading be unintelligible (or in the language of

(a) Com. Dig., Pleader (C. 23); *Wyat v. Aland*, 1 Salk. 324; *Bac. Ab., Pleas, etc. (I.) 4*; *Nevil v. Soper*, 1 Salk. 213; *Butt's Case*, 7

pleading, *insensible*), by the omission of material words, etc., this vitiates the pleading. (b)

Again, if a pleading be inconsistent with itself, or *repugnant*, this is ground for demurrer.

Thus, where, in an action of trespass, the plaintiff declared for taking and carrying away certain timber, lying in a certain place, for the completion of a house then *lately built*, this declaration was considered as bad for repugnancy; for the timber could not be for the building of a house already built. (c) So, where the defendant pleaded a grant of a rent, out of a *term of years*, and proceeded to allege that, by virtue thereof he was seized in his demesne, *as of freehold*, for the term of his life, the plea was held bad for repugnancy. (d)

[So, where T bought a scholarship of S under a contract that "A full course might be taken by him until he was proficient in said lines selected without limited time," and S expelled T from his school without excuse, and T sued S for the amount paid for the scholarship, and in the same declaration relied upon the contract as existing, and also claimed damages for the breach. It was held that T could not treat the contract as rescinded and as existing in the same action, that the two claims were repugnant.<sup>1</sup> And so, where the plaintiff alleged that a certain agent had special authority to sell him a ticket over defendant's road, and later in his declaration alleged that he was ignorant of the withdrawal of the agent's authority to sell said ticket, the declaration was held bad for repugnancy.<sup>2</sup> So, in an action of debt on a bond conditioned for the performance of the covenants of a lease, where the defendant pleaded that by mutual consent the contract in the lease was rescinded and the lease itself cancelled, and the plaintiff replied admitting those facts, but alleging a

Rep. 25; *Hutchinson v. Jackson*, 2 Lut. 1324; Vin. Ab., Abatement (D. a.).

(b) Com. Dig., Pleader (C. 23); *Wyat v. Aland*, 1 Salk. 324.

(c) *Nevil v. Soper*, 1 Salk. 213.

(d) *Butt's Case*, 7 Rep. 25a.

1. *Timmerman v. Stanley*, 123 Ga. 850, 51 S. E. 760

2. *Florida Cent. R. Co. v. Ashmore*, 43 Fla. 272, 32 South. 832.

parol agreement that the terms of the lease should continue in force and be secured by the bond, the replication was held bad for repugnancy.]

But there is this exception; that if the second allegation, which creates the repugnancy is merely superfluous and redundant, so that it may be rejected from the pleading, without materially altering the general sense and effect, it shall in that case be rejected—at least, if laid under a *videlicet*—and shall not vitiate the pleading; for the maxim is *utile, per inutile, non vitatur.*(*e*)

[Frequently a defendant may desire to make inconsistent defences, and while he cannot do this in a single plea, because it will render the plea repugnant, he may do so by separate pleas and it is not permissible to look from one plea to another to discover the repugnancy, as this would in effect deprive the defendant of the right given him by statute to plead as many several matters of law or fact as he pleases.]<sup>3</sup>

## RULE II.

**§ 493. Pleadings must not be ambiguous, or doubtful in meaning; and when two different meanings present themselves, that construction shall be adopted which is most unfavorable to the party pleading.**(*f*)

Thus, if in trespass *quare clausum fregit*, the defendant pleads that the *locus in quo* was his freehold, he must allege that it was his freehold *at the time of the trespass*; otherwise, the plea is insufficient.(*g*) So, in debt on a bond, conditioned to make assurance of land, if the defendant pleads that he executed a re-

(*e*) Gilb. C. P. 131-2; The King *v.* Stevens, 5 East, 255; Wyat *v.* Ayland, 1 Salk. 324-5; 2 Saund. 291, n. (1), 306, n. 14; Co. Litt. 303b.

(*f*) Co. Litt. 303b; Purcell *v.* Bradley, Yelv. 36; Dovaston *v.* Payne, 2 H. Bl. 530; Thornton *v.* Adams, 5 M. & S. 38; Rose *v.* Standen, 2 Mod. 295; Lord Huntingtower *v.* Gardine, 1 Barn. & Cres. 297; Fletcher *v.* Pogson, 3 Barn. & Cres. 192; 6 Barn. & Cres. 295.

(*g*) Com. Dig., Pleader (E. 5).

3. McNutt *v.* Young, 8 Leigh 542-553.

lease, his plea is bad, if it does not express *that the release concerns the same land.*(h)<sup>4</sup>

\* \* \* \* \*

[So, where in an action of assumpsit there are two Hogans and two Purdys named in the declaration, and in setting out the contract sued on it was stated to have been made by the Messrs. Purdy and Hogan, upon a demurrer to the declaration it was held that this form of statement was indefinite and ambiguous, and hence the demurrer to the declaration should be sustained.]<sup>5</sup>

A pleading, however, is not objectionable as ambiguous or obscure if it be *certain to a common intent*,(i) that is, if it be clear enough according to reasonable intendment or construction; though not worded with absolute precision. Thus, in debt on a bond conditioned to procure A. S. to surrender a copyhold to the use of the plaintiff, a plea that A. S. surrendered and released the copyhold to the plaintiff in full court, and the plaintiff accepted it, without alleging that the surrender was *to the plaintiff's use*, is sufficient; for this shall be intended.(j) So in debt on a bond conditioned that the plaintiff shall enjoy certain land, etc., a plea that after the making of the bond until the day of exhibiting the bill, the plaintiff did enjoy, is good; though it be not said that *always* after the making, until, etc., he enjoyed; for this shall be intended.(k)

#### § 494. Negative pregnant.

It is under this head of *ambiguity* that the doctrine of *nega-*

(h) Com. Dig., *ubi supra*, Manser's Case, 2 Rep. 3.

(i) Com. Dig., Pleader (E. 7), (F. 17); 1 Saund. 49, n. 1; Long's Case, 5 Rep. 121a; Doc. Pl. 58; Colthirst v. Bejushin, Plow. 26, 28, 33; Fulmerston v. Steward, *ibid.* 102; Cooper v. Monke, Willes, 52; The King v. Lyme Regis, 1 Doug. 158; Hammond v. Dodd, Cro. Car. 5; Poynter v. Poynter, *ibid.* 194; Dovaston v. Payne, 2 H. Bl. 530; Jacobs v. Nelson, 3 Taunt. 423.

(j) Hammond v. Dodd, Cro. Car. 6.

(k) Harlow v. Wright, Cro. Car. 105.

4. Many objections, however, which would be good if made in time, come too late after verdict. See, in this connection, Va. Code, § 3449.

5. Lydick v. B. & O. Ry. Co., 17 W. Va. 427.

*tives pregnant* appears most properly to range itself. A *negative pregnant* is such a form of negative expression as may imply or carry within it an affirmative. This is considered as a fault in pleading; and the reason why it is so considered is that the meaning of such a form of expression is ambiguous. In trespass, for entering the plaintiff's house, the defendant pleaded that the plaintiff's daughter gave him license to do so; and that he entered by that license. The plaintiff replied, that *he did not enter by her license*. This was considered as a *negative pregnant*; and it was held, that the plaintiff should have traversed the entry by itself, or the license by itself, and not both together.<sup>(l)</sup> It will be observed, that this traverse might imply or carry within it that a license was given, though the defendant did not enter by that license. It is, therefore, in the language of pleading, said to be pregnant with that admission, viz, that a license was given.<sup>(m)</sup> At the same time the license is not expressly admitted; and the effect, therefore, is to leave it in doubt whether the plaintiff means to deny the license, or to deny that the defendant entered by virtue of that license. It is this *ambiguity* which appears to constitute the fault.<sup>(n)</sup>

\*                    \*                    \*                    \*                    \*

[Where the plaintiff alleged that the defendant wrongfully took and detained his goods, and the defendant pleaded that he did not wrongfully take and detain the plaintiff's goods, the plea was held to involve a negative pregnant and was therefore bad.]<sup>6</sup>

This rule, however, against a negative pregnant appears, in modern times at least, to have received no very strict construction. For many cases have occurred in which, upon various grounds of distinction from the general rule, that form of expression has been held free from objection.<sup>(o)</sup> Thus, in debt on a bond conditioned to perform the covenants in an indenture of lease, one of which covenants was, that the defendant, the

(l) *Myn v. Cole*, Cro. Jac. 87.

(m) Bac. Ab., Pleas, etc., p. 420, 5th Ed.

(n) 28 Hen. 6, 7; *Slade v. Drake*, Hob. 295; *Styles' Pract. Reg.*, tit. Negative Pregnant.

(o) See several cases mentioned in Com. Dig., Pleader (R. 6).

6. *Moser v. Jenkins*, 5 Ore. 448.

lessee, would not deliver possession to any but the lessor or such persons as should lawfully evict him, the defendant pleaded, that he *did not deliver the possession to any but such as lawfully evicted him*. On demurrer to this plea, it was objected that the same was ill, and a *negative pregnant*; and that he ought to have said that such an one lawfully evicted him, to whom he delivered the possession, or that he did not deliver the possession to any; but the court held the plea, as *pursuing the words of the covenant*, good (being in the negative), and that the plaintiff ought to have replied and assigned a breach; and therefore judgment was given against him.(p)

RULE III.

§ 495. Pleadings must not be argumentative.(q)

In other words, they must advance their positions of fact in an absolute form, and not leave them to be collected by inference and argument only.

\* \* \* \* \*

In an action of trespass for taking and carrying away the plaintiff's goods, the defendant pleaded that the plaintiff never had any goods; upon which the court remarked, "this is an infallible *argument* that the plaintiff is not guilty, and yet it is no plea."(r)

\* \* \* \* \*

It is a branch of this rule *that two affirmatives do not make a good issue*.(s) The reason is that the traverse by the second affirmative is argumentative in its nature. Thus, if it be alleged by the defendant that a party died seized in fee, and the plaintiff alleged that he died seized in tail, this is not a good issue;(t) because the latter allegation amounts to a denial of a seizin fee, but denies it by argument or inference only. It is this branch of the

(p) Pullin v. Nicholas, 1 Lev. 83, Vide Com. Dig., Pleader (R. 6). Semb. cont., Lea v. Luthell, Cro. Jac. 559.

(q) Bac. Ab., Pleas, etc. (I) 5; Com. Dig. (E. 3); Co. Litt. 303a.

(r) Doct. Pl. 41; Dyer, 43.

(s) Com. Dig., Pleader (R. 3); Co. Litt. 126a; per Buller, J., Chandler v. Roberts, Doug. 90; Doct. Pl. 43; Zouch & Barnfield's Case, 1 Leon, 77; Tomlin v. Surface, 1 Wils. 6.

(t) Doct. Pl. 349; 5 Hen. 7, 11, 12.

rule against *argumentativeness* that gave rise (as in part already explained) to the form of a *special traverse*.

\*            \*            \*            \*            \*

Another branch of the rule against argumentativeness is *that two negatives do not make a good issue.*(*u*) Thus, if the defendant plead that he requested the plaintiff to deliver an abstract of his title, but that the plaintiff did not, when so requested, deliver such abstract, but neglected so to do, the plaintiff cannot reply that *he did not neglect and refuse to deliver* such abstract, but should allege affirmatively that *he did deliver.*(*v*)

#### RULE IV.

### § 496. Pleadings must not be in the alternative.(*w*)

Thus in an action of debt against a gaoler for the escape of a prisoner, where the defendant pleaded that *if* the said prisoner, did at any time or times after the said commitment, etc., go at large, he so escaped without the knowledge of the defendant and against his will; and that *if* any such escape was made, the prisoner voluntarily returned into custody before the defendant knew of the escape, etc., the court held the plea bad; for, "he cannot plead hypothetically that if there has been an escape, there has also been a return. He must either stand upon an averment that there has been no escape, or that there have been one, two, or ten escapes; after which the prisoner returned."(*x*)<sup>7</sup>

So where it was charged that the defendant wrote and published, *or* caused to be written or published, a certain libel, this was considered as bad for uncertainty.

[So where the plaintiff in an action of tort alleged that the loss and damages occurred "By reason of the negligence of one or the

(*u*) Com. Dig., Pleader (R. 3).

(*v*) Martin *v.* Smith, 6 East. 557.

(*w*) Griffith *v.* Eyles, 1 Bos. & Pul. 413; Cook *v.* Cox, 3 M. & S. 114; The King *v.* Brereton, 8 Mod. 330; Witherley *v.* Sarsfield, 1 Show. 127; Rex *v.* Morley, 1 You. & Jer. 221.

(*x*) Griffith *v.* Eyles, 1 Bos. & Pul. 413.

7. The difficulties here presented are easily avoided by the pleader's using several counts in his declaration, or filing several pleas setting out the facts as they may develop upon the trial.

other of defendants, or of both of defendants, and as to which the plaintiff is unable to say as to whether one or the other, or both, but one of these alternatives is true," the plea was held bad for being in the alternative.<sup>8</sup> So where the plaintiff in an action of tort alleged that the defendant, *or his family*, set his dogs upon the plaintiff's swine, the declaration was held bad as being in the alternative.<sup>9</sup> So in an action on a bond where the defendant averred in his plea that the obligees "*or some of them*" released a part of the debt specified in the bond, the plea was held bad as being in the alternative, but where in an action for personal injuries the complaint averred that the act complained of was "wilfully or wantonly done," it was held that the complaint was not bad as being in the alternative, as wantonness was the legal equivalent of wilfulness.]<sup>10</sup>

#### RULE V.

### § 497. Pleadings must not be by way of recital, but must be positive in their form. (y)

The following example may be adduced to illustrate this kind of fault. If a declaration in trespass for assault and battery make the charge in the following form of expression: "And thereupon the said A. B. by —, his attorney, complains, for that *whereas* the said C. D. heretofore, to wit, etc., made an assault," etc., instead of "for *that* the said C. D. heretofore, to wit, etc., made an assault," etc., this is bad, for nothing is positively affirmed. (z)<sup>11</sup>

(y) *Bac. Ab., Pleas, etc.* (B. 4); *Sherland v. Heaton*, 2 Bulst. 214; *Wettenhall v. Sherwin*, 2 Lev. 206; *Hore v. Chapman*, 2 Salk. 636; *Dunstable v. Dunstable*, 2 Show. 27; *Gourney v. Fletcher*, id. 295; *Dobbs v. Edmunds*, Lord Raym. 1413; *Wilder v. Handy*, Stra. 1151; *Marshall v. Riggs*, Ibid. 1162.

(z) It will be observed, however, that in *trespass on the case* the "*whereas*" is unobjectionable, being used only as introductory to some subsequent positive allegation. See citations in (y).

8. *Brown v. Illinois Cent. R. Co.*, 100 Ky. 525, 38 S. W. 862.

9. *Tift v. Tift* (N. Y.), 4 Denio 175.

10. *Mobile, J. & K. C. Ry. Co. v. Smith*, 146 Ala. 312, 40 South. 763.

11. *Spiker v. Borer*, 37 W. Va. 258, 16 S. E. 575. See, also, *Cooke v. Simms*, 2 Call 39; *So. R. Co. v. Willcox*, 98 Va. 222, 35 S. E. 355.

So where a deed or other instrument is pleaded, it is in general not proper to allege (though in the words of the instrument itself) that *it is witnessed* (*testatum existit*) that such a party granted, etc.; but it should be stated absolutely and directly that he granted, etc. But as to this point a difference has been established between declarations and other pleadings. In the former (for example, in a declaration of covenant) it is sufficient to set forth the instrument with a *testatum existit*, though not in the latter. And the reason given is, that in a declaration such statement is merely inducement, that is, introductory to some other direct allegation. Thus in covenant it is introductory to the assignment of the breach.

#### RULE VI.

### § 498. Things are to be pleaded according to their legal effect or operation. (a)

The meaning is that in stating an instrument or other matter in pleading, it should be set forth not according to its tenor, but according to its *effect in law*; and the reason seems to be that it is under the latter aspect that it must principally and ultimately be considered, and, therefore to plead it in terms or form only, is an indirect and circuitous method of allegation. Thus, if a joint tenant conveys to his companion by the words "gives," "grants," etc., his estate in the lands holden in jointure, this, though in its terms a *grant*, is not properly such in operation of law, but amounts to that species of conveyance called a *release*. It should therefore be pleaded not that he "granted," etc., but that he "released," etc. (b) So if a tenant for life grant his estate to him in reversion, this is in effect a *surrender*, and must be pleaded as such, and not as a *grant*. (c) So where the plea stated that A. was entitled

(a) Bac. Ab., Pleas, etc. (I.) 7; Com. Dig., Pleader (C. 37); 2 Saund. 97, and 97b, n. 2; Barker v. Lade, 4 Mod. 150; Moore v. Earl of Plymouth, 3 Barn. & Ald. 66; Howell v. Richards, 11 East, 633; Stroud v. Lady Gerrard, 1 Salk. 8; 1 Saund. 235b, n. (9); Pike v. Eyn, 9 Barn. & Cres. 909.

(b) 2 Saund. 97; Barker v. Lade, 4 Mod. 150-1.

(c) Barker v. Lade, 4 Mod. 151.

to an equity of redemption, and subject thereto that B. was seized in fee, and that they by lease and release granted, etc., the premises, excepting and reserving to A. and his heirs, etc., a liberty of hunting, etc.; it was held upon general demurrer, and afterwards upon writ of error, that as A. had no legal interest in the land, there could be no *reservation* to him; that the plea, therefore, alleging the right (though in terms of the deed) by way of *reservation* was bad; and that if (as was contended in argument) the deed would operate as a *grant* of the right, the plea should have been so pleaded, and should have alleged a *grant* and not a *reservation*. (d)<sup>12</sup>

The rule in question is in its terms often confined to *deeds* and *conveyances*. It extends, however, to all instruments in writing, and contracts written or verbal; and indeed it may be said generally to all matters or transactions whatever which a party may have occasion to allege in pleading, and in which the form is distinguishable from the legal effect. But there is an exception in the case of a declaration for written or verbal *slander*, where (as the action turns on the words themselves) the words themselves must be set forth; and it is not sufficient to allege that the defendant published a libel containing false and scandalous matter *in substance*, as follows, etc., or used words *to the effect* following, etc. (e)

(d) *Moore v. Earl of Plymouth*, 3 Barn. & Ald. 66.

(e) *Wright v. Clements*, 3 Barn. & Ald. 503; *Cook v. Cox*, 3 M. & S. 110; *Newton v. Stubbs*, 2 Show. 435.

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12. Few, if any, of these allegations, would now be regarded even on demurrer, though the rule itself is correct. Under § 3272 of the Code it is declared that on a demurrer (unless it be to a plea in abatement), the court shall not regard any defect or imperfection in the declaration or pleadings, whether it has been heretofore deemed mispleading or insufficient pleading or not, unless there be omitted something so essential to the action or defence that judgment according to the law and the very right of the case cannot be given.

## RULE VII.

**§ 499. Pleadings should observe the known and ancient forms of expression, as contained in approved precedents. (f)**

Thus the forms of original writs and of declarations contained in the first chapter present various specimens of technical language, appropriate from the remotest times to each particular cause of action, from which it would be inartificial and incorrect to deviate. Some of the general issues also present examples of forms of expression fixed by ancient usage, from which it is improper to depart. And another illustration of this rule occurs in the following modern case. To an action on the case, the defendants pleaded the statute of limitations, viz, *that they were not guilty within six years*, etc. The court decided upon special demurrer that this form of pleading was bad, upon the ground that "from the passing of the statute to the present case, the invariable form of pleading the statute to an action on the case for a wrong has been to allege *that the cause of action did not accrue within six years*, etc.; and that it was important to the administration of justice that the usual and established forms of pleading should be observed." (g)

It may be remarked, however, with respect to this rule, that the allegations to which it relates are of course only those of frequent and ordinary recurrence; and that even as to these it is rather of uncertain application, as it must be often doubtful whether a given form of expression has been so fixed by the course of precedents as to admit of no variation.<sup>13</sup>

Another rule connected in some measure with the last, and apparently referable to the same object, is the following:

(f) Com. Dig., Abatement (G. 7); *Buckley v. Rice Thomas*, Plow. 123; *Dally v. King*, 1 H. Blk. 1; *Slade v. Dowland*, 2 Bos. & Pul. 570; *Dowland v. Slade*, 5 East, 272; *King v. Fraser*, 6 East, 351; *Dyster v. Battye*, 3 Barn. & Ald. 448; *Per Abbott, C. J., Wright v. Clements*, id. 507.

(g) *Dyster v. Battye*, 3 Barn. & Ald. 448.

13. Mere matters of form in pleadings (except in pleas in abatement) are for the most part no longer regarded as material, or as vitiating the pleading. See Code, §§ 3245, 3246, 3272.

RULE VIII.

§ 500. Pleadings should have their proper formal commencements and conclusions. (*gg*)<sup>14</sup>

This rule refers to certain formulæ occurring at the *commencement* of pleadings subsequent to the declaration, and to others occurring at the *conclusion*.

A formula of the latter kind, inasmuch as it prays the judgment of the court for the party pleading, is often denominated the *prayer of judgment*.

A PLEA TO THE JURISDICTION has usually no *commencement* of the kind in question. (*h*) Its *conclusion* is as follows:

—the said defendant prays judgment, if the court of our lord the king here will or ought to have further cognizance of the plea (*i*) aforesaid.

or (in some cases) thus:

—the said defendant prays judgment if he ought to be compelled to answer to the said plea here in court. (*j*)

A PLEA IN SUSPENSION seems also to be in general pleaded without formal *commencement*. (*k*) Its *conclusion* is thus:

—the said defendant prays that the suit may remain or be respited without day until, etc.

A PLEA IN ABATEMENT is also usually pleaded without a formal

(*gg*) Co. Litt. 303b; Com. Dig. Pleader (E. 27), (E. 28), (E. 32), (E. 33), (F. 4), (F. 5), (G. 1); Com. Dig. Abatement (I. 12); 2 Saund. 209, n. (1); Per Holt, C. J. *Bower v. Cook*, 5 Mod. 146.

(*h*) 1 Chitty, 450, but sometimes it has such *commencement*. See *Ibid*.

(*i*) 1 Went, 49; 3 Bl. Com. 303; *Powers v. Cook*, Ld. Raym. 63.

(*j*) 1 Went, 41, 49; Bac. Ab., Pleas, etc. (E.) 2; Per Holt, C. J., *Bowyer v. Cook*, 5 Mod. 146; *Powers v. Cook*, Ld. Raym. 63.

(*k*) 2 Chitty, 472; *Plosket v. Beeby*, 4 East. 485.

14. Pleadings should have the proper entitlement of the court in which they are filed, but this is a mere matter of form, and as to pleas in bar is no longer a ground of objection in Virginia. The statute provides that a plea shall commence, "The defendant says that:" Code, § 3269. See, also, §§ 3245, 3246 and 3272. Pleas in abatement, however, must be good in *form* as well as substance. *Horton v. Townes*, 6 Leigh 47; *Guarantee Co. v. First Nat. Bank*, 95 Va. 480, 28 S. E. 909.

*commencement* within the meaning of this rule. (*l*) The *conclusion* is thus:

in case of plea founded on objection to the frame of the original writ (in real or mixed) on the declaration (in personal) actions—  
—prays judgment of the said writ (or declaration), and that the same may be quashed. (*m*)

in case of plea founded on the disability of the party—  
—prays judgment, if the said plaintiff ought to be answered to his said declaration. (*n*)

A PLEA IN BAR, until the change of practice introduced by the recent rule of Hil. T. 4 W. 4, had this *commencement*:

—says that the said plaintiff ought not to have or maintain his aforesaid action against him the said defendant, because he says, etc.

This formula is called *actio. non*.

The *conclusion* was,

—prays judgment if the said plaintiff ought to have or maintain his aforesaid action against him.

But as these expressions were, from the great comparative frequency of pleas in bar, of almost continual occurrence, it was thought desirable, for the sake of brevity, to abandon altogether the use of formulæ which led to so much reiteration; and by the rule of court just mentioned, it was accordingly provided that in future it should not be necessary, where the plea is pleaded *in bar of the whole action generally*, to use any allegation of *actionem non*, or any *prayer of judgment*; but that a plea pleaded without such formal parts shall nevertheless be taken as pleaded in bar of the action.<sup>15</sup>

A REPLICATION TO A PLEA TO THE JURISDICTION has this *commencement*:

(*l*) 2 Saund. 209a, n. 1; Arch. 305.

(*m*) Powers *v.* Cook, Ld. Raym. 63; 2 Saund. 209a, n. 1; Com. Dig., Abatement (I. 12); 2 Chitty, 414.

(*n*) Co. Litt. 128a; Com. Dig., Abatement (I. 12); 1 Went. 58, 62.

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15. In Virginia the formal commencement of pleas, the *actionem non*, *precludi non*, and prayer for judgment in pleas in bar have been abolished by statute. Code, §§ 3269, 3265.

—says, that notwithstanding anything by the said defendant above alleged, the court of our lord the king here ought not to be precluded from having further cognizance of the plea aforesaid, because he says, etc. (*o*)

or this—

—says that the said defendant ought to answer to the said plea here in court because he says, etc. (*p*)

and this *conclusion*:

—wherefore he prays judgment, and that the court here may take cognizance of the plea aforesaid, and that the said defendant may answer over, etc. (*q*)

A REPLICATION TO A PLEA IN SUSPENSION should probably have this *commencement*:

—says that notwithstanding anything by the said defendant above alleged, the suit ought not to stay or be respited because, he says, etc. (*r*)

And this *conclusion*:

—wherefore he prays judgment if the suit ought to stay or be respited, and that the said defendant may answer over.

A REPLICATION TO A PLEA IN ABATEMENT has this *commencement*:

where the plea was founded on objection to the declaration,—

—says, that his said declaration by reason of anything in the said plea alleged, ought not to be quashed; because he says, etc. (*s*)

where the plea was founded on the disability of the party,—

—says, that notwithstanding anything in the said plea alleged, he the said plaintiff ought to be answered to his said declaration; because he says, etc. (*t*)

The *conclusion* in most cases is thus:

in the former kind of plea,—

—wherefore he prays judgment, and that the said declaration

(*o*) 1 Went. 60; Lib. Plac. 348.

(*p*) 1 Went. 39.

(*q*) Lib. Plac. 348; 1 Went. 39.

(*r*) Liber. Intrat.

(*s*) 1 Arch. 309; Rast. Ent. 126a; Sabine v. Johnstone, 1 Bos. & Pul. 60.

(*t*) 1 Went. 42; 1 Arch. 309.

may be adjudged good, and that the said defendant may answer over, etc.

in the latter,—

—wherefore he prays judgment, and that the said defendant may answer over, etc. (*u*)

A REPLICATION TO A PLEA IN BAR, before the Rule Hil. 4 W. 4, of court above mentioned, had this *commencement*:

—says, that by reason of anything in the said plea alleged he ought not to be barred from having and maintaining his aforesaid action against him the said defendant, because he says, etc.

This formula is commonly called *precludi non*.

The *conclusion* was thus:

in *Debt*—

—wherefore he prays judgment, and his debt aforesaid, together with his damages by him sustained, by reason of the detention thereof, to be adjudged to him.

in *Covenant*,—

—wherefore he prays judgment, and his damages by him sustained, by reason of the said breach of covenant, to be adjudged to him.

in *Trespass*,—

—wherefore he prays judgment, and his damages by him sustained, by reason of the committing of the said trespasses, to be adjudged to him.

in *Trespass on the case; in Assumpsit*.

—wherefore he prays judgment, and his damages by him sustained, by reason of the not performing of the said several promises and undertakings, to be adjudged to him.

in *Trespass on the case,—in general*,—

—wherefore he prays judgment, and his damages by him sustained, by reason of the committing of the said several grievances, to be adjudged to him.

(*u*) 1 Went. 43, 45, 54; 1 Arch. 309; Rast. Ent. 126a; Bisse *v.* Harcourt, 3 Mod. 281; 1 Salk. 177; 1 Show. 155; Carth. 137, s. c. As to the cases in which the conclusion should be different, see 2 Saund. 211, note 3; Medina *v.* Stoughton, Lord Ray. 594; Co. Ent. 160a Lil. Ent. 123, Lib. Plac. 1.

And in all *other actions* the replication, in like manner, concluded with a prayer of judgment for damages, or other appropriate redress, according to the nature of the action.(v)

But the rule of Hil. 4 W. 4, provides that no allegation of *actionem non*, or *precludi non*, or *prayer of judgment*, shall in future be necessary in any pleading subsequent upon a plea pleaded *in bar of the whole action generally*; but that every replication or subsequent pleading, pleaded, without these formulæ, shall nevertheless be taken as in bar or maintenance respectively of the action.<sup>16</sup>

With respect to PLEADINGS SUBSEQUENT TO THE REPLICATION, it will be sufficient to observe in general, that those on the part of the defendant commence and conclude like the plea; those on the part of the plaintiff, like the replication.

### § 501. Variations in forms.

The forms of commencement and conclusion given above, are subject to the following variations:

First, with respect to *pleas in abatement*. Matters of abatement, in general, only render the action *abateable* upon plea; but there are others, such as the death of the plaintiff or defendant before verdict or judgment by default that are said to abate it *de facto*; that is, by their own immediate effect, and before plea, the only use of the plea in such cases being to give the court notice of the fact.(w) Where the action is merely *abateable*, the forms of conclusion above given are to be observed; but when abated *de facto*, the *conclusion* must pray, "whether the court will further proceed;" for the declaration being already and *ipso facto* abated, it would be improper to pray that it "may be quashed."(x)

Again, when a plea in bar is pleaded *puis darreign continu-*

(v) See the forms, 2 Chitty, 615, 628, 630, 641; 1 Arch. 410, 442.

(w) Bac. Ab., Abatement (K.), (G.), (F.); Com. Dig., Abatement (E. 17); 2 Saund. 210, n. 1.

(x) Com. Dig., Abatement (H. 33), (I. 12); 2 Saund. 210, n. 1; Hallowes v. Lucy, 3 Lev. 120.

16. Corresponding statute in Va. Code, § 3265.

ance, it has, instead of the ordinary *actionem non*, a commencement and conclusion of *actionem non ulterius*.

So, if a plea in bar be found on any matter arising *after the commencement of the action*, though it be not pleaded *after a previous plea*, it has the same *commencement* and *conclusion of actio non ulterius*, and *actionem non* generally, would be improper; for that formula is taken to refer in point, of time to the commencement of the suit, and not to the time of plea pleaded. (*xx*)

Again, all pleadings by way of *estoppel* have a *commencement* and *conclusion* peculiar to themselves. A *plea* in *estoppel* has the following *commencement*: "says, that the said plaintiff ought not to be admitted to say" (stating the allegation to which the *estoppel* relates); and the following *conclusions* "wherefore he prays judgment, if the said plaintiff ought to be admitted, against, his own acknowledgment, by his deed aforesaid" (or otherwise, according to the matter of the *estoppel*), "to say that" (stating the allegation to which the *estoppel* relates.) (*y*) A *replication*, by way of *estoppel* to a plea, either in abatement or bar, has this *commencement*: "says, that the said defendant ought not to be admitted to plead the said plea by him above pleaded; because he says, etc. (*z*) Its *conclusion*, in case of a plea of *abatement*, is as follows: "wherefore he prays judgment if the said defendant ought to be admitted to his said plea, contrary to his own acknowledgment, etc., and that he may answer over, etc.:" (*a*)—in case of a plea in *bar*,—"wherefore he prays judgment, if the said defendant ought to be admitted, contrary to his own acknowledgment, etc., to plead, that" (stating the allegation to which the *estoppel* relates.) (*b*) *Rejoinders and subsequent pleadings* follow the forms of pleas and replications respectively. (*c*)

Again, if any pleading be intended to apply, to *part* only of

(*xx*) *Evans v. Prosser*, 3 T. R. 186; *Selw. Ni. Pri.* 138.

(*y*) 1 Arch. 202; *Veale v. Warner*, 1 Saund. 325.

(*z*) 2 Chitty, 590, 592; *Took v. Glascock*, 1 Saund. 257.

(*a*) 2 Chitty, 590.

(*b*) 2 Chitty, 592.

(*c*) *Veale v. Warner*, 1 Saund. 325.

the matter adversely alleged it must be qualified according to its *commencement* and *conclusion*.(d) And it would seem from the language of the Rule of Hil. 4 W. 4, above cited, that where the pleading is to part only, even *pleas in bar*, and other pleadings consequent upon them, should still retain, notwithstanding that rule, their ancient forms of commencement and conclusion.

\* \* \* \* \*

While pleadings have thus, in general, their formal *commencements* and *conclusions*, it is to be observed there is an exception to this rule, in the case of all such pleadings as *tender issue*. These, instead of the conclusion with a *prayer of judgment*, as in the above forms, conclude (in the case of the trial by jury) *to the country*; or (if a different mode of trial be proposed) with other appropriate formulæ, as explained under the second rule of the first section. Pleadings which tender issue have, however, the formal *commencements*; unless they are pleaded in bar or maintenance of the whole action generally; for in that case the rule of court dispenses with these formulæ altogether.

### § 502. Improper commencements or conclusions.

In general a defect or impropriety in the *commencement* and *conclusion* of a pleading is ground for demurrer.(e) But if the *commencement* pray the proper judgment, it seems to be sufficient, though judgment be prayed in an improper form in the *conclusion*.(f) And the converse case, as to a right of prayer in the *conclusion* with an improper *commencement*, has been decided the same way.(g) So, if judgment be simply prayed, without specifying *what* judgment, it is said to be sufficient; and it is laid down that the court will, in that case, *ex officio*, award

(d) *Weeks v. Reach*, 1 Salk. 179.

(e) *Nowlan v. Geddes*, 1 East, 634; *Wilson v. Kemp*, 2 M. & S. 549; *Le Bret v. Papillion*, 4 East, 502; Com. Dig., Pleader (E. 27); *Weeks v. Reach*, 1 Salk. 179; *Powell v. Fullerton*, 2 Bos. & Pul. 420. But in some cases a bad conclusion makes the plea a mere nullity, and operates as a *discontinuance*. *Bisse v. Harcourt*, 3 Mod. 281; 1 Salk. 177; 1 Show. 155; Carth. 137, S. C.; *Weeks v. Peach*, 1 Salk. 179.

(f) *Street v. Hopkinson*, Rep. Temp. Hard. 345.

(g) *Tolbert v. Hopewood*, Fort. 335.

the proper legal consequence. (h) It seems, however, that these relaxations from the rule do not apply to pleas in *abatement*, the court requiring greater strictness in these pleas, with a view to discouraging their use. (i)<sup>17</sup>

It will be observed, that the *commencement* and *conclusion* of a plea are in such form as to indicate the view in which it is pleaded, and to mark its object and tendency, as being either to the jurisdiction, in suspension, in abatement, or in bar. It is, therefore, held, that the class and character of a plea depend upon these its formular parts; which is ordinarily expressed by the maxim *conclusio facit placitum*. (j) Accordingly, if it commence and conclude as in bar, but contain matter sufficient only to abate the suit, it is a bad plea in bar, and no plea in abatement. (k)

[Thus, in an action on three promissory notes, where the defendant filed a plea having a formal commencement and conclusion of a plea in bar, but set up only matter in abatement, to-wit, that the debt evidenced by the said writing was not due, it was held bad as a plea in bar, as the commencement and conclusion of a plea, and not its subject matter, determines its character.]<sup>18</sup>

And on the other hand, it has been held, that if a plea commence and conclude as in abatement, and show matter in bar, it is a plea in abatement, and not in bar. (l)

As the *commencement* and *conclusion* have this effect, of defining the character of the *plea*, so they have the same tendency in the *replication* and *subsequent pleadings*. For example, they

(h) 1 Chitty, 446, 539; *Le Bret v. Papillion*, 4 East, 502; 1 Saund. 97, n. 1.

(i) *King v. Shakespeare*, 10 East, 83; *Attwood v. Davis*, 1 Barn. & Ald. 172.

(j) *Street v. Hopkinson*, Rep. Temp. Hard. 346; *Medina v. Stoughton*, 1 L. Ray. 593; *Talbot v. Hopewood*, Fort. 335.

(k) 1 East, 634; *Wallis v. Savil*, 1 Lutw. 41; 2 Saund. 209d, n. 1. Per Littleton, J., 36 Hen. 6, 18.

(l) *Medina v. Stoughton*, 1 Ld. Ray. 593; *Godson v. Good*, 6 Taunt. 587.

17. *Guarantee Co. v. First National Bank*, 95 Va. 480, 28 S. E. 909.

18. *Pitts Sons Mfg. Co. v. Commercial Nat. Bank*, 121 Ill. 528, 13 N. E. 156.

serve to show whether the pleading be intended as in confession and avoidance, or estoppel; and whether intended to be pleaded to the whole, or to part. From these considerations, it is apparent that they are forms, which, on the whole, materially tend to clearness and precision in pleading; and they have, for that reason, been considered under this section.

\* \* \* \* \*

### RULE IX.

#### § 503. A pleading which is bad in part is bad altogether. (m)

The meaning of this rule is that if in any material part of a pleading, or in reference to any of the material things which it undertakes to answer, or to either of the parties answering, the pleading be bad, though in other respects to be free from objection, the whole of it is open to demurrer; so that, if the objection be good, the whole pleading in question is overruled and judgment given accordingly. Thus, if in a declaration in assumpsit, two different promises be alleged in two different counts, and the defendant plead in bar to both counts conjointly, the statute of limitations, viz, that he did not promise within six years, and the plea be an insufficient answer as to one of the counts, but a good bar as to the other, *the whole plea* is bad, and neither promise is sufficiently answered. (n) So, where to an action of trespass for false imprisonment against two defendants, they pleaded that one of them, A., having ground to believe that his horse had been stolen by the plaintiff, gave him in charge to the other defendant, a constable, whereupon the constable, and A., in his aid, and by his command, laid hands on the plaintiff, etc., the plea was adjudged to be bad as to both the defendants, because it showed no reasonable ground of suspicion; for A. could not justify the arrest without showing such ground; and though the case might be different as to the constable, whose

(m) Com. Dig., Pleader (E. 36), (F. 25); 1 Saund. 28, n. 2; Webb v. Martin, 1 Lev. 48; Rowe v. Tutte, Wills, 14; Trueman v. Hurst, 1 T. R. 40; Webber v. Tivill, 2 Saund. 127; Duffield v. Scott, 3 T. R. 374.

(n) Webb v. Martin, 1 Lev. 48.

duty was to act on the charge, and not to deliberate, yet, as he had not pleaded separately but had joined in A.'s justification, the plea was bad as to him also.

[So where, in an action of covenant, the declaration alleged that the defendants, their successors or assigns, did build and operate a certain railroad in the declaration mentioned, the plea simply denied that the defendants built and operated the road, but said nothing as to their successors or assigns, although it professed to answer the whole of the matter in the declaration alleged, it was held bad, because being bad in part, it was bad altogether.<sup>19</sup> So where, in an action of detinue to recover ten slaves, the defendant's plea professed to answer as to Ann and four other slaves, but was defective as to the four other slaves, the plea was held defective altogether under the rule of pleading above stated.]<sup>20</sup>

This rule seems to result from that which requires each pleading to have its proper formal commencement and conclusion: For by those forms (it will be observed) the matter which any pleading contains is offered as an entire answer to the whole of that which last preceded. Thus, in the first example above given, the defendant would, prior to the rule of court dispensing with the *actionem non*, etc., have alleged, in the commencement of his plea, that the plaintiff "ought not to have or maintain his *action*," for the reason therein assigned: and therefore he would pray judgment, etc., as to the whole *action*, in the conclusion. If, therefore, the answer be insufficient as to one count, it cannot avail as to the other; because, if taken as a plea to the latter only, the *commencement* and *conclusion* would be wrong. It is to be observed that there was but one plea, and consequently there would have been but one commencement and conclusion; but if the defendant had pleaded the statute, in bar to the first count separately, and then pleaded it to the second count, with a new commencement and conclusion, thus making two pleas instead of one, the invalidity of one of these pleas could not have vitiated the other.

As the *declaration* contains no commencement or conclusion

19. *Merriman v. Cover*, 104 Va. 428, 51 S. E. 817.

20. *Wittick v. Traun*, 27 Ala. 562, 62 Am. Dec. 778.

of the kind to which the last rule relates, so, on the other hand, the *declaration* does not fall within the rule now in question. Therefore, if a declaration be good in part, though bad as to another part, relating to a distinct demand divisible from the rest, and the defendant demur to the whole, instead of confining his demurrer to the faulty part only, the court will give judgment for the plaintiff.<sup>(o)</sup> It is also to be observed that the rule applies only to material allegations; for where the objectionable matter is mere surplusage, and unnecessarily introduced (the answer being complete without it), its introduction does not vitiate the rest of the pleading.

(o) 1 Saund. 286, note 9; Bac. Ab., Pleas, etc., (B.) 6; Cutforthay v. Taylor, Raym. 395; Judin v. Samuel, 1 New Rep. 43; Bainbridge v. Day, 1 Salk. 218; Powdick v. Lyon, 11 East, 565.

## CHAPTER LIV.

### RULES WHICH TEND TO PREVENT PROLIXITY AND DELAY IN PLEADING.

#### RULE I.

§ 504. *There must be no departure in pleading.*

#### RULE II.

§ 505. *Where a plea amounts to the general issue, it should be so pleaded.*

#### RULE III.

§ 506. *Surplusage is to be avoided.*

#### RULE I.

§ 504. **There must be no departure in pleading.** (a)<sup>1</sup>

A departure takes place when, in any pleading, the party deserts the ground that he took in his last antecedent pleading, and resorts to another. (b)

A departure obviously can never take place till the *replication*.<sup>2</sup>

Of departure in the *replication*, the following is an example. In *assumpsit*, the plaintiffs, as executors, declared on several promises alleged to have been *made to the testator*, in his lifetime. The defendant pleaded that she did not promise within six years, before the obtaining of the original writ of the plaintiffs. The plaintiffs replied that within six years before the obtaining of the original writ, the letters testamentary were granted to them; whereby the action accrued *to them the said plaintiffs* within six years. The court held this to be a departure; as in

(a) Co. Litt. 304a; 2 Saund. 84; *Dudlow v. Watchorn*, 16 East, 39; *Tolputt v. Wells*, 1 M. & S. 395.

(b) Co. Litt. 304a; 2 Saund. 84, n. 1.

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1. See, *Graham & Scott v. Graham & Lane*, 4 Munf. 205; *Va. F. & M. Ins. Co. v. Saunders*, 86 Va. 969, 11 S. E. 794; *New River Min. Co. v. Painter*, 100 Va. 507, 42 S. E. 300; *Union Pac. R. Co. v. Wyler*, 158 U. S. 285.

2. A plaintiff may, however, by amendment of his declaration desert the ground set up in his original declaration, and this is usually termed a departure.

the declaration they had laid promises to the *testator*, but in the replication, alleged the right of action to accrue to *themselves as executors*.(c) They ought to have laid promises to themselves as executors, in the declaration, if they meant to put their action on this ground.

But a departure does not occur so frequently in the replication as in the *rejoinder*.

In debt on a bond conditioned to perform an award, so that the same were delivered to the defendant by a certain time, the defendant pleaded that the arbitrators *did not make any award*. The plaintiff replied, that the arbitrators did make an award to such an effect; and that the same was tendered by the proper time. The defendant rejoined *that the award was not so tendered*. On demurrer, it was objected that the rejoinder was a departure from the plea in bar; "for, in the plea in bar, the defendant says that the arbitrators made no award; and now, in his rejoinder, he has impliedly confessed that the arbitrators have made an award, but says that it was not tendered according to the condition, which is a plain departure; for it is one thing not to make an award, and another thing not to tender it when made. And, although both these things are necessary, by the condition of the bond, to bind the defendant to perform the award, yet the defendant ought only to rely upon one or the other by itself," etc.—"but, if the truth had been that, although the award was made, yet it was not tendered according to the condition, the defendant should have pleaded so at first, in his plea," etc. And the court gave judgment accordingly.(d) So, in debt on a bond conditioned to keep the plaintiffs harmless and indemnified from all suits, etc., of one Thomas Cook, the defendants pleaded *that they had kept the plaintiffs harmless, etc.*(e) The plaintiffs replied that Cook sued them; and so the defendant had not kept them harmless, etc. The defendants rejoined, *that they had not any notice of the damnification*. And the court held, first,

(c) *Hickman v. Walker*, Willes, 27.

(d) *Roberts v. Mariett*, 2 Saund. 188.

(e) This plea was bad for not showing *how* they had kept harmless (1 Saund. 117, n. 1), but the court held the fault cured by pleading over.

that the matter of the rejoinder was bad, as the plaintiffs were not bound to give notice; and, secondly, that the rejoinder was a departure from the plea in bar: for, in the bar, the defendants plead that, "they have saved harmless the plaintiffs," and in the rejoinder, confess that they have not saved harmless, but allege that they had not notice of the damnification; which "is a plain departure." (f) So, in debt on a bond conditioned to perform the covenants in an indenture of lease, one of which was, that the lessee, at every felling of wood, would make a fence,—the defendant pleaded *that they had not felled any wood*, etc. The plaintiff replied that he had felled two acres of wood, but made no fence. The defendant rejoined *that he did make a fence*; this was adjudged a departure. (g)

These, it will be observed, are cases in which the party deserts the ground, in point of *fact*, that he had first taken. But it is also a departure, if he puts the same facts on a new ground in point of *law*; as if he relies on the effect of the common law, in his declarations, and on a custom in his replication; or on the effect of the common law in his plea, and a statute in his rejoinder. Thus, where the plaintiff declared in covenant on an indenture of apprenticeship, by which the defendant was to serve him for seven years, and assigned as a breach of covenant, that the defendant departed within the seven years,—and the defendant pleaded infancy,—to which the plaintiff replied that, by the custom of London, infants may bind themselves apprentices, this was considered as a departure. (h)

\*             \*             \*             \*             \*

To show more distinctly the nature of a departure, it may be useful on the other hand to give some examples of cases that have been held *not* to fall within that objection.

In debt on a bond conditioned to perform covenants, one of which was, that the defendant should account for all sums of money that he should receive, the defendant pleaded performance. The plaintiff replied, that 26*l.* came to his hands for which he had not accounted. The defendant rejoined, that he accounted

(f) *Cutler v. Southern*, 1 Saund. 116.

(g) *Dyer*, 253b.

(h) *Mole v. Wallis*, 1 Lev. 81.

*modo sequente*, viz, that certain malefactors broke into his counting-house and stole it, wherewith he acquainted the plaintiff. And it was argued on demurrer, "that the rejoinder is a departure; for fulfilling a covenant to account, cannot be intended but by actual accounting; whereas the rejoinder does not show an account, but an excuse for not accounting." But the court held, that showing he was robbed, is giving an account; and therefore there was no departure. (i)

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Again, in action of debt on a bond conditioned for the performance of an award, the defendant pleaded that the arbitrators *did not make any award*: the plaintiff replied that they duly made their award, setting part of it forth; and the defendant in his rejoinder, set forth the whole award *verbatim*, by which it appeared that the award was bad in law, being made as to matters not within the submission. To this rejoinder the plaintiff demurred, on the ground that it was a departure from the plea,—for by the plea it had been alleged that there was no award, which meant no award in fact; but by the rejoinder it appeared that there had been an award in fact. The court, however, held that there was no departure; that the plea of no award, meant no legal and valid award according to the submission; and that consequently the rejoinder, in setting the award forth, and showing that it was not conformable to the submission, maintained the plea. So in all cases where the variance between the former and the latter pleading is *on a point not material*, there is no departure. Thus, in *assumpsit*, if the declaration, in a case where the time is not material, state a promise to have been made on a given day, *ten years ago*, and the defendant plead that he did not promise within six years, the plaintiff may reply, that the defendant *did promise within six years* without a departure, (j) because the time laid in the declaration was immaterial.

The rule against departure is evidently necessary to prevent the retardation of the issue. For while the parties are respectively confined to the grounds they have first taken in their declaration and plea, the process of pleading will, as formerly demonstrated,

(i) *Vere v. Smith*, 2 Lev. 5; 1 Vent. 121 S. C.

(j) *Lee v. Rogers*, 1 Lev. 110.

exhaust, after a few alternations of statement, the whole facts involved in the cause; and thereby develop the question in dispute. But if a new ground be taken in any part of the series, a new state of facts is introduced, and the result is consequently postponed. Besides, if one departure were allowed, the parties might, on the same principle, shift their ground as often as they pleased; and an almost indefinite length of altercation might in some cases be the consequence. (*k*)

#### RULE II.

§ 505. Where a plea amounts to the general issue, it should be so pleaded. (*l*)

It has been explained, in a former part of the work, that in most actions there is an appropriate form of plea, called the *general issue*,—fixed by ancient usage as the proper method of traversing the declaration when the pleader means to deny the whole or the principal part of its allegations. The meaning of the present rule is that, if instead of traversing the declaration in this form, the party pleads in a more special way, matter which is constructively and in effect the same as the general issue, such plea will be bad; and the general issue ought to be substituted.

Thus, to a declaration in trespass for entering the plaintiff's garden, the defendant pleaded *that the plaintiff had no such garden*. This was ruled to be "no plea; for it amounts to nothing more than *not guilty*; for if he had no such garden then the defendant is not guilty." So the defendant withdrew his plea, and said *not guilty*. (*m*) So in trespass for depasturing the plaintiff's herbage, *non depascit herbas*, is no plea; it should be *not guilty*. (*n*) So in debt for the price of a horse sold, *that the de-*

(*k*) 2 Saund. 84a, n. 1.

(*l*) Co. Litt. 303b; Doct. & Stud. 271, 272; Com. Dig., Pleader (E. 14); Bac. Ab., Pleas, etc., pp. 370-376, 5th Ed.; 10 Hen. 6, 16; 22 Hen. 6, 37; *Holler v. Bush*, Salk, 394; *Birch v. Wilson*, 2 Mod. 277; *Lynnet v. Wood*, Cro. Car. 157; *Warner v. Wainsford*, Hob. 127; 12 Mod. 537; *Saunder's Case*, id. 513, 514.

(*m*) 10 Hen. 6, 16.

(*n*) Doct. Pl. 42, cites 22 Hen. 6, 37.

*defendant did not buy*, is no plea, for it amounts to *never indebted*.(o) Again, in debt of a bond, the defendant by his plea confessed the bond, but said that it was executed to another person than the plaintiff; this was bad, as amounting to *non est factum*.(p)

[Again, where a defendant was sued in assumpsit upon a contract, and pleaded the general issue, and then offered a special plea that the contract sued on was illegal because in contravention of the Interstate Commerce Act, it was held that the special plea was properly rejected as amounting to the general issue, and that everything sought to be set up by it could be shown under the general issue.]<sup>3</sup>

These examples show that a special plea thus improperly substituted for the general issue, may be sometimes in a negative, sometimes in an *affirmative* form. When in the *negative*, its *argumentativeness* will often serve as an additional test of its faulty quality. Thus the plea in the first example, "that the plaintiff had no such garden," is evidently but an argumentative allegation, that the defendant did not commit because he *could* not have committed the trespass. This, however, does not universally hold; for in the second and third examples, the allegations that the defendant "did not depasture," and "did not buy," seem to be in as direct a form of denial as that of *not guilty*. If the plea be in the affirmative, the following considerations will always tend to detect the improper construction. If a good plea, it must (as formerly shown) be taken either as a traverse or as in confession and avoidance. Now, taken as a traverse, such a plea is clearly open to the objection of *argumentativeness*; for two affirmatives make an argumentative issue. Thus if in action on a bond the defendant plead, that it was executed to another person, J. S., it is an argumentative denial that it was executed

(o) Vin. Ab., Certainty in Pleadings (E. 15), cites Bro. Traverse, etc., pl. 275, 22 Edw. 4, 29.

(p) Gifford v. Perkins, 1 Sid. 450; 1 Vent. 77, s. c.

3. Southern R. Co. v. Wilcox, 99 Va. 394, 39 S. E. 144. See, also, B. & O. Ry. Co. v. Polly Woods & Co., 14 Gratt. 447. For discussion of when a plea amounts to the general issue, see *ante*, § 197.

to the plaintiff, and the denial should have been in the direct form, *non est factum*. On the other hand, if a plea of this kind be intended by way of confession and avoidance, it is bad *for want of color*: for it admits no apparent right in the plaintiff.

It is said that the court is not bound to allow this objection; but that it is in its discretion to allow a special plea amounting to the general issue, if it involve such matter of law as might be unfit for the decision of a jury.<sup>(q)</sup> It is also said that as the court has such discretion, the proper method of taking advantage of this fault is not by *demurrer* but by motion of the court, to set aside the plea, and enter the general issue instead of it.<sup>(r)</sup> It appears from the books, however, that the objection has frequently been allowed on demurrer.

As a plea amounting to the general issue is usually open also to the objection of being *argumentative* or that of *wanting color*, we sometimes find the rule in question discussed as if it were founded entirely in a view to those objections. This, however, does not seem to be a sufficiently wide foundation for the rule:—for there are instances of pleas which are faulty as amounting to the general issue, which yet do not (as already observed), seem fairly open to the objection of argumentativeness—and which, on the other hand, being of the negative kind or by way of traverse,—require no color. Besides, there is express authority for holding, that the true object of this rule is, to *avoid prolixity*;—and that it is therefore properly classed under the present section. For it is laid down that the reason of “pressing a general issue is not for insufficiency of the plea, but not to make long records when there is no cause.”<sup>(s)</sup>

[A plea amounts to the general issue when it denies or affirms some matter which the plaintiff is obliged to prove in order to maintain his case if the general issue were pleaded.]

<sup>(q)</sup> Bac. Ab., Pleas, etc., p. 374, 5th Ed.; *Birch v. Wilson*, 2 Mod. 274; *Carr v. Hinchliff*, 4 Barn. & Cres. 547.

<sup>(r)</sup> *Warner v. Wainsford*, Hob. 127; *Ward v. Blunt's Case*, 1 Leon, 178.

<sup>(s)</sup> *Warner v. Wainsford*, Hob. 127. See also, Com Dig., Pleader (E. 13).

## RULE III.

## § 506. Surplusage is to be avoided.(t)

*Surplusage* is here taken in its large sense, as including *unnecessary matter* of whatever description.(u) To combine with the requisite certainty and precision the greatest possible *brevity*, is now justly considered as the perfection of pleading. This principle, however, has not been kept uniformly in view at every era of the science. Although it appears to have prevailed at the earliest periods, it seems to have been nearly forgotten during a subsequent interval of our legal history; and it is to the wisdom of modern judges that it owes its revival and restoration.

1. The rule as to avoiding surplusage may be considered, first, as prescribing the omission of matter *wholly foreign*. An example of the violation of the rule in this sense, occurs, when a plaintiff, suing a defendant upon one of the covenants in a long deed, sets out in his declaration not only the covenant on which he sues, but all the other covenants, though relating to matters wholly irrelevant to the cause.(v)

2. The rule also prescribes the omission of matter which though not wholly foreign, *does not require to be stated*. Any matters will fall within this description, which under the various rules enumerated in a former section, as tending to limit or qualify the degree or certainty, it is unnecessary to allege; for example, matter of mere *evidence*, matter of *law*, or other *things which the court officially notices*, matter *coming more properly from the other side*, matter *necessarily implied*, etc.

3. The rule prescribes generally the cultivation of *brevity*, or avoidance of unnecessary prolixity in the *manner of statement*. A terse style of allegation, involving a strict retrenchment of unnecessary words, is the aim of the best practitioners in pleading; and is considered as indicative of a good school.

(t) *Bristow v. Wright*, Doug. 667; 1 Saund. 233, n. 2; *Yates v. Carlisle*, 1 Black. 270.

(u) In its strict and confined meaning it imports matter wholly foreign and irrelevant.

(v) *Dundas v. Lord Weymouth*, Cowp. 665; *Price v. Fletcher*, id. 727.

Surplusage, however, is not a subject for *demurrer*,<sup>4</sup>—the maxim being that *utile per inutile, non vitatur*. But when any flagrant fault of this kind occurs, and is brought to the notice of the court, it is visited with the censure of the judges.<sup>(w)</sup> They have also in such cases on motion, referred the pleadings to their officer, that he might strike out such matter as is redundant, and capable of being omitted without injury to the material averments: and in a clear case will themselves direct such matter to be struck out. And the party offending will sometimes have to pay the costs of the application.<sup>(x)</sup>

This is not the only danger arising from surplusage.

Though traverse cannot be taken (as elsewhere shown) on an immaterial allegation, yet it often happens that when material matter is alleged with an unnecessary detail of circumstances, the essential and non-essential parts of the statement are in their nature so connected, as to be incapable of separation, and the opposite party is therefore entitled to include under his traverse, the whole matter alleged. The consequence evidently is, that the party who has pleaded with such unnecessary particularity, has to sustain an increased burden of proof, and incurs greater danger of failure at the trial.

Most of the principal rules of pleading have now been classed in reference to certain common objects which each class or set of rules is conceived to contemplate; and have been explained and illustrated in their connection with these objects, and with each other. But there still remain certain rules, also of a principal or primary character, which have been found not to be reducible within this principle of arrangement, being in respect of their objects, of a miscellaneous and unconnected kind. These will form the subject of the following chapter.

<sup>(w)</sup> *Yates v. Carlisle*, 1 Black. 270; *Price v. Fletcher*, Cowp. 727.

<sup>(x)</sup> *Price v. Fletcher*, Cowp. 727; *Bristow v. Wright*, Doug. 667; 1 Tidd. 552, 4th Ed.; *Nichol v. Wilton*, 1 Chitty Rep. 449, 450; *Carmack v. Grundy*, 3 Barn. & Ald. 272; *Brindley v. Dennett*, 2 Bing. 184.

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4. *Thornton v. Commonwealth*, 113 Va. 736, 73 S. E. 481; *Pennington v. Gillespie*, 63 W. Va. 541, 61 S. E. 416; *Union Stopper Co. v. McGara*, 66 W. Va. 403, 66 S. E. 698.

## CHAPTER LV.

### CERTAIN MISCELLANEOUS RULES.

#### RULE I.

§ 507. *The declaration must be conformable to the original writ.*

#### RULE II.

§ 508. *The declaration should have its proper commencement, and should in conclusion lay damages, and allege production of suit.*

#### RULE III.

§ 509. *Pleas must be pleaded in due order.*

#### RULE IV.

§ 510. *Pleas in abatement must give the plaintiff a better writ or declaration.*

#### RULE V.

§ 511. *Dilatory pleas must be pleaded at a preliminary stage of the suit.*

#### RULE VI.

§ 512. *All affirmative pleadings which do not conclude to the country, must conclude with a verification.*

#### RULE VII.

§ 513. *In all pleadings where a deed is alleged, under which the party claims or justifies, profert of such deed must be made.*

#### RULE VIII.

§ 514. *All pleadings must be properly entitled.*

#### RULE IX.

§ 515. *All pleadings ought to be true.*

### OF CERTAIN MISCELLANEOUS RULES.

These rules relate either to the *declaration*, the *plea*, of *pleadings in general*, and shall be considered in the order thus indicated.

#### RULE I.

§ 507. **The declaration must be conformable to the original writ. (a)**

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[The author's discussion is omitted as no longer of any prac-

(a) Com. Dig., Pleader (C. 12).

tical value. It may be noted, however, in this connection that if there is a variance between the declaration and the summons (writ) the defendant may craveoyer of the writ and plead in abatement the variance (Va. Code, § 3259, W. Va. Code, § 3835), but the courts readily permit amendments so as to cure the variance. This proceeding is no longer permitted in England because the courts refuse to grantoyer of the writ.]

## RULE II.

### § 508. The declaration should have its proper commencement, and should in conclusion lay damages, and allege production of suit.

The form of *commencement* (which in personal actions is fixed by Rule of Court M. T. 3 Will. 4), will be found among the examples in the first chapter.

As to the *conclusion*: First, the declaration must lay *damages*.

In *personal*(*b*) and *mixed* actions (though not in an action purely *real*), the declaration must allege in conclusion, that the injury is to the *damage* of the plaintiff, and must specify the amount of that damage.(*c*) In *personal* actions there is the distinction, formerly explained, between actions that *sound in damages*, and those that do not; but in either of these cases it is equally the practice to lay damages. There is however this difference, that in the former case damages are the main object of the suit, and are, therefore, always laid high enough to cover the whole demand; but in the latter, the liquidated debt or the chattel demanded being the main object, damages are claimed in respect to the *detention* only of such debt or chattel, and are therefore usually laid at a small sum.

The plaintiff cannot recover greater damages than he has laid in the conclusion of his declaration.(*d*)

[As hereinbefore pointed out, the plaintiff generally cannot recover any greater damages than are laid in the declaration, but

(*b*) But *penal* actions are an exception.

(*c*) Com. Dig., Pleader (C. 84); 10 Rep. 116b, 117a, b.

(*d*) Com. Dig., Pleader (C. 84); Vin. Ab., Damages (R.); 10 Rep. 117 a, b.

the damages need not be laid high enough to cover interest on the plaintiff's claim. It is sufficient if they cover the principal.<sup>1</sup> It has been held, however, that after verdict the *ad damnum* may be increased by amendment to embrace the recovery,<sup>2</sup> or a remitter may be entered for the excess above the sum alleged.]<sup>3</sup>

Secondly, the declaration should also conclude with the *production of suit*.

This applies to actions of all classes, real, personal, and mixed.

In ancient times the plaintiff was required to establish the truth of his declaration in the first instance, and before it was called into question upon the pleading, by the simultaneous production of his *secta*, that is, a number of persons prepared to confirm his allegations. The practice of thus producing a *secta* gave rise to the very ancient formula almost invariably used at the conclusion of a declaration,—*et inde producit sectam*; and though the actual production has for many centuries fallen into disuse, the formula still remains. Accordingly, except the count in dower, all declarations constantly conclude thus —“And therefore he brings his suit,” etc. The count in dower concludes without any production of suit; a peculiarity which appears always to have belonged to that action.

### RULE III.

#### § 509. Pleas must be pleaded in due order. (*e*)

The order of pleading, as established at the present day, is as follows:

##### Pleas

1. To the jurisdiction of the court.
2. To the disability of the person.
 

}	1. Of plaintiff.
}	2. Of defendant.
3. To the count or declaration.
4. To the writ.
5. To the action itself,—in bar thereof. (*f*)

(*e*) Co. Litt. 303a; *Louguville v. Thistleworth*, Lord Ray. 920.

(*f*) Com. Dig., Abatement (C.); 1 Chitty, 425.

1. *Georgia Home Ins. Co. v. Goode*, 95 Va. 751, 30 S. E. 366.

2. *Brown v. Smith*, 24 Ill. 196; *Tomlins v. Earnshaw*, 112 Ill. 311.

3. *Crews v. Lackland*, 67 Mo. 619; *White v. Cannadee*, 25 Ark. 41.

In this order the defendant may plead all these kinds of plea successively. Thus, he may first plead to the jurisdiction, and upon demurrer and judgment of a *respondeat ouster* thereon, may resort to a plea to the disability of the person; and so to the end of the series.

But he cannot plead more than one plea of the same kind or degree. Thus he cannot offer two successive pleas to the jurisdiction, or two to the disability of the person.(g)

So he cannot vary the order:—for by a plea of any of these kinds, he is taken to waive or renounce all pleas of a kind prior in the series.<sup>4</sup>

And, if *issue in fact* be taken upon any plea, though of the dilatory class only, the judgment on such issue (as elsewhere explained) either terminates, or (in case of a plea of suspension) suspends the action; so that he is not at liberty, in that case, to resort to any other kind of plea.<sup>5</sup>

#### RULE IV.

### § 510. Pleas in abatement must give the plaintiff a better writ or declaration.(h)<sup>6</sup>

The meaning of this rule is, that in pleading a mistake of form, in abatement of the writ or declaration, the plea must, at the same time, *correct* the mistake, so as to enable the plaintiff to avoid the same objection, in framing his new writ or declaration. Thus, if a misnomer in the christian name of the defendant be pleaded in abatement (a case may still occur in a real action), the defendant must, in such plea, show what his true christian name is, and even what is his true surname,(i) and this, though the true surname be

(g) Com. Dig., Abatement (I. 3); Bac. Ab., Abatement (O.).

(h) Com. Dig., Abatement (I. 1); *Evans v. Stevens*, 4 T. R. 227; *Mainwaring v. Newman*, 2 Bos. & Pul. 120; *Haworth v. Spraggs*, 8 T. R. 515.

(i) 8 T. R. 515.

4. *Howard v. Rawson*, 2 Leigh. 733.

5. As to the law in Virginia on the order of pleading and the number of pleas allowed, see *ante*, §§ 183, 184, 185, 198, Code, § 3264.

6. For discussion of this rule, see *ante*, § 183.

already stated in the declaration; lest the plaintiff should, a second time, be defeated by error in the name. For these pleas, as tending to delay justice, are not favorably considered in law, and the rule in question was adopted in a view to check the repetition of them.

This condition of requiring the defendant to give a better writ, etc., is often a criterion to distinguish whether a given matter should be pleaded in *abatement* or in *bar*. (*j*) The latter kind of plea, as impugning the right of action altogether, can of course give no better writ or declaration, for its effect is to deny that, under any form of writ or declaration, the plaintiff could recover in such action. If, therefore, a better writ or declaration can be given, this shows that the plea ought not to be in bar, but in abatement.

It may also be laid down as a rule, that—

#### RULE V.

### § 511. Dilatory pleas must be pleaded at a preliminary stage of the suit.

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[This subject is fully discussed *ante*, § 183.]

#### RULE VI.

### § 512. All affirmative pleadings which do not conclude to the country, must conclude with a verification. (*k*)

Where an issue is tendered to be tried by jury, it has been shown that the pleading concludes *to the country*. In all other cases, pleadings, if in the affirmative form, must conclude with a formula of another kind, called a *verification*, or an *averment*. The verification is of two kinds,—*common* and *special*. The common verification is that which applies to ordinary cases, and is in the following form: “And this the said plaintiff” (or defendant) “is ready to verify.” The special verifications are used only where the matter pleaded is intended to be tried by record, or by some

(*j*) 1 Saund. 284, n. 4; *Evans v. Stevens*, 4 T. R. 227.

(*k*) Com. Dig., Pleader (E. 32), (E. 33); Co. Litt. 303a; Finch, Law 359.

other method than a jury. They are in the following forms: "And this the said plaintiff" (or defendant) "is ready to verify by the said record," or, "And this the said plaintiff" (or defendant), "is ready to verify, when, where and in such manner as the court here shall order, direct, or appoint."

The origin of this rule is as follows:

It was a doctrine of the ancient law, little, if at all, noticed by modern writers, that every pleading, affirmative in its nature, must be supported by an offer of some *mode of proof*; and the reference to a jury (who, as formerly explained, were in the nature of witnesses to the fact in issue), was considered as an offer of *proof*, within the meaning of the doctrine. When the proof proposed was that by jury, the offer was made in the *vivâ voce* pleading, by the words *prest d'averrer*, or *prest*, etc., which in the record was translated, *Et hoc paratus est verificare*. On the other hand, where other modes of proof were intended, the record ran, *Et hoc paratus est verificare per recordum*, or, *Et hoc paratus est verificare quocunque modo curia consideraverit*. But while these were the forms in general observed, there was the following exception, that on the *attainment of an issue*, to be tried by jury, the record marked that result by a change of phrase, and substituted for the verification, the conclusion *ad patriam*—to the *country*. The written pleadings (which it will be remembered are framed, in general, according to the ancient style of the record), still retain the same formulæ in these different cases, and with the same distinctions as to their use. They preserve the conclusion to the country, to mark the attainment of an issue triable by jury, but in other cases conclude with a translation of the old Latin phrase, *Et hoc paratus*, etc.: and hence the rule, that an affirmative pleading that does not conclude to the country, must conclude with a verification.(1)

As the ancient rule requiring an offer of proof extended only to *affirmative* pleadings (those of a *negative* kind being in general incapable of proof), so the rule now in question applies to the former only, no verification being in general *necessary* in a nega-

(1) "Every plea or bar, replication, etc., must be offered to be proved true by saying in the plea, *et hoc paratus est verificare*, which we call an averment." Finch. Law, 359.

tive pleading; (*m*) but it is nevertheless the practice to conclude with a verification all negative as well as affirmative pleadings that do not conclude to the country.

The rule in question has no longer any value or meaning as regards the object it originally proposed, for till the trial of the issue it is no longer necessary for either party now to refer to his proofs. But as a rule of form, it is attended with convenience, as serving to mark whether the pleading be intended to amount to a tender of issue.

#### RULE VII.

**§ 513. In all pleadings where a deed is alleged, under which the party claims or justifies, profert of such deed must be made. (*n*)**

Where a party pleads a deed, and claims or justifies under it, the mention of the instrument is accompanied with a formula to this effect:—"one part of which said indenture" (or other deed,) sealed with the seal of the said ———, the said ——— now brings here into court, the date whereof is the day and year aforesaid.

This formula is called *making profert* of the deed. Its present practical import is, that the party has the instrument ready for the purpose of giving oyer; and at the time when the pleading was *vivâ voce*, it implied an *actual production* of the instrument in *open court* for the same purpose.

The rule in general applies to *deeds* only. No profert, therefore is necessary of any written agreement or other instrument not under seal (*o*) nor of any instrument which, though under seal, does not fall within the technical definition of a *deed*; as, for example, a sealed will or award. (*p*) This, however, is subject to exception in the case of letters testamentary and letters of administration; executors and administrators being bound when plaintiffs to support their declaration, by making profert of these instruments.

(*m*) Co. Litt. 303a; *Millner v. Crowdall*, 1 Show. 338.

(*n*) Com. Dig., Pleader (O. 1); *Leyfield's Case*, 10 Rep. 88.

(*o*) Com. Dig., Pleader (O. 3); *Aylesbury v. Harvey*, 3 Lev. 205.

(*p*) Com. Dig., Pleader (O. 3); 2 Saund. 62b, n. (5).

The rule applies only to cases where there is occasion to *mention the deed in pleading*. When the course of allegation is not such as to lead to any mention of the deed, a profert is not necessary though in fact it may be the foundation of the case or title pleaded.

The rule extends only to cases where the party *claims* under the deed, or *justifies* under it; and therefore when the deed is mentioned only as inducement or introduction to some other matter, on which the claim or justification is founded, or alleged not to show right or title in the party pleading, but for some collateral purpose, no profert is necessary.(q)

The rule is also confined to cases where the party relies on the *direct and intrinsic operation of the deed*.(r) Thus, in pleading a feoffment no profert is necessary, for the estate passes not by the deed but the livery. So in pleading a conveyance by lease and release under the statute of uses, it is not necessary to make profert of the lease, because it is the *statute* that gives effect to the bargain and sale for a year, and the deed does not intrinsically establish the title. But in pleading the release it would seem that profert ought to be made, as the same reason does not apply.

Another exception to the rule obtains where the deed is *lost* or *destroyed* through time or accident, or is *in the possession of the opposite party*.(s) These circumstances dispense with the necessity of a profert; and the formula is then as follows;—"Which said writing obligatory," (or other deed,) "having been lost by lapse of time," (or "destroyed by accidental fire," or, "being in the possession of the said ——") "the said —— cannot produce the same to the court here."(t)

The reason assigned for the rule requiring profert is, that the court may be enabled by inspection to judge of the sufficiency of the deed.(u) The author, however, presumes to question, whether the practice of making profert *originated* in any view of

(q) Bellamy's Case, 6 Rep. 38a; Holland v. Shelby, Hob. 303; Banfill v. Leigh, 8 T. R. 571; Com. Dig., Pleader (O. 16); 1 Saund. 9a, n. 1.

(r) Read v. Brockman, 3 T. R. 156.

(s) Read v. Brockman, 3 T. R. 156; Carver v. Pinkney, 3 Lev. 82.

(t) 2 Chitty, 153.

(u) Leyfield's Case, 10 Rep. 92b; Co. Litt. 35b.

this kind. It will be recollected, that by an ancient rule, all affirmative pleadings were formerly required to be supported by an offer of some mode of proof. As the pleader, therefore, of that time, concluded in some cases by offering to prove by jury, or by the record, so in others he maintained his pleading by producing a *deed* as proof of the case alleged. In so doing, he only complied with the rule that required an offer of proof. Afterwards the trial by jury becoming more universally prevalent, it was often applied, as at the present day, to determine questions arising as to the genuineness or validity of the deed itself so produced; and from this time, a deed seems to have been no longer considered as a method of proof, distinct and independent of that by jury. Consequently it became the course to introduce as well in pleadings where the party relied on a deed, as in other cases, the common *verification*, or offer to prove by *jury*; and the true object of the profert was in this manner not only superseded but forgotten, though in practice it still continued to be made.<sup>7</sup>

The actual value of the rule, whatever its origin or ancient object, consists in enabling the adverse party to obtain inspection (by demanding oyer) of the instrument of which profert is made. Where the instrument is such that no profert need be made of it, he has no such means of obtaining inspection, and he is therefore obliged to resort to the less convenient course of applying to a judge for an order that inspection be granted. But an order of this kind will in general be made as a matter of course, with respect to all instruments which either party sets forth in the pleading, and which are of such a kind as not to require profert.

#### RULE VIII.

#### § 514. All pleadings must be properly entitled. (v)

\* \* \* \* \*

[This is mere matter of form and is not essential and its omis-

(v) 1 Chitty, 261, 527, 528; 1 Arch. 72, 162; Topping v. Fuge, 1 Marsh. 34.

7. It is provided by statute in Virginia that it shall not be necessary to make profert of any deed, letters testamentary, or commission of administration, but a defendant may have oyer in like manner as if profert were made. Code, § 3244.



## CHAPTER LVI.

### CONCLUSION.

#### § 516. Merits of system.

To the view that has been taken in this work, of the principles of the system of pleading, it may be useful to subjoin a few remarks on the merits of that system, considered in reference to its effects in the administration of justice.

When compared with other styles of proceeding, it has been shown to possess this characteristic peculiarity—that it *produces an issue*; that is, it obliges the parties so to plead, as to develop by the effect of their own allegations, some particular question as the subject for decision in the cause. With respect to the *degree* of particularity with which such question or issue is developed, we have seen in the first place, that it is always distinctly defined as consisting either of *fact* or *law*, because, in the former case it arises on a traverse, in the latter it presents itself in the very different shape of a demurrer. But independently of this distinction, it will be remembered, that the issue produced is required to be *certain* or particular. It is true that some issues are framed with less certainty than others: but still it is the universal property of all, to define the question for decision, in a shape more or less specific.

That prior to the institution of any proceeding for the purpose of decision, the question to be decided should be by some means publicly adjusted as consisting either of fact or law, and this too with some certainty or specification of circumstance, is evidently required, by the nature of the English common law system of jurisprudence. For, by the general principles of that system, questions of law are determinable exclusively by the judges; while questions of fact (some few instances excepted), can be decided only by a jury; and in those excepted cases are referred to other appropriate modes of trial. Unless therefore some public adjustment of the kind above described, took place between the parties, they would be unable, after the pleading had terminated, to pursue further their litigation. For they might disagree upon

the very form of the proceeding, by which the decision was to be obtained; or, if they both took the same view of the general nature of the question, so that they both referred their controversy to the same method of determination, for example, trial by jury they might yet differ as to the shape of the question to be referred.

A public adjustment of the point for decision of the specific kind above described, being for this reason necessary, there are two ways in which it might conceivably be effected, either by a retrospective selection from the pleading, or by the mere operation of the pleading itself. The law of England, in producing an issue, pursues the latter method. For as has been shown, the alternate allegations are so managed, that by the natural result of that contention, the undisputed and immaterial matter is constantly thrown off, until the parties arrive at demurrer, or traverse; upon which a tender of issue takes place, on the one hand, and an acceptance of it on the other; and the question involved in the demurrer or traverse, is thus mutually referred for decision.

The production of an issue, when thus defined and explained, appears to be attended with considerable advantage in the administration of justice, for the better comprehension of which it will be useful to advert to those styles of juridical proceeding in which no issue is produced.

In almost every plan of judicature with which we are acquainted, except that of the common law of England, the course of proceeding is to make no public adjustment whatever of the precise question for decision. For as all matters, whether of law or fact are decided by the judge, and by him alone, upon proofs adduced on either side by the parties, the necessity upon which that practice has been shown to be founded in the English common law system does not arise. Consequently the mutual allegations are allowed to be made *at large* as it may be called; that is, with no view to the exposition of the particular question in the cause by the effect of the pleading itself. The litigants indeed, before they proceed to proof, must explore the particular subject in controversy, in order to ascertain whether any proof be required, and to guide them to the points to which their proof is to be directed. And upon the hearing of the cause, the judge

must of course also ascertain for his own information, the precise point to be decided, and consider in what manner it is met by the evidence. But in these proceedings, neither the court nor the parties have any public exposition of the point in controversy to guide them; and they judge of it as a matter of private discretion, upon retrospective examination of the pleadings.(a)

This, as already stated, is the almost universal method; but there is another, which also requires notice; viz, that which at present prevails in the *Scottish judicature*. Since the trial by jury in civil causes has been engrafted upon the judicial system of Scotland, it has, of course, been found necessary to adjust and settle publicly, between the parties, the particular question or questions on which the decision of the jury is to be taken. But instead of eliciting such question (called by analogy to the law of England, the issue), by the mere effect and operation of the pleading itself, according to the practice of the English courts, the course taken has been to adjust and settle the issue *retrospectively* from the allegations, by an act of court; and these allegations have consequently continued to be taken *at large*, according to the definition of that term already given.(b)

Now the English common law method, as compared with either of those that have been just described, possesses this advantage,

(a) The practice of the courts of *equity* in this country forms no exception to this general statement. For, though the common replication offers a formal contradiction to the answer, a contradiction which initiates, in some measure, the form of an issue in the common law, and borrows its name,—yet, in substantive effect, the two results are quite different; for the contradiction to which the name of an issue is thus given in the equity pleading is of the most general and indefinite kind, and develops no particular question as the subject for decision in the cause.

(b) It is to be understood, however, that the issues are not extracted from the pleadings in the full latitude of allegation sometimes allowed to them by the Scottish law, but from allegations of a more succinct and specific character, called *condescendences* and *answers*; which the parties are directed to give in, as the materials from which the court are to adjust the issue. Yet, even these *condescendences* and *answers* are pleadings *at large*, in the sense in which the author uses that term; for they do not develop the point in controversy by their intrinsic operation.

that the undisputed or immaterial matter which every controversy more or less involves, is cleared away by the effect of the pleading itself: and therefore when the allegations are finished, the essential matter for decision necessarily appears. But under the rival plans of proceeding, by which the statements are allowed to be made at large, it becomes necessary when the pleading is over, to analyze the whole mass of allegation, and to effect for the first time the separation of the undisputed and immaterial matter, in order to arrive at the essential question. This operation will be attended with more or less difficulty, according to the degree of vagueness or prolixity in which the pleaders have been allowed to indulge; but where the allegations have not been conducted upon the principle of coming to issue, or in other words, have been made at large, it follows from that very quality, that their closeness and precision can never have been such as to preclude the exercise of any discretion in extracting from them the true question in controversy; for this would amount to the production of an issue. Therefore it will always be in some measure doubtful, or a point for consideration, to what extent, and in what exact sense, the allegations on one side, are disputed on the other, and also to what extent the law relied upon by one of the parties, is controverted by his adversary. And this difficulty, while thus inherent in the mode of proceeding, will be often aggravated, and present itself in a more serious form, from the *natural tendency* of judicial statements, when made at large, to the faults of vagueness and prolixity. For where the pleaders state their cases in order to present the materials, from which the mind of the judge is afterwards to inform itself of the point in controversy, they will of course be led to indulge in such amplification on either side, as may put the case of the particular party in the fullest and most advantageous light, and to propound the facts in such form as may be thought most impressive or convenient, though at the expense of clearness or precision. On the other hand, it is evident, that upon the English common law method, the pleaders having no object but to produce the issue, are without the least inducement either to an uncertain, or a too copious manner of statement; and, on the contrary, have a mutual interest to effect the result at which they aim, in the shortest and most direct manner.

The difficulty that must thus be always, in some measure, found under the method of pleading at large, in ascertaining the precise extent of the mutual admissions of fact or law, is attended with this obvious inconvenience that a party may be led to proceed to proof or trial, upon matters not disputed, or not considered as material to be disputed, on the other side, or to omit the proof or trial of matters which are meant to be disputed, and which are in fact essential to the final determination of the cause. The judge may consequently find, upon examination of the whole process, and hearing the further allegations and arguments of the parties, that the investigation of fact has either been redundant, and therefore attended with useless expense and delay; or defective, so as not to present him with the materials on which he can properly adjudicate. On the other hand, these evils are almost unknown to the English system of judicature.

On the whole, then, it may be fairly concluded, that the system of pleading is not only distinguished from other methods of judicial allegation by its production of an issue, but is in this respect *advantageously* distinguished from them, and derives from this singularity of proceeding, considerable protection from inconveniences under which they severely labor.

It also appears to deserve high praise, in respect of such of its rules as are classed in this work, by their tendency to prevent *obscurity*, or *confusion*, *prolixity*, or *delay*. Here, indeed, the objects pursued are not peculiar to the English system, for the avoidance of such faults is of course, in some measure, the aim of every enlightened plan of judicature. But, in general, there is either a want of regulation to enforce the object, or the regulation is found to be ineffectual. On the contrary, the system of pleading has various rules specifically designed to promote precision and brevity in the method of allegation, rules exclusively its own, and extremely strict and efficacious in their character. Accordingly, it has ever been proverbially famous for the former of these qualities; and in modern times, and under the influence of enlightened judges, the principle of avoiding the introduction of unnecessary matter has been so rigorously applied, and the cases of unnecessary allegation have been so well defined and understood, as considerably to remove its not less ancient and notorious *reproach* of amplification and prolixity.

While the system of pleading is thus in general distinguished for the excellence of its structure, it cannot be denied that there are points on which its merit is questionable.

\* \* \* \* \*

There is something not satisfactory in its tendency to decide the cause, upon points of *mere form*.

It will be observed, that, in general, whenever a demurrer occurs in respect of insufficiency in the manner of statement, and not for insufficiency in substance, or where an issue, either in fact or law, is joined upon a plea in abatement, the issue joined in such cases, involved a question of form only. And as the issue, whatever be its nature, is in general decisive of the fate of the cause, it follows that where issue is so joined, the action must commonly be decided upon a point of form, and not upon the merits of the case,—a result that seems inconsistent with sound justice. Thus, if the plaintiff, in an action of trespass, should happen to omit in his declaration, to state the day or time at which the trespass was committed, and the defendant should demur specially for this omission, and the issue joined on this demurrer should be decided (as it would be) in favor of the defendant,—by the regular consequence, judgment would be also given for the defendant, and the plaintiff's claim would be defeated by the omission of a few words in his declaration.<sup>1</sup> Yet

1. This objection is met in Virginia by the following provisions of the Code:

Section 3245.—“All allegations which are not traversable, and which the party could not be required to prove, may be omitted, unless when they are required for the right understanding of allegations that are material.”

Section 3246.—“No action shall abate for want of form, where the declaration sets forth sufficient matter of substance for the court to proceed upon the merits of the cause.”

Section 3272.—“On a demurrer (unless it be to a plea in abatement), the court shall not regard any defect or imperfection in the declaration or pleadings, whether it has been heretofore deemed mispleading or insufficient pleading or not, unless there be omitted something so essential to the action or defence, that judgment, according to law and the very right of the cause, cannot be given. No demurrer shall be sustained, because of the omission in any pleading of the words, ‘this he is ready to verify,’ or ‘this he is ready to verify by the record,’ or, ‘As appears by the record;’ but

we have seen that time, if alleged, need not have been proved as laid; and its omission, therefore, is a fault of the most strictly formal kind. Again, if the defendant should plead in abatement, that he is sued by a wrong Christian name, and the plaintiff should choose to take issue in fact upon the plea, and go to trial, the verdict, if given for the plaintiff, entitles him to judgment *quod recuperet*, and he consequently recovers his demand. The case is otherwise, however, if the plaintiff succeeds on an issue in *law* on a plea in abatement, for there the judgment is *respondent ouster* only. On the other hand, if given for the defendant, it is followed by judgment of *breve* (or *billa*) *cassetur*; and thus the action in one case and in the other, both the action and the demand itself, are disposed of upon a mere question relating to the Christian name of the defendant.<sup>2</sup>

But if any objection attach on this ground, to the system of pleading, its weight, at least, is much diminished, by the liberality with which *amendments* are allowed in the modern practice.<sup>3</sup>

the opposite party may be excused from replying, demurring, or otherwise answering to any pleading, which ought to have, but has not, such words therein, until they be inserted."

2. This objection has been met in Virginia by Code, § 3258, which is as follows:

"No plea in abatement for a misnomer shall be allowed in any action, but in a case wherein, but for this section, a misnomer would have been pleadable in abatement, the declaration may, on the defendant's motion, and on affidavit of the right name, be amended by inserting the right name."

3. The right to amend is given in Virginia by the following provisions of the Code:

Section 3253.—"The plaintiff may of right amend his declaration \* \* \* before the defendant's appearance."

Section 3258.—See last note.

Section 3258a.—Provides as follows: "That whenever it shall appear in any action at law or suit in equity heretofore or hereafter instituted, by the pleadings or otherwise, that there has been a misjoinder of parties, plaintiff or defendant, the court may order the action or suit to abate as to any party improperly joined and to proceed by or against the others as if such misjoinder had not been made, and the court may make such provision as to costs and continuances as may be just.

Section 3259.—"In other cases, a defendant, on whom the process summoning him to answer appears to have been served, shall not

Thus, in the case of demurrer above supposed, if the plaintiff should imprudently join in demurrer (instead of applying, as he ought, for leave to amend), the court would nevertheless, after joinder in demurrer, and even after the demurrer had come on to be argued, allow him to amend; and the only inconvenience that he would suffer, would be the payment of costs. The second case, indeed, viz, that in which an issue in fact is joined upon a plea in abatement, is such as would not allow of amendment, unless applied for before the cause had come on for trial. But even in this instance, it is not probable that any hardship or injustice would arise by the final determination of the cause, upon the point of form, for if the unsuccessful party had had any substantial case upon the merits, he would presumably have applied to amend, without hazarding the trial.

take advantage of any defect in the writ or return, or any variance in the writ from the declaration, unless the same be pleaded in abatement. And in every such case the court may permit the writ or declaration to be amended so as to correct the variance, and permit the return to be amended upon such terms as to it shall seem just."

Section 3263.—"After such plea in abatement, the plaintiff, without proceeding to trial upon an issue thereon, may amend his declaration, and make the persons, named in such plea as joint contractors, defendants in the case with the original defendants, and cause process to be served upon the new defendants; and if it appear by the subsequent pleadings in the action, or at the trial thereof, that all the original defendants are liable, but that one or more of the other persons named in such plea are not liable, the plaintiff shall be entitled to judgment, or to verdict and judgment, as the case may be, against the defendants who appear liable; and such as are not liable shall have judgment and recover costs as against the plaintiff, who shall be allowed the same as costs against the defendants who so pleaded."

Section 3384.—"If, at the trial of any actions, there appears to be a variance between the evidence and allegations or recitals, the court, if it consider that substantial justice will be promoted and that the opposite party cannot be prejudiced thereby, may allow the pleadings to be amended, on such terms as to the payment of costs or postponement of the trial, or both, as it may deem reasonable. Or, instead of the pleadings being amended, the court may direct the jury to find the facts, and, after such finding, if it consider the variance such as could not have prejudiced the opposite party, shall give judgment according to the right of the case."

Again, some doubt may reasonably be felt with respect to the advantage of that part of the system, which relates to the *singleness* of the issue.<sup>4</sup> Provided only, that a party be restrained from raising issues inconsistent with each other, or such as he knows to be without foundation in fact, it may be questioned whether any sufficient considerations of utility or convenience can be urged at the present day, in favor of the object of *singleness*. At all events, some presumption must arise against the value of this object, in modern pleading, when we recollect that the long permitted use of several counts, in respect of the same cause of action, and the provision of the statute of Anne, allowing the use of several pleas, have declared it as the sense both of the bench and the legislature, that if the original principle deserved to be retained, it required at least material mitigation. However, it is clear that the principle of singleness, is so far, at least, a right and valuable one, as it may tend to prevent the parties from offering *inconsistent* allegations, or *such as they may know to be false*. For, though the interests of justice seem to require, in many cases, the allowance of several counts or pleas in respect of the same demand, they are, on the other hand, directly opposed to the allowance of repugnant ones, and where one of the matters alleged must evidently be false, the party should, of course, be obliged to make his election between them: and so, in allowing a party to make different allegations, he ought, if possible, to be excluded from such as (whether inconsistent or not with what has been previously pleaded) he must know to be without foundation in fact. Yet these, which are perhaps the only beneficial results that can flow from the principle of singleness, the present state of the law against duplicity, unfortunately fails to produce. For, first, a plaintiff is at liberty to adopt as many counts as he pleases, however apparent it may be that the cases which they respectively state, cannot all be true. So a defendant is allowed, under the provisions of the statute of Anne, to plead,

4. Code, § 3264, provides as follows:

"The defendant in any action may plead as many several matters, whether of law or fact, as he shall think necessary, and he may file pleas in bar at the same time with pleas in abatement, or within a reasonable time thereafter, but the issues on the pleas in abatement shall be first tried."

with scarcely any exception, matters directly inconsistent with each other, for example, he may plead, in trespass for assault and battery, not guilty (namely, that he did not commit the trespass), and also, son assault demesne, viz, that he committed them in self-defence or, in debt on bond, non est factum (viz, that he did not execute the deed), and also, that he executed it under duress of imprisonment. Again, a party is not restrained by the present system, from adding to his true case, another that, though consistent with it, he knows to be false. And, accordingly, a defendant, at the same time that he pleads a special plea founded on his real matter of defence, almost always resorts also to the general issue, or some other plea by way of traverse, in order to put the plaintiff to the proof of his declaration, without having, in truth, the least reason to deny the allegations which it contains. The statute of Anne, indeed, provides a check against this, by a provision of which the general effect is as follows: that, where the defendant has pleaded several pleas, and the issue upon any one of them, is found for the plaintiff, the court may give the plaintiff the costs of every such issue, unless the judge of *nisi prius* shall certify that the defendant had probable cause to plead the matter found against him. But the construction and effect given to this provision, in practice, seem to have rendered it inadequate to the object which it contemplates.

3. Another feature of doubtful character, in the system of pleading, is the *wide effect* which belongs, in certain actions, to the *general issue*.<sup>5</sup> In debt on simple contract, in assumpsit, and trespass on the case in general, the general issue embraces almost every ground of defence to which the defendant, at the trial, may choose to resort; the questions offered by these issues, being, in effect, nearly these, whether the defendant be indebted to the plaintiff, as alleged in the declara-

5. This difficulty is met in Virginia by Code, § 3249, which is as follows:

"In any action or motion, the court may order a statement to be filed of the particulars of the claim, or of the ground of defence; and, if a party fail to comply with such order, may, when the case is tried or heard, exclude evidence of any matter not described in the notice, declaration, or other pleading of such party, so plainly as to give the adverse party notice of its character."

tion, or whether he be liable to the plaintiff's demand, as set forth in the declaration. Now, these questions are so general and vague as to produce, but in a limited and inferior degree, the advantages which attend the production of a more strict and special issue. For, first, they do not fully effect the separation of matter of fact from matter of law. To understand this, it must be considered that, though the parties cannot go to trial on a *mere* question of law (a traverse of matter of law not being allowable), yet it is, in the nature of many issues in fact, to involve some subordinate legal question, the decision of which is essential to the decision of the issue. And the wider and more general the form of the issue, the more likely it is to comprise these subordinate questions of law. For example: In an action of debt on simple contract, or assumpsit, if the defendant rely on a lease executed by the plaintiff, he may give this in evidence under the general issue (*nil debet*, or *non assumpsit*), because it tends to show that he is not indebted, or is not liable, as alleged and, if the plaintiff's answer to the release, be, that it was obtained by duress, this will, of course, be also offered in evidence under the same issue. Upon this point of duress, two questions may be supposed to arise, first, whether the execution of the deed under duress, would defeat the effect of the deed, secondly, whether the deed were, in fact, executed under duress. Before the jury can find a verdict either for the plaintiff or defendant, both these questions must be disposed of. But the first is a question of mere law, and their decision upon it, must be guided by the direction of the judge. Here then, is a question of law involved under the issue in fact. Now, if, on the other hand, a form of action be supposed, in which the pleading is more special, and the general issue less comprehensive, for example, the action of covenant, this very same question will be distinctly developed, as a point of law, upon the pleading by way of demurrer. For the defendant cannot, under *non est factum* (which is the general issue in that action), set up the release, but must plead it specially, and the plaintiff must, consequently, plead the duress in reply; and, then, if the defendant disputes the legal consequence of the duress, his course is to demur to the replication. Of such demurrer, occurring in the very case here imagined, the reader has already

seen an example in the course of this work and to this he may be again referred, for further illustration.

It thus appears, then, that it is the effect of the wider general issues to render less complete, than it otherwise would be, the separation of fact from law. And the inconvenience of this is felt, in the great frequency with which difficult legal questions arise for the opinion of the judge at *nisi prius*, the numerous motions for new trials consequently made in the court in bank, to obtain a revision of such opinions, and the delay and expense necessarily attendant on a proceeding of this kind, when compared with the regular method of demurrer.

\* \* \* \* \*

Again, it is an inconvenience arising from general issues of this description, that they tend to conceal from each party, the case meant to be made by his adversary, at the trial.<sup>6</sup> Thus, in the instance above supposed, the plaintiff would have no notice from the nature of the issue, *nil debet* or *non assumpsit*, that the defendant meant to set up a release, nor would the defendant, on the other hand, have any intimation that it was to be met by the allegation of duress. And thus is defeated, in some measure, another of the advantages otherwise attendant on the production of an issue—viz, that of apprising the parties of the precise nature of the question to be tried, and enabling them to shape their proofs without danger of redundance on the one hand, or deficiency on the other.

Another objection to the system of pleading, and one more formidable, perhaps, than any that has been above suggested, is to be found in the excessive subtlety, and needless precision, by which some parts of it are characterized.<sup>7</sup> The existence of these faults cannot fairly be denied, nor that they bring upon suitors, the frequent necessity of expensive amendments, and sometimes occasion an absolute failure of justice upon points of mere form. Yet is their inconvenience less severely felt in practice, at the present day, than a mere theoretical acquaintance

6. This objection is met in Virginia by provision of § 3249 of the Code, which is copied on page 1016.

7. This objection is met in Virginia by the provisions of §§ 3245, 3246, 3272, hereinbefore quoted in the notes.

with the subject, would lead the student to suppose. Many of the intricacies and mysteries of pleading,—those, for example, which relate to *color*, and *special traverses*, long discouraged by the courts, are rapidly falling into disuse, and, on the whole, have but little effect in the actual operation of the system; and, with respect to the science in general, it may be remarked, that its increasing cultivation has made the course of practice more uniformly correct than in former times, and the occasions for formal objection, considerably less frequent.

## APPENDIX

In preparing the copy for the printer, the following section was accidentally dropped out:

### § 283a. Rejection of pleas.

In Virginia it is held that if a plea is offered and rejected, or if it has been filed and has afterwards been stricken out, in either case a bill of exception is necessary to enable the appellate court to review the ruling of the trial court. It is said that when stricken out, it is as if it had never been filed unless made a part of the record by a bill of exception.<sup>1</sup> In West Virginia it is provided by statute that "When a plea is offered in any action or suit, which is not sufficient in law to constitute a defense therein, the plaintiff may object to the filing thereof on that ground, and the same shall be rejected. But if the court overrule the objection and allow the plea to be filed, the plaintiff may take issue thereon without losing the benefit of the objection, and may, on appeal from a judgment rendered in the case in favor of the defendant, avail himself of the error committed in allowing such plea to be filed, without excepting to the decision of the court thereon."<sup>2</sup> And if error is committed in refusing to permit a plea to be filed no formal bill of exception is necessary if the order book of the court expressly states that the defendant excepted to the ruling of the trial court in rejecting the plea.<sup>3</sup> In Georgia if the plea has once been filed, and is afterwards stricken out, it is regarded as still so far a part of the record that no bill of exception is deemed necessary.<sup>4</sup> It will be observed, however, in reading the last mentioned case, that the plea was not stricken out on motion, but that a demurrer thereto was sustained. Of course no bill of exception was necessary in such a case, as the demurrer was a part of the record, and a bill of exception is never necessary to review the ruling of a court on demurrer.<sup>5</sup> If an assignment of error may be affected by extraneous evidence there must be an exception, or bill of exception.<sup>6</sup>

1. *Fry v. Leslie*, 87 Va. 269, 12 S. E. 671.

2. W. Va. Code, § 3876.

3. *Sweeney v. Baker*, 13 W. Va. at page 215.

4. *McCall v. Herring*, 116 Ga. 235, 42 S. E. 468.

5. *Russell Creek Coal Co. v. Wells*, 96 Va. 416, 31 S. E. 614.

6. *Swann v. Washington, etc., Co.*, 108 Va. 282, 61 S. E. 750.

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