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Report to the Committee on Judicial Administration and Legal Reform of the West Virginia Bar Association Containing Suggestions Concerning Pleading and Practice in West Virginia

Thurman W. Arnold
West Virginia University College of Law

James W. Simonton
West Virginia University College of Law

Harold C. Havighurst
West Virginia University College of Law

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REPORT TO THE COMMITTEE ON JUDICIAL ADMINISTRATION AND LEGAL REFORM OF THE WEST VIRGINIA BAR ASSOCIATION CONTAINING SUGGESTIONS CONCERNING PLEADING AND PRACTICE IN WEST VIRGINIA.

THURMAN W. ARNOLD*

JAMES W. SIMONTON*

HAROLD C. HAVIGHURST*

This Report was submitted by the Committee on Judicial Administration and Legal Reform to the West Virginia Bar Association at its annual meeting at White Sulphur Springs on the tenth day of September, 1929. The Bar Association after hearing the papers of Dean Charles E. Clark and Professor Edson R. Sunderland, which are printed in this issue of the Quarterly, voted to approve the idea of a Judicial Council. Inasmuch as the somewhat bulky report had not been read by most of the members of the Association at the time of the meeting it was decided that the matters of procedure contained in the report should be again referred to the next succeeding Committee on Judicial Administration and Legal Reform for study during the coming year, and that a report on this method of procedure and on the details of the Judicial Council Act should be submitted to the meeting of the Association in 1930.

*Members of the Faculty of the College of Law, West Virginia University.

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*To the Committee on Judicial Administration and Reform,
West Virginia State Bar Association:*

FOREWORD

This report is a result of a resolution passed by the Bar Association requesting the faculty of the College of Law to study chapter 125 of the Code and make suggestions concerning the pleading and practice in law cases. The idea behind that resolution was that it would be profitable for the faculty of the law school to devote its time to a study of the legal problems of West Virginia. The request for a study of pleading came first no doubt because it is one of the questions uppermost in the mind of the public spirited lawyer all over the country. Every law school and every bar association naturally wish to be at the front in solving problems which are within their particular province. A simple and speedy method of procedure is not only within the province of both the law school and the bar but it lies at the heart of the administration of justice. For this reason it was thought that recommendations on the procedure might well be among the first pieces of research to be done by the law faculty.

It should not be inferred from the fact that we are offering suggestions as to procedure that we think the procedure of West Virginia is particularly bad. On the contrary we believe that as procedure goes in the United States, West Virginia has escaped many of the difficulties which have involved other states. It has never been a state which would refuse to listen to liberal ideas and our code of procedure is full of them. Nevertheless as conditions change procedure as well as law must be constantly changed and restated. Nothing remains the same very long. Every system of rules must be continually revised and simplified. This process is much easier in a state where the procedure is not bad than in one where it is very bad. A thoroughly antiquated and cumbersome system of procedure offers so many opportunities to skillful lawyers that they acquire a sort of vested interest in it which they are unwilling to give up without a struggle.

It does not require a revolution to keep a reasonably ef-

efficient system up to date, and doubtless the fact that West Virginia procedure today is reasonably efficient is one of the reasons we are permitted to make suggestions to the bar concerning it. We therefore present our suggestions not in a critical frame of mind but only believing that to keep a procedure simple and efficient must require constant study, constant re-statement and constant experimentation.

To the College of Law a simplified procedure and the omission of ancient rituals is of peculiar importance. If ancient forms are used, their history must be studied. To know the complicated logical machinery of the common law requires years of study for an expert. Most of this machinery is seldom used, yet all of it might conceivably be of use. Most law schools give a general course in common law procedure which covers its general outlines. West Virginia goes into detail and has more required procedural courses than any other school. The general course in common law procedure will always be necessary. The details however take time which is devoted in other schools to the study of problems of greater importance to the lawyer of the future.

OUTLINE OF OUR PROPOSAL FOR PROCEDURAL REFORM.

In brief our proposal consists of setting up machinery for the continuous study of legal problems in West Virginia. The motive power of this machinery consists in a judicial council which has (1) rule-making power, (2) facilities for research through the use of the faculty of the state law school, and (3) bureau of statistics.

The history of the judicial council, the forms which this device has taken in the various states and the compelling reasons why one should be instituted in West Virginia are summarized in the April issue of the *West Virginia Law Quarterly*. We will not attempt to repeat these arguments here. We have discussed the question of rule-making power with Mr. Sunderland of the Michigan Law School faculty and he has kindly consented to review the merits of this proposal in a general way for the benefit of the West Virginia bar. This article appears in the June issue of the

West Virginia Law Quarterly. We do not think it is necessary therefore to cumber this record further with an explanation of these arguments except to express our appreciation to Mr. Sunderland for his kindness in helping our project, for which he has expressed the greatest enthusiasm.

In order to give a complete demonstration of a judicial council with rule-making power it is necessary to picture the machine in operation. We have therefore assumed that we have a judicial council with rule-making power and that the law faculty is the research unit of that judicial council. Acting as such research unit we have drafted for that judicial council its first proposed rules, which consist in an extension of the motion for judgment procedure. If these suggestions were accepted by the judicial council under the above assumption they would become the rules of procedure in this state.

Nevertheless our proposal is so drawn that in the event that a judicial council is not approved with such wide powers, our suggestions could be passed as a legislative act governing procedure. We suspect however that an examination of the complications involved in passing such an act might provide a very convincing argument as to why the rule-making power should be vested in a judicial council rather than in a legislature. Such a body cannot possibly have time to consider either the difficulties involved in drafting an act or the faults of pleading which we are trying to remedy. In any event we have made our proposal so that if any part does not receive the approval of the bar association the rest may go forward independently.

OUTLINE OF THE METHODS OF RESEARCH.

It may be useful for the Bar to know just what authorities have been consulted and how the work has been carried on.

In drafting the Judicial Council Act, we have examined the statutes in every state which has a judicial council and have collected them all in the article in the West Virginia Law Quarterly above referred to; we have written to the judicial council in each state and obtained reports where any are published; we have written to lawyers interested in the work in the various states where

judicial councils have been successful; we have interviewed personally the members of the Judicial Council of Massachusetts and discussed our problems with them. Results of our study and the conclusions are found in the draft we submit and in the article to which we have referred.

We wish also to acknowledge our indebtedness to Mr. Sunderland of Michigan, and Dean Clark of Yale, with whom we have conferred at some length, and the draft of our act contains many of their ideas.

In the drafting of the procedure on motion for judgment in addition to consulting the statutes and literature on the general topic we have made the following first hand investigation:

First: We have written letters and sent out questionnaires to all judges, all clerks of courts in Virginia and about fifty representative lawyers. These questionnaires were designed to ascertain just how this procedure worked in Virginia. The results are summarized elsewhere in this report.

Second: We have had personal conferences with lawyers and the Judge of the Circuit Court in Winchester, Virginia, at which conference we went over our act in detail and were assured that it was practical and workable.

Third: We have spent ten days at Yale University going over the act in great detail with Mr. Clark, Dean of the Law School, Mr. Leon Green and Mr. Dodd of the Yale Faculty. Numerous suggestions and criticisms were offered in great detail and the act re-drafted as a result of the co-operation of the Faculty of Yale for whose work we wish to express our appreciation and indebtedness.

While the frame work of the act comes from Virginia and West Virginia, its various suggestions and proposals were taken from England, Canada, Connecticut, New York and we are particularly indebted to Mr. Sunderland's Code of Civil Procedure on which he has spent some years' work in Michigan.

I. THE JUDICIAL COUNCIL

DRAFT OF ACT PROVIDING FOR JUDICIAL COUNCIL.

Section 1.—*Judicial Council—Establishment and Purposes.*

There is hereby created a Judicial Council for the continuous study of organization, rules and methods of procedure and practice of the judicial system of the state. It shall be composed of one Justice of the Supreme Court, three Circuit Judges, who shall be appointed by the President of the Supreme Court of Appeals, and four practicing attorneys and one member of the faculty of the College of Law of West Virginia University, who shall be appointed by the Governor. Not more than two judges and two attorneys shall be members of any one political party.

Section 2.—*Appointment and Term of Office.*

The executive council of the State Bar Association shall submit to the President of the Supreme Court of Appeals, nominations for judges to serve on the Judicial Council, consisting of at least two names for each vacancy on said Council. They shall also submit to the Governor of the state a list of nominees selected from among the attorneys of the state and from the faculty of the College of Law.

Three members shall be appointed to said Council for a period of two years, one of whom shall be a judge, another a practicing attorney, and the third, a member of the faculty of the College of Law of West Virginia University; three members shall be appointed for a period of four years, one of whom shall be a judge and two of whom shall be practicing attorneys, and three members shall be appointed for a period of six years, two of whom shall be judges and one a practicing attorney. All appointments made thereafter shall be for a period of six years, except that in a case of vacancy the appointment shall be

made to fill the unexpired term. The President of the Supreme Court shall designate the time and place of the first meeting.

Section 3.—*Duties and Powers of the Judicial Council.*

The Judicial Council shall from time to time

(1) Meet at the call of the chairman who shall be selected by the Council from its members;

(2) Survey the conditions of business in the several courts of the state with a view of improving the administration of justice, and submit such suggestions to the courts as they may deem advisable;

(3) Report to the Governor and to the Legislature at the convening of each regular session, such recommendations as they may deem proper;

(4) Hold public hearings, administer oaths and require the attendance of witnesses and the production of books and documents. The circuit court shall have power to enforce obedience to summons issued by the Council and compel the giving of testimony.

Section 4.—*Bureau of Statistics.*

The Council shall have the power to organize a Bureau of Statistics for the purpose of gathering information relating to civil and criminal litigation. Judges, prosecuting attorneys, sheriffs, and attorney general, clerks of the district court, superior officers of penal institutions and asylums and other county and municipal officers, boards and commissions shall render such council such reports as it may request on matters in the scope of its powers. The clerks of the circuit courts of the state shall prepare a statement semi-annually showing the cases filed and their disposition and such other information regarding litigation in their respective courts as may be required under a method of arrangement and upon forms to be furnished them by the said Judicial Council, which statement shall be forwarded to the Judicial Council.

Section 5.—*Rules of Pleading and Practice.*

The practice and procedure in actions at law or in equity shall be as simple and non-technical as may be consistent with the efficient administration of justice. In order to carry out the details of this general provision the Judicial Council shall have power to prescribe and establish by general rules, the process, writs, pleadings, verifications, motions and forms of action and the trial and appellate practice and procedure in civil actions at law and equity and in the rendition, entry, opening or vacating of judgments or orders therein. Such rules shall not abridge, modify or enlarge the substantive rights of any litigant. When and as the rules of procedure herein authorized shall be promulgated all laws in conflict therewith shall be of no further force or effect, provided, however, that this act shall not be construed to deprive the courts of power to establish rules for the conduct of their business not inconsistent with rules promulgated by the Judicial Council or with statutory law.

All rules promulgated by the Judicial Council shall go into effect as follows:

(1) The chairman of said Council shall mail to each judge, justice of the peace and clerk of the circuit court a number of copies of each proposed rule, one of which copies shall be posted by each of said officers in a prominent place with the request that any objections by any judge or attorney to such proposed rule be put in writing and mailed to the chairman of the Judicial Council.

(2) Forty days after mailing the copies of said rules as provided above, the Judicial Council may present the same to the Supreme Court of Appeals for its approval. If said rules are satisfactory to a majority of the Court it shall by its order declare that said rules go into effect thirty days thereafter.

(3) If it appear to a majority of the court that there are substantial objections to any of said rules or that said rules require further study or modification, the court shall summon the chairman of the Judicial Council before it with such other members of said council as may care to appear to explain either the meaning of or the necessity for any of said rules. If, after such hearing, a majority of the court

is not satisfied with any rule no order putting said rule into effect shall be entered.

Section 6.—*Bureau of Research.*

The faculty of the College of Law of West Virginia University shall constitute a Bureau of Research on legal problems and the legal aspects of industrial problems, in so far as funds may be conveniently made available by West Virginia University for work in the summer time, and for diminishing the teaching load of those members engaged on said work during the school year. In so far as it may be possible, without interfering with the teaching schedule of the College of Law, the faculty or members thereof designated by the Dean, shall prepare reports on matters within the scope of the powers of investigation by said council.

Section 7.—*Expenses.*

All members of the Council shall serve without compensation but shall be paid their actual and necessary expenses incurred in the performance of their duties. They may further incur such expense for clerical help, the collection of statistics and other matters in the scope of their purposes, which may be approved by the Governor. All bills or accounts of the Council shall be approved by the Chairman and shall be audited and paid by the state as other claims authorized by law.

COMMENT ON JUDICIAL COUNCIL ACT.

Section 1.

(a) Number on the Council. The numbers on the judicial councils at present organized in the United States vary from four to about forty. Large judicial councils however do not seem to be effective. Those of Connecticut and Massachusetts which are both outstanding have nine in number. California has eleven.

(b) Personnel of the Council. The personnel of the judicial councils in the United States differs widely. The California Council which is one of the best consists entirely of judges. Massachusetts has five judges and four attorneys. In Connecticut there are four judges, four attorneys

and one state's attorney. Other judicial councils make the attorney general an ex-officio member. Kansas and Washington include judges, attorneys and members of the legislature. North Dakota includes the dean of the state law school. (See vol. 35 W. Va. Law Quar. 213.)

The reasons for the personnel selected in this draft are as follows: The courts should not have a majority because they should not be held responsible for the rules of procedure which are passed. To impose this responsibility on them is to subject them to the criticism which inevitably comes to a legislative body.

The reason that a member is selected from the law school faculty is that the Law School represents the research machinery of the Council. Representation on the Council is therefore necessary to make the participation of the law faculty effective.

Section 2. Appointment and Term of Office.

Most judicial councils in the United States are appointed by the Supreme Court or the Governor. It seems better however that the bar who are the most affected by the work of the judicial council should have a certain responsibility in selecting the members. Assuming that we want the bar to nominate members of the Council, we have a choice of having these nominations made by the entire Bar Association or by the Executive Council. We have chosen the Executive Council as the best body for this purpose, for the reason that it is a small body in which frank discussion of the qualifications of the nominees may be had. Judicial councils appear to fail not so much because of lack of powers as because of lack of administrative ability and interest on the part of the men chosen. Many of the judicial councils are mere gestures because the right men have not been appointed. Therefore it is clear that a non-political body in which frank confidential discussion is possible is the only kind of a body which will ever select proper men for this important service. We therefore thought it best to make the Executive Council of the Bar Association the nominating body.

Nevertheless we thought it wise to give the Governor and the Supreme Court the final voice in the selection of the

members because of the weight which an appointment by these officers will give to the Council. It is also doubtful if it is constitutional to limit the appointing power to nominations made by an unofficial body. Therefore it is not made compulsory that the appointments be made from the nominations submitted. These nominations probably would be given great weight and generally followed. It does not seem desirable to go further by making the appointment from these nominations compulsory.

Section 3, subsection 1.

It was thought best to allow the Council to organize itself rather than to have any chairman appointed by statute. This gives a more elastic organization.

Subsection 2. This section is somewhat rhetorical but contains language which is usually found in these acts.

Subsection 3. It is hoped that the Judicial Council will gradually build up in authority and influence, so that these reports here provided will have weight. A member of the Judicial Council of Massachusetts told us that its recommendations were at first almost completely rejected by the Legislature but after four years of growing influence the Council was now able to get almost everything it recommended passed.

Subsection 4. This provision is found in Oregon, Ohio, Washington, North Carolina and North Dakota. The Council does not now need any such power so far as any procedural studies or changes are concerned and we have no immediate problem in mind which requires such power. The idea in giving it however is that if a situation arises where the Council desires to investigate any practice on the part of the bar such as ambulance chasing, it will have the necessary machinery with which to operate. The recent activities in Philadelphia and in New York regarding the ambulance chasing evil are in point. If such an investigation were ever required in West Virginia it would be greatly facilitated by this section.

Section 4. This is a very important function of the Council. The absence of proper judicial statistics is one of the chief causes of the failure of any judicial council. Judicial

statistics should include a record of what happens in every case in every *nisi prius* court. They are essential in order to have any authoritative notion as to how any rule of pleading or of substantive law is working. If this section is passed it is hoped that the Law School may be able to start a system of keeping judicial statistics in this state by collaborating with the Yale University Law School which is doing it in Connecticut. When once a statistical method is devised and proper forms provided, it should not be difficult to have these statistics continued by the clerks.

Section 5. Rules of Pleading and Practice. This section is discussed later.

Section 6. The incorporation of the faculty of the law school as a research body of a judicial council is somewhat novel. However it has been observed that judicial councils without some machinery for research work have accomplished very little. The members cannot be expected to give the detailed attention to such work which it requires. Financing this work is bound to be expensive. Using the law school therefore for this purpose seems to be the logical solution. It will have the double advantage of getting the work done and also bringing the faculty and students in closer touch with the legal problems of West Virginia.

Section 7. Expenses.

As a practical matter it has been found very difficult to obtain adequate financing from the legislature for judicial councils. Under the scheme suggested in this act a large part of the expenses will be shifted to the state university by using the law faculty for research. Expenses for clerical help will not be large. The expenses for the collection of statistics can be kept within reasonable bounds by limiting it to amounts approved by the governor.

POLICY UNDERLYING PROPOSAL TO GIVE RULE- MAKING POWER TO JUDICIAL COUNCIL.

(Comment on *Section 5*, Rules of Pleading and Practice)

I. Rule-making power in general.

For some years the proposal to give courts complete rule making power by which they may supersede all legislative enactments in conflict therewith has been urged by leaders

of the American bar. A committee of the American Bar Association, composed of Josiah Marvel, Roscoe Pound, Charles S. Cutting, Frank W. Grinnell, E. W. Hinton, Charles S. Cushing, Thomas W. Shelton and Edson R. Sunderland are endorsing this idea and conducting active propaganda in its favor.

The proposal in its broadest terms contemplates the substitution of court rules for legislative codes of practice and procedure. For the purpose of illustration only, let us divide law into two classes: (1) What the courts may do, (2) How they may do it. The first class would include jurisdiction and general procedure; the second, all rules of practice directing the *manner* of bringing parties into court and the *method* by which the court proceeds thereafter.

The first is to be a matter of legislative enactment.

The second is to be provided for by court rules.

This proposal would not eliminate codes of civil procedure, but would cut down their application to jurisdictional matters, rules of evidence and rules of substantive law.

Nor would such a rule-making body attempt to prescribe by general rule matters which might better be covered by local rules of the particular court. Such matters can be determined only by experience.

The chief practical objection urged to regulation of procedure by rules of court is that it would require the enactment of a new code of procedure which in turn would require judicial construction and would plunge us into a condition of uncertainty which it would require years to remove.

The chief reasons for the advocacy of the rule-making power may be summed up as follows:

(1) General rules of procedure are matters requiring skill, experience, time and research. At present this intricate job is attempted by the legislature. Doubtless many members of the legislature are qualified, if they only had the time, to treat this subject adequately, but if they were called upon to do so they could scarcely be expected to do anything else. Every conceivable problem is placed before them in a hurried manner in a short session. They are necessarily embroiled in political disputes and in obtaining a fair share of state funds for their respective counties. Such matters must necessarily be among their first concerns

because representation on these matters is what they are elected for. To expect them to devote sufficient time to a study of as intricate a matter as procedure is to expect the impossible. It is therefore without casting any reflections on the legislature that we say there is no conceivable object in employing them to do a work requiring particular skill when experts on that work are readily available.

(2) A system of procedure requires a certain elasticity. If the rule-making power is vested in a body of experts the rules which do not properly function may be changed without waiting for a legislative session.

(3) The making of rules of procedure should be based upon judicial statistics. These cannot be either gathered or understood by a legislature.

(4) The making of rules of procedure should be divorced from political considerations. This can never be done when they are made by legislatures. The courts and the bar should feel a sense of responsibility towards their conduct in the administration of justice. This responsibility is destroyed when they have no power to make their own rules.

(5) The rule-making power in every instance where it has been tried has been successful. Results of successful operation of this power are found in England, Australia, Ireland and British India. Congress, whenever new courts have been established, always allows these courts to establish their own procedure and this policy has met with success in the Municipal Court of Chicago, the Court of Claims, the United States Court of China, the Court of Customs and Appeals, the Supreme Court of the District of Columbia, the Interstate Commerce Commission and the Board of Tax Appeals. The Municipal Court of Chicago is a conspicuous example of the success of the rule-making power.

II. Reasons why the initiative in rule-making power is given to judicial council rather than to court.

In drawing this act we have preferred to give the initiative in the rule-making power to the Judicial Council rather than the court (though the actual power is still kept in the court) for the following reasons:

(1) The courts do not have the time to work out a system of procedure.

(2) The making of rules is essentially a legislative function. Any body which makes rules must necessarily be subject to criticism which comes to all legislative bodies. This criticism should not be borne by the courts. They should not have to accept responsibility for the making of the rules which they have to interpret.

(3) The rule-making power when vested in courts has not been a conspicuous success in America because the courts have failed to use it. Colorado, Delaware, Washington and Michigan have all granted complete power to courts to make rules which may supersede any act of the legislature. Nothing has been done under this power as yet by the Courts themselves. Much is being accomplished at present in these states, but the work is being done by committees of the Bar Association who are submitting rules to courts. In this act we have attempted to supply the judicial council with the necessary research machinery through the use of the Law School Faculty so that the rule-making power may be effective.

We have not however deprived the courts of their power over these rules. The Supreme Court has been given an absolute right to refuse to put into effect any new rule of which it does not approve. The initial burden of making the rules is all that has been transferred to the Council and we believe that is the body on which this burden should rest.

THE CONSTITUTIONALITY OF THE PROPOSED JUDICIAL COUNCIL ACT.

The only constitutional question that can arise with respect to this act relates to the rule-making power. The Judicial Council may propose rules governing pleading and practice which become effective upon an order of the Supreme Court of Appeals. Although there are no exact precedents supporting the constitutionality of this provision, we believe that there will be no difficulty in upholding it upon general well established principles. We shall attempt to present the analysis and argument on this point

as briefly as possible. A list of authorities follows the discussion.

The question involves constitutional doctrines as to the separation and delegation of governmental power. Our Constitution (Art. 5, Sec. 1) provides:

“The legislative, executive and judicial departments shall be separate and distinct so that neither shall exercise the powers properly belonging to either of the others, nor shall any person exercise the powers of more than one at the same time excepting that justices of the peace shall be eligible to the legislature.”

The decision of any particular case arising under this broad general section of the Constitution must turn upon the view taken as to the nature of the power to be exercised. It is difficult to lay down any logical scheme for allocating powers of various kinds to the different governmental departments. There are no hard and fast categories. Historical and practical considerations must be taken into account.

The nature of the rule-making power has been discussed in a number of judicial opinions and articles. There are two views: (1) that this power is an exclusively judicial power and (2) that it is a legislative power, although not exclusively such. There is no authority for the view that it is an exclusive non-delegable power of the legislature. That possibility may therefore be at once dismissed.

I.

If the power is exclusively judicial that would mean that the only reason that statutory provisions governing practice and procedure have ever had any force has been that the judiciary has tacitly accepted the legislative rule. Any rule made by the court in conflict with a statute would take precedence. This is the view presented by Dean Wigmore in 23 Ill. L. Rev. 276. There is a suggestion of this view in several North Carolina cases, but the principal reason for these cases holding that a rule of the Supreme Court would take precedence over a legislative act is to be found in the peculiar provisions of the North Carolina constitution. Other cases suggesting the idea that the rule-making power

is inherently judicial and may not be exercised by the legislature are probably to be explained on the ground that the legislative enactments involved related not simply to practice and procedure but attempted to prescribe how the members of the court should act under given circumstances. An example of the latter are statutes requiring opinions in all cases to be in writing. There is little substantial authority in support of the view that the rule-making power is exclusively judicial. It does not make a ready appeal to judges or members of the bar who are accustomed to the idea of following statutory regulations of practice and procedure.

Under this view, however, no constitutional question of the validity of the statute we are suggesting would arise. In making an order putting into effect the rules proposed by the Judicial Council the court itself is exercising a rule-making power. It is true that under our plan the court is not given the power to initiate proposals. If the Supreme Court should undertake to make rules on its own initiative in conflict with those previously proposed by the Judicial Council and made effective by court order, then the question whether the judiciary possesses inherent and exclusive rule-making power would arise. That, however, is no more apt to come up than the question whether under the present statutory situation a rule of court would take precedence over a statute on matters of practice and procedure.

II.

The view that the power may be exercised by the legislature but that it is not an exclusive legislative power is widely held. The leading case is *State ex rel Foster-Wyman Lumber Co. v. Superior Court*, 267 Pac. 770 (Wash., 1928). This case upholds a rule made by the court under a statute giving the court such powers, even though it conflicted with an earlier statute. Dean Pound and Mr. Scott of the Harvard Law School have also expressed this view of the nature of the rule-making power in articles appearing in the list of authorities. When our constitutions were adopted, the practice in the English courts was regulated by the superior courts at Westminster, which correspond to our state supreme courts. There is thus historical pre-

cedent for this view that courts may exercise rule-making power. Our own court has held that the power is not exclusively in the legislature in that the court has the inherent power to make rules not in conflict with any existing statutory provision. *Peter v. George*, 86 W. Va. 454 (1920). There would seem to be no question that the power is one which may be delegated to the court.

The provisions of the statute we are suggesting, however, are slightly different in that they do not give the court complete power of making rules. The Judicial Council has the power of initiating proposals and the court is limited to approving and putting into effect the proposals thus made. Although this procedure varies but little from that provided by the Washington statute, it presents a problem that is new in some respects.

There can be no question that the legislature itself might propose rules leaving the court to accept them or not as it should choose. If the court may be given complete power of rule-making it would seem to be a far less delegation of power to permit it merely to accept or reject a proposal already framed. The only question then is whether the power of proposing the rules may be delegated by the Legislature to the Judicial Council.

Many decisions in state and federal courts upholding the powers delegated to public service commissions, workmen's compensation boards, boards of health, etc., lend much support to the constitutionality of such a delegation of power. It is repeatedly stated in the cases that the legislature may lay down a policy and delegate the carrying out of this policy and the making and enforcing of detailed rules. This is precisely the type of thing that the Judicial Council would be doing in proposing rules for practice and procedure. If the legislature may delegate power to make and put into effect detailed regulations in the fields referred to, it would seem to follow that it might delegate the power of merely proposing rules to the Council.

It is indeed quite arguable under the decisions mentioned that the complete rule-making power might be given to the Judicial Council alone, without a provision for court approval. But there is one feature of the rule-making power which might serve to distinguish it from other powers that

have been delegated. The Judicial Council is undoubtedly an agency in the executive branch of the government. It might be considered an improper division of authority to permit it to prescribe rules according to which the judicial branch should carry on its work. This objection however does not appear under our proposed act. The Judicial Council has not been given the power to control the work of the courts. No rule can go into effect without an order of the Supreme Court of Appeals which is properly the head of the judicial system of the state. There can thus be no encroachment by the executive on the functions of the judicial department. This being true it is difficult to see any objections from the standpoint of constitutionality. It is merely the power of proposing rules that is delegated. Since the power of rule-making is not an exclusively legislative function there can be no objection to such delegation.

Practical considerations lend further support to this argument. Chief Justice Taft has frankly recognized that the question of the separation and delegation of powers involves considerations of "common sense and the inherent necessities of the governmental co-ordination" *J. W. Hampton, Jr., & Co. v. United States*, 276 U. S. 394, 406 (1928). We have already shown that it is eminently proper that a body like the Judicial Council should investigate all questions of procedure and make recommendations for rules governing practice and procedure. It is also a wise provision to permit the judiciary to have the final word as to what rules should actually go into effect. There is no encroachment by any department of government upon any other department. The entire scheme would seem to be in accord with "common sense and the inherent necessities of the governmental co-ordination".

REVIEW OF AUTHORITIES FOR THE CONSTITUTIONALITY OF THE RULE MAKING POWER.

The view that power to make rules for pleading and practice is an inherent judicial power and that all statutes prescribing such rules are unconstitutional, has occasionally been urged. (John H. Wigmore, Editorial Note, All Legislative Rules for Judiciary Procedure are Void Constitutionally, 23 Ill. L. Rev. 276.)

In several North Carolina cases it has been held that a rule of the Supreme Court takes precedence over a statute governing appellate practice. *Herndon v. Insurance Company*, 111 N. C. 384 (1892); *Greene v. Newsome*, 184 N. C. 615 (1922); *Lee v. Baird*, 146 N. C. 363 (1907); *Pentruff v. Park*, 195 N. C. 609 (1928) and cases there cited. The constitution of North Carolina, however, provides (Art. IV, Sec. 2) that the Legislature should regulate procedure in all courts below the Supreme Court, leaving it to be implied that the Supreme Court should make rules regulating the procedure on appeal. These cases therefore do not support the general view of inherent judicial power, but turn on the peculiar provisions of the State Constitution.

Many judicial opinions referring to the inherent rule making power of the courts have been rendered in cases involving statutes which prescribe the details of judicial conduct and may thus be considered as encroaching on the judicial branch of the government. *In re Jessup*, 81 Cal. 487 (1889) (a statute requiring orders for a re-hearing to be made in writing signed by five justices); *Houston v. Williams*, 13 Cal. 24 (1859) (a statute requiring that opinions in all cases be in writing); *ex parte, Griffiths*, 118 Ind. 83 (1888) (a statute requiring a judge to write the syllabus in cases to be reported). Such statutes may sometimes be difficult to distinguish from those governing pleading and practice, but it is believed that it is possible to do so. Such a distinction is pointed out in *Parkinson v. Thompson* 164 Ind. 609 (1905).

Although it cannot be said to be a question that has been finally determined, it seems clear that the rule making power is not exclusively judicial.

The view that the Legislature has power to prescribe rules for pleading and practice but that such power might be delegated to the court, finds much judicial support. In *State ex rel Foster-Wyman Lumber Co. v. Superior Court for King County*, 267 Pac. 770 (Wash. 1928) it was held that a statute was constitutional which provided that the Supreme Court might make rules for the superior courts which would supersede prior statutes. The court said (p. 773):

“The Legislature, although formerly functioning in this state as the source of rules of practice and procedure in the courts, did not, in so doing, perform an act exclusively legislative, and may, if it so desires transfer that power to the court without such act being a delegation of legislative power.”

A similar statute was upheld in *Ernst v. Lamb*, 73 Colo. 132 (1923). The Supreme Court of the United States expressed the same view in *Weyman v. Southard*, 10 Wheat, 1 (1825) and *Bank of the United States v. Halstead*, 10 Wheat 51 (1825). The delegation of such power by the Legislature to a court is also discussed and the historical background given in articles in legal periodicals. Roscoe Pound, Regulation of Procedure by Rules of Court, 10 Ill. L. Rev. 163; Austin W. Scott, Actions at Law in the Federal Courts, 38 Harv. L. Rev. 1; Edmond M. Morgan, Judicial Regulation of Court Procedure, 2 Minn L. Rev. 81.

If the Legislature could delegate the power to make rules, it would follow that it might also frame rules, leaving it to the court to put them into effect. Authorities holding that an act may be proposed in complete form with the provision that it should become effective upon an act of a public officer are collected in 12 C. J. 864. See *Blue v. Smith*, 69 W. Va. 761 (1911).

The delegation by the Legislature to the Judicial Council of the power to frame rules which should go into effect upon order of the Court, finds support in many decisions holding that the Legislature may delegate to administrative bodies the power to enact rules and regulations to carry out a broad policy laid down by the Legislature in connection with the subject. West Virginia cases enunciating this principle are *United Fuel Gas Company vs. Public Service Commission*, 73 W. Va. 571 (1914); *State ex rel. Public Service Commission vs. B. & O. R. R. Co.*, 76 W. Va. 399 (1915). A large number of cases to the same effect are collected in 12 C. J. 847-853.

In *Blue v. Smith*, cited *supra*, a statute authorized the Chief Inspector over Public Offices to prescribe rules and forms to be followed in keeping the accounts of public funds of the state. These were to become operative upon

the approval of the Board of Public Works. This statute was held to be constitutional. The mechanics of the statutory scheme are not unlike those of the suggested statute on rule-making power.

II. MOTION FOR JUDGMENT PROCEDURE.

THE PURPOSE AND SCOPE OF THE PROPOSED MOTION FOR JUDGMENT PROCEDURE.

Two difficulties immediately occur to the experienced lawyer who reads the draft of a proposal changing procedure in actions at law. First, that any radical change in procedure leads to confusion. Second, that any new system of procedure is at first considered as an experiment and by many as a dangerous experiment. As a matter of fact both of these difficulties generally turn out to be more imaginary than real. Procedure generally works better when it is new than when it is old, or at least it is under systems which have been in effect for a long time, that the most evident abuses have arisen. In England the efforts of the most respectable members of the bar were united to prevent the imposition of a system which they sincerely felt would bring chaos. Their predictions remain unfulfilled and the English system is regarded as a model. The confusion relating to changing systems of legal procedure and the danger of adopting new ones has never in the past at least led to any of the disastrous results which were predicted. Nevertheless we recognize that these two ideas are entertained by very intelligent and eminent lawyers and we have met them in the following way.

(1) We have not undertaken to change the present common law procedure in West Virginia in any particular. If our suggestions were adopted tomorrow any lawyer could still use any of the procedural forms to which he has been accustomed.

(2) We have adopted as a basis for our suggestions the extension of a form of procedure which is already in use in a restricted form in West Virginia so that everyone is familiar with its operation. Its use has been an unqualified success. It has been in use for over ten years in Virginia with the result that lawyers have so far preferred it that

common law actions are practically abolished not by statutory action but by the deliberate preference of an experienced bar. An actual count of the cases shows that less procedural difficulties have arisen under this system than under the old common law pleading in spite of the fact that the motion procedure has been construed but a very short time. The reason of course is that it has not needed much construction.

Therefore in answer to those who say that it is dangerous to change the procedure we may reply that we have changed nothing—that if our suggestions are not inherently valuable they will fall into disuse because no one is compelled to take advantage of them. The bar is risking nothing if it accepts our suggestions because they are entirely optional.

To those who urge that our suggestions constitute a dangerous experiment we may also reply that they are neither an experiment nor have they proved to be dangerous. On the contrary they have worked and worked well with a minimum of judicial construction and to the entire satisfaction of those who are using them.

The idea of offering these optional changes in procedure which would come in general use only if they were effective was suggested to us by Mr. David C. Howard of the Charleston bar. We feel that it is the only possible way in which procedural changes will ever be actually accomplished because it combines the possibility of a new system together with an escape from that system if it proves to be unsatisfactory.

At the risk of being tedious we feel that it is necessary to explain somewhat in detail the atmosphere and psychology with which we have attempted to invest this suggested method of pleading. We do this because we feel that the success of any system of pleading depends as much on the attitude with which it is regarded by the bench and bar as on its actual content. Codes of pleading are like constitutions. The actual rules which they lay down are not as important as the frame of mind of their interpreters. In drawing up this act we have tried to take the emphasis away from the pleading and transfer it to the trial of the case. The only way to make pleading simple is to make questions of pleading comparative unimportant.

If the emphasis is put upon pleading, and a logical system of rules is developed, the questions which arise under that system will be endless. If the parties are told to give each other reasonable notice of what their case is about, and then go ahead and try it, questions of pleading will not arise—provided always that the judge or umpire is given sufficient power to compel the parties on his own motion to make the case reasonably clear. On the other hand if the parties are told that if they follow certain rules and their logical implications, and then if they have done this satisfactorily they may have a trial, rules will have to be added to rules and interpretations to interpretations forever. The attempt to provide in advance for all contingencies represents one attitude which we have tried to avoid. The alternative has been to increase the power of the judge to control the way that the case is finally presented for trial, giving him power to call the parties before him and tell them to straighten their pleadings out. In order to do this we have made our procedure as short as possible, and left everything to the fairness and good sense of the trial judge which could properly be placed in his hands. No other official in our government has had his hands so tied by rules and restrictions as our judges. One aim of our proposal is to free the judges so far as is possible from these restrictions, and to allow them a free hand in bringing to bear, in the conduct of their business, their experience and judgment.

The motion for judgment procedure, as it has worked out in West Virginia in a limited class of actions, and in Virginia in all actions at law, places the responsibility on the judge by limiting the pleading to a statement of the bare essentials, necessary to go to trial. These essentials are (1) the defendant must know in a general way what he is being sued for (2) the plaintiff must know in a general way what kind of a defense he will have to meet. If we have this condition, further pleading is superfluous except as a matter of logical symmetry, and logical symmetry can never be achieved without emphasizing it until the purpose of the court to decide the rights of litigants is lost in the background. The great merit of common law pleading over the pleading of facts is that by its artificial forms it provides a method of informing the other party as to what the

case is about in a general way without detail. Its only defect is that it has been raised to the importance of a logical creed, and its logical consistency has in many instances been regarded as of more importance than the substantive rights of litigants.

Granting that all we need to start the trial of a case is that each party should know in a general way what the other party's case or defense is about, how shall we assure ourselves of that result before the trial of each case? The sensible answer is that each shall tell the other as briefly as possible what he is trying to do, without detail. Generally this is all that is required. If one of the parties is not satisfied with the information which he has received, he may ask for more. The judge is in a better position than anyone else to know whether this inquiry is made in good faith, or only for the purpose of securing a technical advantage. If the parties themselves are satisfied, but the judge does not think that enough advance information is given, then he can tell the parties just what more he wants. That is exactly what the judges are doing in Virginia under this form of procedure. It sounds sensible, and we believe that the overwhelming opinion of lawyers and judges in its favor is conclusive evidence that it is as sensible as it sounds.

If any other general attitude is taken toward pleading, or if greater emphasis is put on it than is required to fulfill these two essentials, it becomes a complicated ritual sooner or later. The great success of the English system, which is regarded almost with awe by the leaders of procedural reform in this country, owes its efficiency, according to Mr. Sunderland, not to the numerous rules, which are not so simple as one might imagine, but to a process which compels the parties to come before a master and informally settle how the case is to be presented. There are as many opportunities for complicated construction under the English Rules as under any other system. But these questions are almost impossible to raise. The master informally tells the parties to get ready for trial and tell him and each other what the case is about. They submit to him the method they are going to follow. If he doesn't like it he suggests changes. In such an atmosphere it is extremely difficult to be technical. When the case goes to trial there

are no questions of pleading, and before the case goes to trial the directions of the master prevent arguments on pleading.

In addition to that the pleaders are aided by numerous forms, with which all parties are familiar. These forms are only suggestions, but they are generally used.

We have tried to do the same things in our proposed motion procedure. We have not tried to do them exactly the same way as has been done in England because of the difficulty of adopting an entirely new system. When we have a model procedure with which everyone is familiar, and the success of which has been proved, it seems futile to use unfamiliar methods, however sound they may be. We believe that the motion for judgment procedure is just as well adapted to accomplishing these results as any we have found. And it has the advantage of being susceptible of examination in its actual practice in Virginia. Our forms we have taken largely from Connecticut. Many of the details of our procedure are taken from the English practice, but its general framework and sequence is made to conform to what is already familiar to the West Virginia bench and bar.

Objection is often raised that this procedure will not work in tort actions. Why not? If any kind of an action lends itself to short informal statement a tort action does. Every attempt to define the issues clearly in a tort action has always failed. The plaintiff says that the defendant negligently injured him. The defendant claims that it was the plaintiff's fault. This is about all that the pleadings ever show in any action of that kind regardless of all attempts to force them to show more. The best answer to the objection this form of procedure cannot be used in tort actions is the fact that in Virginia experienced lawyers use it in the most important tort cases in preference to common law pleading. Suppose an action for libel and slander, one of the most technical declarations to draw. If it were pleaded under the motion practice the notice would run as follows:

"To C____D_____, W_____, West Virginia.

Please take notice that on the _____ day of _____, 1929, I shall appear by my attorney before the circuit court

of ----- County, West Virginia, at the court house in ----- at the opening of court or as soon thereafter as the matter can be heard, and move for a judgment against you for damages in the sum of \$----- . Said damages were suffered because that during October, 1929, in the City of Morgantown, West Virginia, in the hearing of other persons you spoke to and concerning me the following words, which from their usual construction and common acceptance are construed as insults and tend to violence and breach of the peace, to-wit:

'You are dishonest in your dealings.'

'You ought to be arrested.'

'You are a confidence man.'

Dated this ---- day of -----, 1929.

A----- B-----
By----- His Attorney."

Suppose again an action for damages for negligence. Under the motion practice the notice would run as follows:

"To the ----- Company, a corporation, -----, West Virginia.

Please take notice that on the ---- day of -----, 1929, I shall appear by my attorney, before the circuit court of ----- County, West Virginia, at the court house in ----- at the opening of court or as soon thereafter as the matter can be heard, and move for a judgment against you for the sum of \$----- . This sum is due me from you for damages suffered by me when struck by a bus negligently operated by your agent on ----- Street near ----- Street in the City of Morgantown, West Virginia, on or about the ---- day of -----, 1929. At which time and place you may appear if you see fit.

Dated this ---- day of -----, 1929.

A----- B-----, Plaintiff.
By-----, His Attorney."

We ask in all candor what more is gained by a long extended statement of facts such as is found in code pleading or formality such as is found in common law pleading. The plaintiff if he has good sense will not disclose his evidence but will simply obscure it in a mass of words. The defendant under any system of pleading will know nothing more than can be inferred from these statements, and in

addition to that, in a tort action both parties know all about the case anyway.

The objection has also been raised that this form of procedure will not make definite issues for trial. The notion that this can be done in any system of pleading is responsible for most of the intricate complexities which vex us today. The attempt to create definite issues has been made in two ways.

(1) The common law way. Historically the common law system tried to keep its issues definite and clear by refusing justice to everyone who demanded any kind of relief which did not fit into its narrow form of writs. If no writ could be found to fit the action, then no relief could be given. The failure of this system is evidenced by the fact that another system had to be imposed on it to meet the demands of justice, a circumstance which has happened in no other system of jurisprudence. The other device of the common law system of pleading in its attempt to make issues definite and clear was more successful because it evaded the issue, and gave up the attempt under the cloak of a fiction. This device was simply to pretend there was a clear cut issue by compelling the parties to allege and deny matters which had nothing to do with the case and never happened. Logical symmetry was preserved at the expense of reality, but at least lawyers escaped the bother of trying their cases twice,—once in the pleadings and again at the trial, through the convenient subterfuge of a fictitious form. Suppose that the plaintiff uses the common counts and the defendant pleads the general issue. Such pleading does not create any clear cut issue; it actually conceals any issue which might be in the case and conceals it very elaborately. Yet even this absurd ritual seems to work fairly well, for the simple reason that in nine cases out of ten the defendant actually knows what he is being sued for and the plaintiff knows what kind of a defense he will have to meet. By using these forms the parties escape pleading difficulties, not because the issues are clear, but because there is nothing left to do but to try the case. Once try to make the issues clear, and one good technical lawyer can run the pleadings out indefinitely and create enough controversies to keep appellate courts busy for years. And this because we have lost sight of the fact that a case should only be tried once,

(2) The second way of making clear cut issues is usually termed Code pleading, a somewhat inaccurate term because there are so many kinds of codes. However it is usually applied to the attempt to make the parties plead the facts and come to definite issues on the facts. This use is due to the fact that this was the attempt made in the first New York Code. This code, though much criticised was copied in most of the western states because they had to have some model and it was the only one available. In our opinion fact pleading has resulted in more delays and technicalities than common law pleading because of its attempt to define the issues before the trial. Once the attempt is made there is no limit to the possibilities of motions to strike, and motions to make more definite and certain. *In the case of the general issue pleaded to the common counts the parties had to go to trial because there was nothing else to do. In the case of fact pleading, the parties never have to go to trial, because there is always something else to do.* Hence the failure of the attempt to define the issues by pleading the facts.

Of course we must readily admit that any system of pleading develops according to its atmosphere and psychology rather than according to the language of its rules. Under the common law system in West Virginia it is entirely possible to draw up a declaration in the same way that a petition is drawn in a code state, and for the defendant to draw the same kind of an answer. This is never done. The atmosphere and attitude of the pleader is different and also the attitude of the judge construing the pleading does not lean that way. So too we admit that it is possible under our motion system to plead facts elaborately. However that has never been done in Virginia or West Virginia because the emphasis has not been put on elaborate pleading of facts and such pleadings are not favorably regarded. The motion system of pleading has worked so well in West Virginia in its limited form and in Virginia in all actions for the following reasons: (1) It has avoided on the one hand the attempt to secure a fictitious logical symmetry which is the fault of the common law pleading, and (2) it has avoided the attempt to clarify issues of fact which is the impossible dream of the code pleader.

We may summarize the changes which we have made in

the Virginia system by the statement that to this Virginia system we have added two other essentials. We believe that they are essential because we have discovered in conference with Virginia attorneys and judges that the Virginia courts are following our changes as a matter of practice without statutory authority. These additions are (1) we have put the power to control the pleadings where it belongs—in the court. This is actually what the Virginia judges are doing today in their motion procedure. It is the reason why English procedure works so well. It is fundamentally the reason why football games, in spite of a volume of complicated rules, can nevertheless be played without several days preliminary adjudication. The contesting teams must trust the umpire instead of the rules. The emphasis is on getting the game played.

(2) We have offered a number of forms for guides which are not compulsory but which may be followed. The tendency is always to follow forms. It is safer. The existence of certain forms is really what has kept common law pleading on its feet. These forms which we have offered are adapted from Connecticut forms which have worked successfully in an industrial state with complicated litigation and crowded courts. We believe that they tell the defendant in a general way what he should know of the plaintiff's case.

We think we have achieved in this motion procedure the atmosphere of common law pleading because it is an attempt not to give the details of the case but rather a system of notice pleading which is the heart of the common law system. If we were forced to select a name for it we would like to call it "simplified common law pleading".

We believe that we may recommend its adoption for the following reasons: (1) Because it is not unfamiliar to West Virginia lawyers. (2) Because it preserves the atmosphere of common law pleading through its reliance on notice to the opposite party rather than on the details of the case. (3) Because it has been entirely successful in Virginia not by a compulsory legislative fiat but by the voluntary acceptance of an experienced bar. (4) Because it does not take away from any lawyer the right to use the common law pleading if he prefers it.

DRAFT OF ACT AMENDING MOTION FOR JUDG-
MENT PROCEDURE.

Note:—The proposal is made on the assumption that the proposed revised code will be passed. If it is not, the changes in section references can readily be made.

CHAPTER 56.

PLEADING AND PRACTICE.

ARTICLE 2.

NOTICES OF MOTIONS.

Sections 1-5 as in the draft of the Revised Code without change.

Section 6. *Motion for Judgment; Discontinuance.* Any person entitled to maintain an action at law may, in lieu of such action at law, proceed by motion for judgment before any court which would have jurisdiction in such action, after not less than twenty days' notice, which notice shall be in writing, signed by the plaintiff or his attorneys, and shall be returned to the clerk's office of such court within five days after service of the same, and when so returned shall be forthwith filed and the date of filing noted thereon, and shall be placed upon the docket for hearing. Such notice may be served, returned, filed and docketed at any time before or during the term of court at which the motion for judgment is to be made, and may be heard at such term if the term continues for a period of twenty days after the service of such notice. If the court be not in session on the return day as set out in the notice, and the term of court be not ended, the motion shall be considered continued until the next court day of the term, and if the term be ended, then the motion shall stand continued. The return day of a notice under this section shall not be more than ninety days from its date unless the commencement of the next succeeding term of court be more than

ninety days from such date, in which case the return day may be the first day of such term.

A proceeding under this section shall not be discontinued by reason of the failure of the clerk to docket the same or by reason of no order of continuance being entered in it from one day to another or from term to term.

All pleadings and motions under this and the following sections shall be as simple and non-technical as may be consistent with the efficient administration of justice.

Pleadings under this and the following section may be filed in the clerk's office as of course without order of court, and the clerk shall endorse thereon the date of filing and upon request, the time of filing.

Section 7. Joinder of Claims and Parties; Counter-claims. To the end that all matters at law in controversy between the parties to any dispute shall be completely and finally determined in one proceeding and multiplicity of legal proceedings avoided, the trial court in its discretion may permit matters involving several claims, counter-claims or parties, plaintiff or defendant, to be tried together if it can be conveniently done, subject to the following provisions:

In any proceeding by motion for judgment, the plaintiff may unite in the same proceeding, any number of claims regardless of their nature. All persons may be joined in one proceeding as plaintiffs either jointly, severally or in the alternative, in any case where, if such persons brought separate actions any common question of fact or law of substantial importance would arise, and all persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative. The court may in its discretion permit the defendant on motion, to join other parties to the proceeding, either as plaintiff or co-defendant. Judgment may be given against such one or more of the defendants as may be found to be liable according to their respective liabilities. The defendant or defendants may set up by way of counter-claim, any claim against any plaintiff, upon which he might bring an action at law before the same court;

Provided however, that such claims as cannot conveniently be disposed of or tried together or such counterclaims as

cannot be conveniently tried together with the claims of the plaintiff may on motion of any party or on the court's own motion, be ordered to be severed or stayed or any of the issues may be ordered to be separately tried; and

Provided further, that if it shall appear that the joinder of any plaintiff or defendant may embarrass or delay the trial of the action, the court may order separate trials or make such other order as may be expedient; and

Provided further, that if the joinder of any claims, counterclaims or parties is likely to create a substantial prejudice in favor of, or against any one of the parties because of the nature of the evidence which is likely to be introduced, the Court may, in its discretion, order separate trials even though said issues might otherwise conveniently be tried together.

OR (Alternative Section)

Section 7. *Joinder of Claims; Counterclaims.* In a proceeding under the preceding section, the plaintiff may unite in the same proceeding any number of claims between the same parties regardless of their nature. If such claims cannot conveniently be disposed of or tried together, the court may at any time, on motion of a party or on its own motion, order any of them to be severed or stayed, or order any of the issues to be separately tried.

The defendant may set up by way of counterclaim any claim against the plaintiff upon which he might bring an action at law before the same court. If any such counterclaim cannot conveniently be disposed of or tried together with the claims of the plaintiff or if the nature of such counterclaim is such as to create a prejudice against the plaintiff, the court may at any time, on motion of a party or on its own motion, order that the counterclaim be proceeded with separately in an independent action, or order the issues arising on the counterclaim to be separately tried.

Section 8. *Affidavit of Claim; Judgment.* In any such proceeding by motion to recover money on contract, if the plaintiff shall serve and file with his notice an affidavit of himself or any other credible person, stating the several items of the plaintiff's claim, and the sum affiant believes is due from the defendant to the plaintiff thereon, including principal and interest, after deducting all payments, credits

and sets-off, no notice of defense setting forth a defense on the merits shall be filed in the case unless the defendant shall file therewith the affidavit of himself or of some other credible person, stating that the affiant believes that there is not any sum due from the defendant to the plaintiff upon the demand or demands stated in the plaintiff's notice, or stating a sum certain less than that stated in the affidavit filed by the plaintiff, which the affiant believes is all that is due to the plaintiff. If such notice of defense and affidavit be not filed, on motion, judgment shall be entered for the plaintiff for the sum stated in his affidavit with interest thereon from the date thereof until paid. If the notice of defense and the affidavit filed by defendant admits that any sum is due to the plaintiff, judgment may be taken for the sum so admitted to be due, with interest thereon from the date of the affidavit filed by the plaintiff until paid, and the case tried as to the residue.

If the plaintiff does not file such affidavit with his notice of motion and the defendant does not appear, judgment shall be entered for the plaintiff as hereinbefore provided upon the subsequent filing of such affidavit by the plaintiff.

Section 9. *Notice of Defense; Further Pleading.* The defendant may state his grounds of defense, and/or his counterclaims, informally in a notice of defense, and there shall be no other pleading by the defendant. As to new matter in the notice of defense constituting a defense to the claim set forth in the notice of motion, the parties shall be deemed to be at issue on the grounds stated without further pleading; Provided, however, that the court, on motion of a party or on its own motion, may order such further or amended pleadings to be filed as the nature of the case may require.

Every allegation of fact in any pleading not denied in the next subsequent pleading of the adverse party where such subsequent pleading is required, shall be taken as admitted; except that allegations in the notice of defense not bearing upon a counterclaim shall not be taken as admitted if the plaintiff fails to deny such allegations in his notice of defense to counterclaim.

Matter entitling the defendant to relief in equity which

he would be entitled to plead under section five, article five of this chapter, may be set forth in the notice of defense.

Section 10. *Notice of Defense to Counterclaim.* If the defendant in his statement of defense states a counterclaim, the plaintiff may state his grounds of defense to the counterclaim informally in a notice of defense to counterclaim, under the same provisions as the defendant may defend as to the notice of motion.

Section 11. *Verification of Pleadings.* Where any party sets forth matter in a pleading, which contains the substance of a plea required to be verified when pleaded in an action at law, he shall verify the pleading in its entirety, or shall file an affidavit of himself or some other credible person covering the matter containing the substance of the plea required to be verified.

Section 12. *Objection to Pleading.* An objection to a pleading or any part thereof in point of law for a ground appearing on the face of the pleading, may be taken by a motion to quash. A demurrer shall be treated as a motion to quash for an objection appearing on the face of the pleading. Said motion to quash when made to a notice of motion, shall be made before or at the time of the filing of the notice of defense and when made to the notice of defense shall be made within twenty days after the filing thereof. Where there is an objection to a pleading on the ground that it fails to inform the opposing party sufficiently of the nature and object of the claim, defense or counterclaim, or that its precise meaning is otherwise indefinite, uncertain or obscure, the objection may be taken by a motion to require the amendment of the pleading.

If an objection is not taken by motion within the time specified, it shall be waived unless it shall be upon either of the following grounds:

1. That the pleading is insufficient in that it fails to state the substance of a claim or defense and that such insufficiency has actually misled or is likely to mislead the adverse party to his prejudice in maintaining his action or defense upon the merits.

2. That the court has not jurisdiction of the subject matter of the proceeding.

OR (Alternative Section)

Section 12. *Objection to Pleading.* An objection to any pleading or any part thereof in point of law for a ground appearing on the face of the pleading may be taken by a motion to quash. Where there is an objection to a pleading on the ground that it fails to inform the opposing party sufficiently of the nature and object of the claim, defense or counterclaim, or that its precise meaning is otherwise indefinite, uncertain or obscure, the objection may be taken by a motion to require the amendment of the pleading. A demurrer shall be treated as a motion to quash for an objection appearing on the face of the pleading.

Section 13. *Summary Disposition of Certain Defenses.* If the defendant believes that a trial of the action may be avoided by a summary presentation of any of the following defenses:

- (1) That the proceeding has not been brought before the proper court;
- (2) That the court has not jurisdiction of the person of the defendant;
- (3) That the court has not jurisdiction of the subject matter of the proceeding;
- (4) That the plaintiff has not legal capacity to sue;
- (5) That there is another action or proceeding either at law or in equity pending between the same parties for the same cause;
- (6) That the cause of action is barred by a prior judgment;
- (7) That the cause of action did not accrue within the time limited by law for the commencement of an action thereon;
- (8) That the claim or demand set forth in the plaintiff's pleading has been released;
- (9) That the claim on which the proceeding is founded is unenforceable under the provisions of the statute of frauds;
- (10) That the cause of action did not accrue against defendant because of his infancy or other disability;
- (11) That the plaintiff's claim has been discharged in bankruptcy;

he may present the same by a motion to quash the notice of motion for judgment or any claim set forth therein, supported by affidavits to be filed setting forth the facts relied upon. If the plaintiff desires to file counter-affidavits the court shall fix a time within which such counter-affidavits may be filed. The court may decide the motion on the affidavits presented, and if the motion is granted, the court may in its discretion permit the plaintiff to amend his notice of motion upon such terms as are just. If such motion raises an issue of fact not determinable on the affidavits, the court may in its discretion, deny the motion with leave to the defendant to set forth the matters relied upon, in his notice of defense, or may forthwith hear evidence presented by the respective parties. Where evidence is to be heard on such an issue of fact, on demand of either party, a jury shall be impanelled to hear such evidence.

The plaintiff may move to quash a counterclaim under the same provisions as the defendant may move with respect to the notice of motion.

Section 14. *Matters in Abatement.* Matters in abatement not presented by motion under section thirteen of this article may be set forth in the notice of defense but may not be presented by amendment or otherwise after any defense on the merits has been filed.

Section 15. *Trial.* On motion when an issue of fact is joined and either party desires it, a jury shall be impanelled for the trial of the issue. Otherwise the trial shall be before the court without a jury.

If the issue of fact arises on a matter in abatement, the court may in its discretion, try such issue first.

If the issue of fact arises on an equitable defense where a trial by jury is not required by the Constitution, such issue may be tried by the court without a jury.

Section 16. *Variance.* No variance between the allegations in a pleading and the proof is to be deemed material or shall be a ground for reversal of a ruling of the trial court unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Wherever it appears that a party has been so mis-

led the court may order the pleading to be amended, upon such terms as may be just.

Where the variance is not material as defined above, the trial court or the appellate court, may disregard it, or before or after judgment order an immediate amendment of the pleadings to conform to the proof, without costs.

Section 17. *Summary Judgments in Certain Cases.* In a proceeding under the preceding sections to recover a debt or liquidated demand in money, with or without interest, arising:

(1) On a negotiable instrument, a contract under seal or a recognizance; or

(2) Any other contract, express or implied excepting quasi-contracts; or

(3) On a judgment for a stated sum; or

(4) On a statute where the sum sought to be recovered is a fixed sum or in the nature of a debt; or

(5) On a guaranty, whether under seal or not, when the claim against the principal is in respect of a debt or liquidated demand only;

the plaintiff may, at any time after the defendant appears and before trial, move for immediate judgment on all or part of the claim set forth in the notice of motion, by giving at least ten days' written notice to the defendant or his attorney, and serving and filing with the notice of said motion an affidavit of himself or any other credible person, stating that, to the affiant's personal knowledge, the allegations contained in the notice of motion, with respect to the claim on which judgment is sought, are true, and that the affiant believes there is no defense to such claim. Where such motion is made by the plaintiff, the defendant may file an affidavit of himself or other credible person stating on personal knowledge, the facts relied upon as a defense to the plaintiff's claim; or the affidavit may admit part of the plaintiff's claim and state, on personal knowledge, the facts relied upon as a defense to the residue. If no affidavit is filed by the defendant or if the affidavit filed does not show such facts as may be deemed by the court to entitle the defendant to defend, judgment shall be entered for the plaintiff on the claim stated in the plaintiff's affidavit. If an affidavit be filed by the defendant and part of

the plaintiff's claim shall be admitted, and if such affidavit shows such facts as may be deemed by the court to entitle the defendant to defend as to the residue, judgment may be taken by the plaintiff on the claim admitted. In any case where the plaintiff recovers judgment on only part of his claim the case shall be tried as to the residue.

The defendant may move for immediate judgment on a counterclaim under the same provisions as a plaintiff may move for immediate judgment on any claim set forth in the notice of motion.

Section 18. *Commencement of Proceeding.* A proceeding under the preceding sections shall commence when the notice of motion is returned to and filed with the clerk; *Provided, however,* that the plaintiff may commence the proceeding prior to the service of the notice of motion by filing a true copy of the notice with the clerk, the date of which notice must be the date of the filing of the said copy, or an earlier date. In the event that the plaintiff exercises this option and the notice of motion is returned by the sheriff of the proper county "not found" as to any defendant the plaintiff may serve on the defendant an alias notice after filing with the clerk a true copy of such alias notice, returnable within the same time as if it were an original notice. In such case any proceeding upon such alias notice shall be deemed to have commenced from the date of the filing of the original notice with the clerk. If such alias notice be returned by the proper sheriff "not found" further process may be allowed in the discretion of the court upon such terms as the court may see fit.

Section 19. *Other Provisions of Law Applicable.* Rules of law, statutory or otherwise, governing the procedure in actions at law, shall apply to proceedings by motion for judgment, in so far as they are not in conflict with the provisions of the preceding sections or inapplicable because of the nature of the proceeding.

Section 20. *Forms.* The Judicial Council shall from time to time prepare suitable instructions and forms for proceedings by motion for judgment which may be followed in pleading under the foregoing sections.

COMMENT ON PROPOSED ACT AMENDING MOTION FOR JUDGMENT PROCEDURE

Section 6. MOTION FOR JUDGMENT; CONTINUANCE.

The first sentence of this section extends the motion for judgment to all cases in which actions at law might be brought. The rest of the material in the section is found in the first and the last paragraphs of Ch. 56, Art. 1, Sec. 6 of the Proposed Code, the second paragraph of that section being placed in Sec. 8 hereafter. Since the actions of detainee, ejectment and forcible entry and detainer are statutory, and for the further reason they are already rapid and efficient, it is probable they will remain as they are and proceedings by motion in such cases will not be attempted. The same is probably true of extraordinary remedies such as mandamus, quo warranto and prohibition. After considerable discussion it was deemed best to make the motion apply to all actions at law, without attempting to make express exceptions. This was done in Virginia and the result seems to be that the motion procedure is not used in the actions above mentioned.

The third paragraph serves only to give further atmosphere to the system of procedure proposed.

Section 7. JOINDER OF CLAIMS AND OF PARTIES; COUNTER-CLAIMS.

Purpose. We have provided two alternative sections of joinder. We unhesitatingly recommend the first one. The problems of joinder of causes of action, joinder of parties plaintiff, joinder of parties defendant, and also the problem of counterclaims, are all one problem. Only one question ever should arise in these cases and that is the convenience of the Court in trying the case. The purpose of the section therefore is to treat all these questions as one, and to allow the Court an opportunity of trying such things together as may conveniently and without confusion be tried together, after hearing arguments on whether confusion will likely

arise in the trial, and not arguments on interpretation of rules of joinder as a logical system.

Source, Explanation and Argument. In most codes and at common law we find the problem of joinder divided and each division treated separately. There are four classes of cases.

1. Where one plaintiff (or joint plaintiffs) unites in a single proceeding two or more causes of action against one defendant.

2. Where two or more plaintiffs, each having a cause of action against the same party or parties unite their causes of action in one proceeding.

3. Where one plaintiff, or joint plaintiffs, having several causes of action, each against a different party, unites them in one proceeding.

4. Where the defendant wishes to try a separate cause of action against the plaintiff in the same proceeding, by way of counterclaim. (The language of the above classification is adopted from 26 Mich. L. Rev. 1.)

In most codes and at common law each one of these divisions is treated not only separately but differently. No apparent relation between them and no consideration of them as one problem is usually expressed in any statutory provision or in the common law decisions. They are found in different places in the codes and under different headings in common law textbooks. Decisions on one of these questions do not refer to decisions on others. The result has been confusion. We believe that it may be safely asserted that at common law there is no satisfactory test as to (a) what parties may be joined, and (b) what claims may be joined. In codes which follow the historical distinctions of the common law the problem has not been satisfactorily solved. A tremendous amount of judicial construction has been had upon these provisions and the result is not satisfactory. We believe however with Mr. Sunderland that there is only one problem involved in all questions of joinder. That problem is the convenience of the court and the parties in trying the case. This applies to questions of joinder of parties plaintiff, or parties defendant, of causes of action and of counterclaims. It is believed further that no general rule can be laid down in advance as to what

classes of cases may be conveniently tried together. Cases are not simple or complicated because of the form of action under which they are brought. Their complications arise from the situation which brings them forth. There is only one person who can decide intelligently in a given case whether a number of claims urged by different parties can be disposed of in one proceeding, and that is the court which has these parties before it. After hearing arguments frankly directed toward the subject of convenience of trial and not directed toward the interpretation of an attempted logical system we propose to let the court after considering the question argued on its merits determine the question of convenience of trial. As Mr. Sunderland has pointed out it is much easier to sever causes of action than it is to consolidate them.

Looking at the question as a matter of convenience at the trial (which seems to us the only realistic way of looking at it since our attempted emphasis in the whole act is on the trial), what fundamental difference can there be between the problem of joinder of causes of action, joinder of parties plaintiff, joinder of parties defendant, and the trial of counterclaims? In any one of these classes of cases it may be inconvenient to try the issues together. In any one of them it may be convenient. In no one of those classes, however, is there any greater chance of convenience or inconvenience than in any other.

We recognize however that the idea of broad joinder of claims, parties and counterclaims has always been regarded with grave misgivings by most intelligent lawyers. The restrictions upon joinder of claims and parties are so ancient and supported by such respectable authority and reasoning, that it is not surprising that broad provisions of joinder have been regarded as rather startling innovations. It has been necessary to study the subject historically and seek the origin of the common law doctrines as to joinder before any hearing could be obtained for changing it. Mr. Sunderland of Michigan has been a leader in this work. For the argument which we use here we are indebted to him and to Mr. William Wirt Blume, one of his research assistants. In two articles appearing in the Michigan Law Review, (Vol. 26, page 1, and vol. 18, p. 571) they have covered the subject thoroughly.

The usual reason given for the restrictions on joinder is that "jurors are qualified to deal with simple questions only—the fewer the better—and the common law rules as to parties, as well as those relating to the formation of issues, were adapted to the nature of the tribunal before which the cases were to be tried." (26 Mich. L. Rev. p. 3.) Historical research however shows that this dogma is simply a rationalization of an historical accident. The reason that joinder was refused at common law in types two and three above arose out of the trial by ordeal. One person could not be both victor and vanquished in a trial by battle and in a wager of law the issue was on the general veracity of the party. Therefore only one controversy could be settled in one proceeding. (Holdsworth, *History of the English Law*, v. 3, p. 639, 26 Mich. L. Rev. 2, 3.) This history is developed at some length by Mr. William Wirt Blume in the above article and we believe he thoroughly establishes the fact that there was no rational basis for the modern restrictions on joinder. Further than that Mr. Sunderland with his usual careful scholarship has shown that there is no possible test of misjoinder at common law which will work even in a reasonably large number of cases. (See article in 18 Mich. L. Rev. p. 571.) Space does not permit us to develop Mr. Sunderland's argument and we therefore merely quote his conclusion:

"One aspect of the case brings out in strong relief the inherent hollowness and unreality of the doctrine of misjoinder as a substantial fault in pleading. The judges could not agree on the true rules respecting joinder of forms of action. The plaintiff's case suffered capital punishment, so to speak, for an error in this regard, but the courts could not tell him with any certainty how to avoid it. A paragraph from Tidd quaintly expounds this remarkable situation. (We omit quotation from Tidd.)

"This amazing incongruity did not seem to call for any apologetic explanation from the profession. None of the classical writers on common law pleading and none of the judges of that era appeared to have been disturbed by the anomaly. The doctrine of misjoinder was a professional tradition, which had always been recognized in some form or other, and

was fully justified by the antiquity of its ancestry. The perils of misjoinder were inherent risks which had to be patiently endured by the people, like the perils of war and contagious disease. If the problem of defining and identifying misjoinders was too difficult for the courts to solve, why blame the courts? They were only human and could not be expected to do impossible things.

“This attitude marked the culmination of what may be considered the complacent period of procedural despotism. From this position the courts have receded under the pressure of hostile criticism or under legislative orders, until it can hardly be said that a single rule or a single principle which looked so impressive and was taken so seriously a hundred years ago, has come unscathed through the hardships of the great retreat. There are still outposts in the old procedural front line trenches, held by devoted courts who worship Chitty and the old regime, but they are isolated and all but surrounded, and their fall is inevitable.”

Treatment of Misjoinder Under the Codes.

In the original New York Code there was very little improvement over the common law system. Section 143 of the Code of 1848 gave seven cases where joinder might be had, which are not much of an improvement on the common law. Most of the states usually classified as code states, except Arizona and Iowa, followed the original code in the adoption of arbitrary classification of joinders. Today however in New York there is the same liberty of joinder *as to parties* which we have set out in our section excepting that parties plaintiff and parties defendant are treated in different sections of the code.

Speaking of joinder of causes of action Mr. Sunderland has said:

“Accordingly, in default of any rational basis for a system of rules on joinder relating to the form, nature or subject-matter of actions, we reach the final stage of development, where it is frankly admitted that the common law created imaginary difficulties in joining actions, that the code retained them with

substantial but illogical variations, that all *a priori* restrictions fail to meet the needs of practical litigation, and that only by allowing an unlimited freedom of joinder can the maximum of convenience in the trial of actions be attained. If a plaintiff joins too many actions it is easy to separate them for trial, while if he severs them it may be very hard to effect a consolidation, owing to differences in the time of reaching issue, lack of initiative in bringing about a consolidation, and the possibility that they may be pending in different courts." 18 Mich. L. Rev. 581.

In regard to joinder of parties the English amendment of 1896 is similar to ours. It reads as follows:

"All persons may be joined in one action as plaintiffs, in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative, where if such persons brought separate actions any common question of law or fact would arise; provided that, if upon the application of any defendant it shall appear that such joinder may embarrass or delay the trial of the action, the Court or a Judge may order separate trials, or make such other order as may be expedient * * *." 26 Mich. L. Rev. 23.

The same idea is found in New York, Connecticut, Ontario and several other states. Space forbids a summary of the various types of statutes in this comment. This work has been done sufficiently well in Clark on Code Pleading, and in the article in 26 Mich. L. Rev. p. 1. In this comment we have simply tried to give an idea of the uselessness of the restrictions on joinder without going into scholarly detail.

If we may summarize however we may set out three general notions to be found in the various statutes:

(1) Arbitrary classifications of cases which may be joined. We have discarded this notion because we believe that its uselessness is demonstrated.

(2) A common test is as follows: Actions arising out of the same transaction or transactions connected with the

same subject of action, may be joined. We quote Sunderland's comment. "This section introduces necessity of construction of three terms, (1) *transaction*, (2) *subject of action*, (3) and *connected with*, none of which had any precise meaning. * * * And the volume of litigation which has resulted from the effort to define and administer this vague rule is distressingly large." (See Sunderland, 18 Mich. L. Rev. 579 and cases in footnote.)

(3) The test of "common question of law and fact". This test we have included in our section. We confess that it is vague but we believe that this language gives the proper atmosphere to the statute, which we consider important.

Our section is not novel except in one respect. It treats all problems of joinder as one problem and combines them in one section. In doing this we have the approval of Mr. Clark of Yale who has made an extensive study of the subject. The unrestricted joinder idea is not new and is found in various forms in Kansas, Iowa, Wisconsin, the New England states, England, Ontario and New York.

Statistics on Unrestricted Joinder in Actual Practice.

We realize that on first reading of the section an immediate reaction will be that if it is actually made a rule of practice, one-half of the state of West Virginia will bring suit against the other half. The harassed court before whom this complex action is brought will spend the next two years in adding and dropping parties and causes of action from this prodigious litigation. To quiet this fear it is necessary to examine what actually happens under unrestricted systems of joinder. The fact is that suits of this kind are not brought. No plaintiff ever wants to drag in unnecessary trouble. The only statistics which we have had available are the judicial statistics collected by Dean Clark of Yale Law School in Connecticut and Massachusetts. Mr. Harris of the faculty of the Law School of Ohio State University, kindly consented to examine these statistics for us in detail on the question of joinder. His findings were that no complicated cases of joinder arose and no abuse of the liberal provision of joinder was discoverable. We call attention to the fact that his study was made not merely of

cases in the appellate court but of every case which was brought before any *nisi prius* court in Connecticut. It is true that if lawyers deliberately start out to make trouble they can do so under any system of pleading, but after all some trust must be put in the bar. If this trust is misplaced no attempted restrictions can prevent them from, or ever have prevented them from, creating confusion in actions at law. We believe it is sufficient answer to the fear that cases will become unduly confused to point out that in no state where this unrestricted joinder provision has been used have the cases been confused and we know of no complaint arising from any of these jurisdictions.

In conclusion we wish to reiterate (1) that the problem of joinder both of causes, of parties, and of counterclaims is one which is entirely concerned with the convenience of the trial court; that there is no rational method of determining in advance by rule in what cases this confusion will arise. The court must determine that from an examination of the actual situation before him. (2) Under our system the court will be aided by arguments which bear directly on the question of convenience instead of arguments on ancient authorities and logical deductions which have absolutely nothing to do with getting the case to trial. (3) The appellate court will be free from the trouble and necessity of reversing the trial court where the trial court thought that convenience would be served by joining or not joining the actions. See *Shaver v. Security Trust Co.*, 82 W. Va. 618, and *Halsby v. Lanark Co.*, 55 W. Va. 484. Certainly as Mr. Sunderland points out the penalty for mistaken joinder is too severe if it includes the loss of the plaintiff's case on something not connected with the merits.

Our idea is that if the plaintiff loses his case he should lose it at the trial and not before the trial.

Section 8. AFFIDAVIT OF CLAIM—JUDGMENT.

Purpose. The purpose of this section is familiar. It provides a method of taking a default judgment on affidavit without the necessity of further proof.

Source and Explanation. This section contains the provisions of the second paragraph of section 6, article 2,

chapter 56 of the draft of the Revised Code. It is slightly simplified in its language but the substance is preserved. The words "and unpaid" following "due" are omitted as it seems that such preciseness in the wording of the statute has led to an unduly technical attitude on the part of the court, as shown in the case of *Marsteller v. Ward*, 52 W. Va. 74.

It is to be noted that chapter 39 of the Laws of 1929 has amended the section on motion for judgment by adding the provision that "the affidavit of the plaintiff * * * shall be legal evidence of plaintiff's claim". This provision is not in the draft of the revised code and would seem to be unnecessary in view of the fact that there is a provision that in default of an affidavit and plea, judgment should be entered for the plaintiff. This provision seems to be preferable to the 1929 amendment in view of the fact that it makes it clear that the judgment is to be entered on the plaintiff's affidavit alone whereas the 1929 amendment still leaves the question open as to whether or not the affidavit of the plaintiff is the only evidence necessary.

The last sentence is new in this section and permits the plaintiff to file an affidavit after the commencement of the proceeding, where the defendant does not appear. This obviates the necessity of holding an inquiry as to damages in case of defendant's default where no affidavit was originally served. It merely carries over into the motion for judgment proceeding the provision of section 46, chapter 125 of the Barnes' Code (Draft Rev. Code, ch. 56, art. 4, sec. 51) applying to actions for the recovery of money on contracts. The statement here is more direct than that of section 46 and also precludes the question whether the affidavit is the only evidence necessary, which that section also leaves open. Of course this would not prevent the plaintiff from having an inquiry of damages if he prefers to resort to that method rather than to file an affidavit.

In order to make this section fit in with the rest of the procedure contemplated in this report, it is provided that no "notice of defense setting forth a defense on the merits" shall be filed by the defendant rather than that no "plea" should be filed. Section 46 of chapter 125 has already been construed not to preclude the filing of a plea in abatement.

Netter, Oppenheimer & Co. v. Elfant, 63 W. Va. 99 (1907), and that decision would of course be a precedent for the notice of motion procedure. Since it is provided in Section 14 that matters in abatement may be set forth in the notice of defense it has been thought well to word the section so as to make it clear that matters in abatement could be presented without the filing of an affidavit by the defendant.

Since certain defenses may be made without filing a notice of defense, under section 13, there is the possibility that the defendant might make a defense on the merits based on the matters listed, 5-11, under that section. However, since the defendant in proceeding under section 13 is required to file an affidavit it seems unnecessary to require him to file this additional affidavit before making the defense in the manner provided for by section 13.

It will be seen that the changes made in this section are only those necessary to make the procedure fit in with the rest of the provisions here recommended, and no substantial change is suggested. Attorneys are familiar with the method of taking judgment by default on affidavit and would find that they could proceed under this section exactly as they have in the past in actions at law for the recovery of money on contract or in proceedings by motion for judgment.

Section 9. NOTICE OF DEFENSE—FURTHER PLEADING.

Purpose. This section is designed to provide a method whereby the defendant may make an informal defense in a proceeding brought by notice of motion. The purpose of this section is to require the defendant to give the same kind of notice of his defense, without detail or set form, which the plaintiff does of his claim. Our idea throughout this act is that of informal notice pleading subject to the control of the court. We must therefore make it uniform for both the plaintiff and the defendant.

Source and Explanation. The informal notice of defense is substituted for all common law pleas and is the only way in which the defendant may state his defenses. This method has never been used in West Virginia. In Virginia, how-

ever, the amendment of 1919 provides for this informal defense as an optional method. The answers to our questionnaire sent to Virginia judges and lawyers show that this method has practically superseded the practice of filing common law pleas in a large number of Virginia counties. Those who have used it prefer it to the former method of making defense. Much of the advantage which may be derived from the procedure by motion is destroyed if common law pleas are allowed. After the notice of motion is served, the proceeding continues precisely as a common law action with all of the emphasis upon technical accuracy and logical symmetry which it is our desire to avoid. A system of pleading in which informality ceases with the serving of the notice can only be a half-way measure and cannot be much of a step forward in the direction of procedural reform. Attorneys who are accustomed to stating claims in an informal way should have little difficulty in accustoming themselves to stating their defense in the same manner.

The name "notice of defense" given to the statement which the defendant may file is used advisedly. We recognize, as we have pointed out in our preliminary remarks, that the psychology and atmosphere surrounding the procedure is the most important factor in determining how it is actually to operate. By calling the defendant's statement a "notice of defense" we hope to encourage informality and brevity of statement.

The provision that the parties are to be deemed at issue after the notice of defense is filed and that there should be no further pleading in the nature of a replication is taken directly from the Virginia code. The object is to avoid a multiplicity of paper work by attorneys which can serve no useful purpose and will only produce further wrangling prior to the actual trial. There are, however, cases where issues may need clarification and where a pleading in the nature of a replication is necessary in order to enable the parties adequately to make their preparations for the trial. This contingency is taken care of by the provision that further pleadings may be ordered. It is in line with our general purpose of giving control over the pleadings to the trial court, so that useless paper work may be avoided, and yet where further clarification is necessary

the court has the power to compel such clarification. In some instances this result may better be accomplished by an amended pleading rather than additional pleading, and in order to make this possible the wording of the section gives the court the power to require amended pleadings also.

The second paragraph is found in substance in the English rules and is also in the statutes governing pleading in many states of this country. The Virginia statute has no such provision and the question has arisen as to whether it is necessary for the plaintiff to prove his entire case even when some of his allegations are not denied by the defendant. It is probable that such a provision as this will only lead to more extensive denials by the defendant so that the ultimate result will not be essentially different from the one that would be reached if the plaintiff should be required to prove his entire case even when there is no denial of parts of it. The principal purpose of the provision here is to settle the question that would be bound to arise on this point.

The exception as to allegations in the notice of defense bearing upon a counterclaim is necessary because of the literal force of the preceding sentence which would make it necessary for the plaintiff in filing his notice of defense to counterclaim to deny other allegations in the notice of defense which he did not wish to admit. The notice of defense to counterclaim should be confined to stating the defense to the counterclaim alone and matters not relating to the counterclaim should not be incorporated in it.

The third paragraph might be unnecessary in view of section 19 which makes other provisions of law applicable to a proceeding by motion. However, the statement of section 5, article 5, referred to, is that the defendant may file a *plea* alleging matter entitling him to relief in equity and as a precautionary measure it was thought advisable to state expressly that such matter could be stated in the notice of defense. Other matter permitted to be stated in a plea under section 5 of article 5 in the nature of pleas of set-off is taken care of by the liberal counterclaim provisions of section 7, and consequently no reference need be made in this section.

We would unhesitatingly recommend allowing the de-

defendant to set up in any proceeding, matter entitling him to relief in equity against the plaintiff's claim. This would constitute an extension of the rule provided for in section 5, article 5, since that section applies only to contract actions. If a broader provision for equitable defenses is enacted, however, it should be done by a general statute applying to all actions. If it were confined to a proceeding by motion for judgment alone it might have a tendency to discourage plaintiffs from using this form of procedure.

Section 10. NOTICE OF DEFENSE TO COUNTERCLAIM.

The purpose of this section is obvious. In some states where the defendant sets up a counterclaim the plaintiff must file a further pleading which must state the defenses to the counterclaim and must also deny such new matter in the plaintiff's pleading as he does not care to admit. It seems, however, that the pleading which the plaintiff should file when the defendant sets up a counterclaim should confine itself to the counterclaim unless there are special reasons for further pleading as to the original claim of the plaintiff. Where such reasons exist, the provisions of the preceding section permit this upon a court order, but where they do not exist it seems useless to require any further pleading as to the original claim.

Section 11. VERIFICATION OF PLEADINGS.

Provisions as to verification should follow the practice in actions at law. The only reason for this section is occasioned by the fact that no pleas are required as such and consequently a defendant might be in doubt as to the procedure to be followed. This simple provision for a separate affidavit makes the practice clear.

Section 12. OBJECTION TO PLEADING.

Purpose. We have here presented alternative sections. We favor the first one. Most of the provisions of this section would be followed apart from any express provision. The purpose is to outline the procedure more completely and further to provide for the waiver of certain objections

after a limited period, thus avoiding continued controversies on pleading points and the attendant delay.

Source and Explanation. Our statute (Barnes' Code, ch. 134, sec. 3) provides that practically all defects in the pleadings are waived if not taken advantage of before judgment. The section here proposed provides for the waiver of less important defects at an earlier time. Although the general purpose of this whole procedure is to restrict objections to matters of substance, there may be some less important matters which may properly be objected to at the outset of the case. This is permitted, but is rather closely restricted. There is no particular reason for giving the parties any further time in which to make such objections and especially is it unfortunate if such objections are made after the case has gone to trial.

The exceptions listed are obviously necessary. If any pleading discloses a lack of jurisdiction over the subject matter of the action, that can of course never be waived. Any other defect, however, should be waived unless it is so substantial as to prejudice the adverse party. If, for instance, the notice of motion should fail to state a claim and be so indefinite that the defendant could not adequately prepare for trial, it would seem that such notice of motion should be quashed, even after the time limit has expired. Any other rule would penalize the defendant too heavily for his failure to take the objection before filing his notice of defense.

Doubtless this section does not change the practice now existing to the extent that might be supposed from a casual reading. The court may still even after the time limit has expired quash a pleading that is wholly unsubstantial, but the wording of the statute emphasizes the fact that the consideration involved is the effect of the defect upon the conduct of the case by the opposing parties. This provision simply emphasizes and extends to all pleadings the statement which has been repeatedly made by the Supreme Court of Appeals with respect to a notice of motion that it is sufficient if it acquaints the defendant with the grounds on which he is to be proceeded against however wanting it may be in form and technical accuracy. See *Kelley Co. v. Phillips*, 102 W. Va. 85 (1926). It is true in a general

way that the further the case has progressed, the less a court is likely to permit pleading objections. The provisions of this section carry out and give legislative sanction to this eminently proper attitude of the court.

The provision for a motion to require a party to amend a pleading does not make any substantial change in the present procedure as a motion to quash if granted may ordinarily be followed by amendment of the pleading. It is thought, however, that in some cases it might be more convenient to make the motion in the form stated.

Section 13. SUMMARY DISPOSITION OF CERTAIN DEFENSES.

Purpose. This section provides for the summary determination of cases which can be shortly disposed of on some narrow and familiar issue. The chief advantage is that it may dispense with the necessity of a trial where that would only be a needless expenditure of time and effort. We have in section 17 provided for a summary disposition of the plaintiff's case without formal trial, limiting that procedure to cases where experience has shown this may be done. The present section is in a sense the analogue of the section providing for summary judgment for plaintiff, although the types of cases lending themselves to a summary disposition in favor of the defendant are quite different from those where a summary judgment may be readily given for the plaintiff. Each may stand on its own merits, but both are desirable in that they save the time of the court and parties.

Source and Explanation. The test used in determining what defenses may be included in this section is whether it is a defense which may be disposed of quickly and on simple facts, without reference to other more complicated issues of fact. Each of these defenses in the majority of cases may be disposed of quickly. Others might be added as experience dictates the necessity, but those included here are all that we feel are necessary at present.

The types of cases where it is expedient to allow a summary disposition of the defendant's case are chosen not only by logic but by actual experience. The provisions of

this section have for some time been in effect in various states and have been incorporated into the rules framed by the Michigan Commission, of which Mr. Sunderland is a member, and recently adopted by the Supreme Court of Michigan. We have added to the list of defenses the first and eleventh which we have thought could also be disposed of in a summary way on affidavit.

It is true that occasionally the issues of fact arising on these defenses may not lend themselves readily to determination by affidavit. Accordingly the procedure is made flexible so that in the discretion of the court such matters may be tried out on oral evidence presented by the parties. Where the other issues in the case are not badly complicated it may be that it would be more convenient to try all the issues at once. It is therefore provided that the court in its discretion may refuse to decide the issue and give leave to the defendant to set forth the defenses in his notice of motion. In such an event the issues would be tried out at the same time as the other issues in the case are tried.

Section 14. MATTERS IN ABATEMENT.

The provisions of this section are probably unnecessary as this result would be reached by construction of the other sections in the light of the existing practice. We insert it here merely for the sake of clarity and completeness.

Section 15. TRIAL.

Purpose. The wording of this section is designed to encourage trials without a jury, although it is framed in such a way that there can be no question that it preserves the constitutional requirement for a jury trial.

The purpose of the second paragraph is to give added flexibility to the procedure so as to leave the question of the separate trial of issues on matters in abatement to the discretion of the court.

Source and Explanation. The first paragraph is taken from the present section governing the trial of issues arising in notice of motion proceedings (Barnes' Code, Ch. 121, sec. 8). The provision that the court may call for a jury, although neither party desires it, is omitted as this seems to

be an unnecessary and unused provision. The last sentence providing that otherwise trial should be before the court without a jury merely emphasizes the fact that it requires affirmative action by the parties to secure a jury trial and that unless such action is taken the normal procedure is for the issues to be tried before the court without a jury.

Under the present procedure in actions at law matters in abatement must be tried first. (Barnes Code, Ch. 125, Sec. 21.) Although this in the great majority of cases would be the most convenient procedure and would make it unnecessary for the parties to put in their complete proof when there is a possibility of disposing of the case without trying the main issue, nevertheless it is conceivable that occasions might arise where matters in abatement could be conveniently tried along with the issues of fact on the merits. This paragraph is in harmony with our general idea of having a flexible procedure and leaving the question of the order of trial to the discretion of the court.

We have already provided in section 9 for the setting up of equitable defenses in the notice of defense. Presumably under the existing practice in actions at law the issues of fact arising on such defenses would be tried before a jury unless the parties waived it. It is felt however that ordinarily the issues arising on equitable defenses will lend themselves more readily to trial before a court, and since on equitable matters the constitution would not require a jury trial, this paragraph makes it permissible to try such issues without a jury. Of course if the court thinks it more convenient, such issues might be submitted to a jury along with other issues on the merits.

Section 16. VARIANCE.

Purpose. This section provides a liberal rule for taking care of variances. It is designed to prevent useless new trials because of technical objections which can have no relation to the fairness of the trial or general principles of justice.

Source and Explanation. The present section as to variance (Barnes' Code, ch. 131, sec. 8) is liberal and provides a method for disposing of most of the points that will arise on the question of variance on a just basis. We be-

lieve, however, that there may be an advantage in making a distinction between a material and an immaterial variance such as the present statute does not make. If a variance between the proof and the pleading is such that the adverse party has been misled to his prejudice, considerations of justice plainly require that the amendment should be made and further time should be given for him to prepare his defense. The phrase in this section "upon such terms as may be just" of course permits the trial court to grant a continuance if that is necessary and is thus in accord with the present law. If the variance is immaterial presumably the trial court under the present law would not grant a continuance but would simply order an amendment and proceed with the trial of the case. Furthermore under the statute of jeofails, (Barnes' Code, ch. 134, sec. 3) an objection on the ground of a variance could not be taken after verdict. This provision would continue to be applicable to the new procedure although as a matter of form we have provided that either the trial court or the appellate court might make an amendment after judgment. It has further been provided that if the variance is immaterial, since it has not misled the adverse party to his prejudice, then the overruling of an objection made at the trial would not be such error as to constitute grounds for reversal. The appellate court however may still make the necessary amendment. It is felt that this is an improvement over the present procedure where the possibility remains that the appellate court might reverse where the variance was not such as to mislead the adverse party and where a fair trial has already been had.

Section 17. SUMMARY JUDGMENTS IN CERTAIN CASES.

Purpose. The purpose of this section is to secure to the plaintiff a speedy method of obtaining judgment when there is no defense, without the delay and expense incident to a trial, in certain types of cases which lend themselves readily to a summary method of procedure. We have already discussed our proposed section 13 which enables the defendant to present certain defenses which can readily be tried out on affidavits without resorting to trial. There are also cases where the requirement of affidavits on the

part of the defendant setting forth his defense may serve to search his conscience and prevent him from delaying the case where there is no actual defense. The subject of the summary judgment is covered in an article by Charles E. Clark and Charles U. Samenow (38 Yale L. J. 423). We quote from the introductory paragraph which summarizes in an admirable way the advantages of this method of procedure.

“Dissatisfaction in and out of the profession with the ‘law’s delay’ has long been manifested. As an effective remedy for such delay within the limits prescribed by its form and purpose, the summary judgment procedure has become an important feature of the most modern practice systems. Under this procedure judgment may be entered summarily for the plaintiff in the more usual types of civil actions, on motion setting forth his demand and his belief that there is no defense to it, unless the defendant, by counter-affidavit, shows that the facts are in dispute. The reform is usually advocated because of its effectiveness in preventing delays by defendants, and in securing speedy justice for creditors. But its advantages would seem to be more than merely these. Because of its simplicity it is available for the prompt disposition of bona fide issues of law as well as of sham defenses. Except where a trial is necessary to settle an issue of fact, the whole judicial process is, by this procedure, made to function more quickly and with less complexity than in the ordinary long drawn out suit.”

Source and Explanation. The summary judgment provision was first introduced in England in 1855. It has worked well there and has been since adopted in some form in a large number of other jurisdictions. The most extensive rules for summary judgment are to be found in Connecticut, New York, Michigan, New Jersey, Delaware and the British Colonies. The present statutory provision in West Virginia applicable to actions or motions to recover money on contracts in requiring an affidavit by the defendant before a defense on the merits is filed is a form of summary judgment, but it is slightly different in that it is primarily a provision to take care of defaults. It should be

noted (1) that this section provides for the filing of the affidavit by the plaintiff *after* the defendant appears; (2) the judgment rendered is not a default judgment; (3) the plaintiff and defendant in their respective affidavits swear not as to their *belief* in the claim or defense but as to the *truth* of the facts upon which the claim or defense is based.

We have considered changing the present section to make it conform more closely to the English method of procedure, but we have come to the conclusion that a separate section was preferable. The existing provisions are familiar to the attorneys of this state and in their present form may be used in cases of default. The new section may be invoked even if the defendant does file a defense on the merits, for the purpose of searching his conscience to determine whether there is really any substance to his defense. It goes much further than the existing provision. It is, however, more closely restricted as to the type of case in which it may be invoked. The present section applies broadly to actions to recover money on contracts whether liquidated or not. The new section applies only to liquidated claims, as experience has shown that the advantages of the procedure can best be obtained in cases involving such claims.

Some rules for summary judgment apply to types of cases other than those we have listed. The recently established Connecticut rule includes actions for the recovery of specific chattels, to quiet title to real estate and to foreclose mortgage liens. Equitable causes, however, cannot be included in this draft since it covers only cases on the law side of the court. We have also thought that our detinue remedy as it now exists is fairly speedy, and it would be impossible to frame a section to fit in with our detinue procedure without making it too complex. The judgment in a detinue action, for example, is that the plaintiff recover the chattel or if it is not recoverable, the value thereof as found by the jury. Obviously no summary judgment could designate the value, since that can only be determined on evidence. We could not extend summary judgments to detinue cases, therefore, without providing for a new type of judgment, and we have felt this would constitute a departure from the existing law that would not be justified by the advantages to be derived.

Section 18. COMMENCEMENT OF PROCEEDING.

Purpose. This section provides for the commencement of the proceeding prior to service of the notice at the option of the plaintiff, since there are cases where this is desirable.

Source and Explanation. The first provision is in accord with existing law as to notice of motion proceedings. See *Charlton v. Pancake*, 98 W. Va. 363 (1925). The proviso clause is new and would seem to be necessary in a case where the statute of limitations is about to run or where the plaintiff wishes to have an attachment.

If the plaintiff is not permitted to begin the proceedings before the service of the notice he is under a distinct disadvantage in bringing this kind of a proceeding instead of a common law action where he can begin the action by filing his praecipe with the clerk. In code states where the action is ordinarily commenced by service of the summons a special provision has been enacted whereby the action may be commenced in cases where the statute is about to run by delivering a copy of the summons to the sheriff. It is felt, however, that the simpler procedure is to have him file a copy of the notice of motion and thus commence the action since this same procedure may be used in various cases where it is desirable to commence the proceeding prior to service of the notice.

Our attachment statute (Barnes' Code, c. 106, sec. 1) provides that an attachment may only be had at the commencement of the action or suit or at any time thereafter. In Virginia under a similar attachment act, it has been held that an attachment issued before a motion for judgment has been filed is void since there is no suit pending until the return is made. (*Furst v. Banks*, 101 Va. 203.) But where the attachment was after the return of the notice of motion it was held valid since there was then an action at law pending. (*Breeden v. Powell*, 106 Va. 39. See *Burks Pleading and Practice* 232-3.) These cases would doubtless be followed in West Virginia.

It is apparent that it may often be desirable to have an attachment prior to the service of the summons. The provision of this section will therefore be of advantage to the plaintiff in enabling him to commence the proceeding and

have an attachment prior to the service of the notice. He will thus be in just as advantageous a position as in a common law action.

The provision that the date of the notice must be the date of the filing of the copy or an earlier date makes it impossible for the plaintiff to allow the proceeding to continue indefinitely without any service. Section 6 provides that the return day of the notice shall not be more than ninety days from its date unless the commencement of the next succeeding term of court be more than ninety days from such date, in which case the return day may be the first day of such term. It is thus apparent that the return day must ordinarily be within ninety days from the date of the filing of the copy under this section. Since the notice must be served at least twenty days before the return day the time within which the plaintiff may serve his notice after commencing the proceeding is limited. This puts him in substantially the same position that he would be in a common law action where the return day of his writ must be within ninety days of the date of the writ.

Note on Time of Commencement of Judgment Lien. There seems to be some difficulty in the present statutes as to just when the judgment lien on a motion for judgment proceeding becomes effective. Common law judgments appear to relate back to the first day of the term if the cause was in such condition that judgment could have been rendered on that day. (*Dunn's Ears. vs. Renick*, 40 W. Va. 349.) It is not entirely clear just when a judgment on motion procedure commences to be a lien. Therefore if the Report of the Code Revisers is not adopted by the legislature this matter needs clarification.

The new Code, Chapter 38, Art. 3, Sec. 6, while it deals with this problem, would not be entirely satisfactory if the procedure recommended in this report were adopted, because it was framed without this procedure in mind. We believe that if the following section were added to our motion for judgment procedure the difficulty would be solved:

Every judgment for money rendered under this proceeding shall be a lien on the real estate of the defendant from the date that the notice of motion is returned, or from the first day of the term in which

said judgment is rendered, whichever date shall be the later.

Such a provision makes the date of the commencement of the lien clear and is also designed to prevent any defendant, against whom several suits are pending, from preferring such creditors as he may select by allowing them to take judgment immediately, while delaying others.

However we did not think it wise to insert such a provision in our proposed act for the following reasons: (1) The question of the attachment of a lien might be considered one of substantive law, and should not be included under rules of procedure. (2) As a matter of convenient arrangement of the Code, such a provision should be included in the chapter on liens. If the new Code were passed this section should be included under Chapter 38, article 3.

We therefore confine ourselves to pointing out the necessity for some such provision in the chapter on liens, in the event that our proposed act should be passed. The matter is not of primary importance because a liberal interpretation of Sec. 6, Art. 3, Chap. 38, of the new code would give the same result as the proposed section set out above.

Section 19. OTHER PROVISIONS OF LAW APPLICABLE.

Although we have outlined a fairly complete system of procedure there are undoubtedly questions that will arise which are not covered. The rules governing the practice on demands for a bill of particulars and those governing the conduct of a trial are among those which should be governed by the existing rules in actions at law. Even in the absence of such a section as this the court would undoubtedly look to the existing rules governing actions at law in order to fill up such gaps as may appear. This section would give this express statutory sanction.

Section 20. FORMS.

It will undoubtedly be helpful to attorneys to have a schedule of forms to which they may refer in proceeding under these sections. The schedule of forms attached to this report will serve as an example of what the judicial council might be expected to prepare. Other instructions

which the judicial council would be in a position to give might likewise be of assistance to attorneys in enabling them to make effective use of this method of procedure. Such instructions would, of course, have no binding effect, but the court might give such consideration to them as it might choose in construing and interpreting the provisions governing the procedure.

EXAMINATION OF THE QUESTIONS OF PLEADING ACTUALLY RAISED ON MOTION PROCEDURE AS COMPARED WITH COMMON LAW PROCEDURE IN THE LAST TEN VOLUMES OF THE VIRGINIA REPORTS.

When any new system of pleading is proposed the first objection which is always raised is that it will be followed by a period of judicial construction and confusion consequent upon the uncertainties of such a construction. It is always argued that before the new system can be judicially construed and these uncertainties removed a good many years will have elapsed during which time the bar will be working under the handicap of an ill-defined system of pleading. The classic example of the confusion resultant upon a new system is the original New York Code of Civil Procedure which appears to have become very complicated in the course of time.

The best way however of determining whether a system of pleading involves a great deal of judicial construction is to examine the cases which arise under it and see in how many of them points of pleading are brought to the Supreme Court. Of course this method does not show how many points of pleading were raised in the lower court and later abandoned, but inasmuch as we have no judicial statistics on actions in the lower court our only method is to count the cases in the Supreme Court. With this idea in mind we have examined 282 cases in Virginia, starting from the last printed volume, and counted the points of pleading raised in both actions brought under the common law forms and under the Virginia motion for pleading. Considering the results of this examination the following important considerations should be kept in mind, (1) The

procedure under the motion for judgment has practically supplanted the common law pleading in Virginia. Our reports from the clerks of courts show that it is used in from ninety to ninety-five per cent of the cases. The common law procedure has become so rare as to be an oddity. This has happened in the past few years. (2) The motion for judgment procedure is comparatively new in Virginia and has had very little construction. It is only in the past few years that it has become universal and as one goes back in the reports the number of common law actions increase. Therefore the motion for judgment has had but a few years of judicial construction whereas the common law procedure has had several hundred. From an a priori point of view therefore we would expect to find more points of pleading raised for a decision of the Supreme Court on motion for judgment than under the common law procedure for the very adequate reason that a new method which has been effective only a few years should logically considered required more construction than a method which has been construed for several hundred years. If therefore the results should show that there were still more points of pleading raised in common law actions than there were under this new procedure it would be almost conclusive that the new procedure was the better and more simplified form.

As a matter of fact the results of an examination of the Virginia cases show the surprising result that out of 182 cases brought on motion for judgment there were only eight points of pleading raised in the Supreme Court, most of them going to the sufficiency of the notice. Out of these cases none were reversed. This makes a percentage of 4.4 of the cases in which points of pleading were raised under the motion procedure. As contrasted with this we find that during the same period of time there were only one hundred cases of appeals which were brought under the common law form of pleading. In fifteen of these cases points of pleading were decided in the Supreme Court with one reversal. There were two points of pleading raised upon common law defenses to motions.

It therefore appears that there were nearly four times as many points of pleading raised in the last ten volumes of Virginia reports on the old common law proceeding which

has been construed for so long as in the new motion for judgment procedure which is only a few years old. These statistics certainly show that the adoption of this form of practice does not mean a period of uncertainty and confusion pending judicial construction. In fact it means less uncertainty in pleadings than under the old system which is so often credited with the virtue of certainty by many members of the profession.

The following were the cases in the last ten volumes of the Virginia reports in which points of pleading were raised under the motion practice. 182 cases in all were decided in these volumes under this practice.

151 Va. 409 at 415. Plaintiff limited in his recovery to the case set out in the pleading.

151 Va. 458 at 470. Question of sufficiency of motion and failure to charge negligence.

151 Va. 694 at 702. Question raised as to variance between motion and evidence introduced.

150 Va. 432 at 450, notice held effective in lower court and not sufficiently stating cause of action. Affirmed in upper court.

149 Va. 235 at 239-240. Question of amending the notice.

148 Va. 601. Question of sufficiency of a motion for judgment in detinue.

143 Va. 656 at 682. Question of sufficiency of notice as a basis of recovery on quantum meruit.

142 Va. 550. Question of sufficiency of notice. (Note. In none of the cases was there a reversal on the point of pleading.)

Cases in the last ten volumes of Virginia Reports in which points of pleading were raised at common law actions. There were 100 of these cases in the last ten volumes.

150 Va. 82, 98.

150 Va. 276. Case reversed because wrong form of action was used.

149 Va. 200; 149 Va. 906; 148 Va. 573; 148 Va. 850 at 857; 147 Va. 542; 146 Va. 448; 146 Va. 553; 144 Va. 782; 144 Va. 795; 143 Va. 12; 143 Va. 168; 142 Va. 789. (Note: There was one reversal under these fifteen cases.)

(3) Cases where points of pleading were raised to a common law plea to the motion procedure, in the last ten volumes.

143 Va. 855 at 864. Question as to whether misjoinder of parties can be raised by demurrer.

143 Va. 920 at 930. Question as to the sufficiency of a plea of *puis darrein continuance* at common law which was filed to a motion for procedure. (Note: These cases were not counted in the percentage of common law points of pleading raised although they properly might be.)

Cases where points of substantive law were raised under the guise of pleading questions.

144 Va. 169. Question of amending the notice of motion and subrogating the employe for the employee in a suit for injuries suffered by the employee where the employer had compensated the employee for injuries under the Workmen's Compensation Act.

151 Va. 120. Question as to whether defendant had filed certain pleas of usury too late.

151 Va. 495 at 498. Demurrer to motion for judgment on the ground that as a matter of substantive law plaintiff has no cause of action. (Note: These cases are not counted as raising questions of pleading.)

ANALYSIS AND DISCUSSION OF INVESTIGATION AMONG JUDGES, ATTORNEYS AND CLERKS IN VIRGINIA.

We have gone to some trouble to study the actual working of the motion procedure in Virginia as applied to all actions at law. The best method seemed to be to send out letters to all the clerks of court, all of the judges, and about fifty representative lawyers for whose selection we are indebted to Mr. Stuart Campbell, a member of the Board of Law Examiners of Virginia. As a result of these statistics the following statements may be made without hesitation.

(1) The motion for judgment procedure has practically supplanted the common law actions in all classes of actions, both in tort and in contract. The only exceptions are

where there is a special statutory form provided, such as ejectment, and in cases of extraordinary remedy such as mandamus, prohibition, etc.

(2) There is a practically unanimous approval of this method of procedure among both bench and bar.

(3) Although there is an option of pleading common law defenses to the motion, the informal method of defense is becoming used in a majority of counties to the exclusion of the old common law plea.

(4) The great majority of replies indicate that the informal method of defense is regarded as a quicker and more convenient method of pleading than the old common law pleas. This is remarkable in view of the fact that some years ago the Supreme Court had grave doubt as to the workability of the informal method of defense and even went so far as to intimate that it was not the best way of pleading in a motion for judgment proceeding. We attach tables showing in detail the replies received.

REPLIES TO QUESTIONNAIRES SUBMITTED TO VIRGINIA JUDGES

Units in Circuit	Frequency of use of s. 6046 in actions other than for liquidated amounts	Is there any particular law action in which it is not used and reason	Common method of defense	Should informal statement be allowed	Why was C. I. defense option allowed	Should summary judgment provisions be used
King Geo. Hanover Caroline Spotsyl. Stafford Fred'bg Ct.	About 90%	Used generally	Stating grounds informally	Yes	Opposition to motion	Yes
Elizabeth City Newport News Cir.	9 out of 10. Tresp. & Tresp. on case seldom used.	Used generally	Stating grounds informally	No	Leave choice to counsel and please older lawyers	Yes
Prince Wm. Fairfax Arlington Alex. City	90%	Pretty general use	Informal defense	No	Just in process of evolution	
Halifax Lunenburg Mecklenburg	50%	Used generally except for det. and ejection	Informal defense			No

REPLIES TO QUESTIONNAIRES SUBMITTED TO VIRGINIA JUDGES

	80% to 90%	Used generally	Informal grounds of defense	Informal grounds Yes	Not to permit a Pl. to deprive D. of C. L. rights of defense	Yes
Clarke Frederick Shenand. Warren Winchester Ct.						
Nansemon Southampton Suffolk Cir.	75%	Bar inertia	Usual oral pleading	No	To please older bar members	
Lynchburg Corp.	Generally	Used generally	Informal grounds of defense	No	For preference of user	No
Norfolk City Circuit	75%	Used generally	Common law method	No	Make procedure more flexible and less technical	Yes
Newport News Corporation	90% to 95%	Used generally	Always informal grounds of defense	No	To suit older bar members	No
Norfolk Ct. of Law and Chancery	90%	Used generally		No	No particular reason	No

REPLIES TO QUESTIONNAIRES SUBMITTED TO VIRGINIA JUDGES

Danville Corp. Court	Generally	Used generally	Plea of general No issue, and if plaintiff requires it, writ-ten ground	To allow plea, if needed, or omit, if not needed	No
Supreme Court of Appeals Staunton	Generally	Used generally			

REPLIES TO QUESTIONNAIRES SUBMITTED TO VIRGINIA LAWYERS

Initials of lawyer given for purpose of reference to original letter	Is proc. under s. 6046 success-fully applied to all actions at law	When informal written statement of defense is used does it become confused	Should it be limited to informal state-ment of defense unless the court requires further pleading	Is notice of motion ever used in extraor-dinary remedies	Should defenses which can be settled before trial, be separated	Summary judgment provision favored
T. W. S.	Yes	No	Better	No	Yes	Yes
A. K. M.	Yes	No	As good	No, but could be	Yes	Yes
A. W. P.	Yes	No	Yes	No, use petition	Perhaps better	Yes
A. E. S.	Yes	No	Not quite	No, use petition	No	Yes, for liq'd sums
C. & L.	Yes	No	No	No	No (qualified)	Yes
A. C. G.	Yes	No	No	No	No	No
A. I. H.	Yes	No	No	No	No	Yes
C. & C.	Yes, for money	No		No	No	No

REPLIES TO QUESTIONNAIRES SUBMITTED TO VIRGINIA LAWYERS

A. W. H.	Yes	No	Yes	No	Yes	No	Yes
C. M. H.	Yes	No	Yes (qualified)	No	Yes	No	Yes
B. K. Mc & G.	Yes	No	Yes	No	Yes	No	Sees no objection
G. N. W.	Reasonably so	Often so	No	No	No	No	No
G. B.	Yes	No	Doubtful	No	Yes	Yes	No
B. F. B.	Yes	No	Yes	No	Yes	No	Sees no objection
W. & W.	Yes	No	Yes	No	Yes	Not to a great extent	Yes
C. F. & C.	Yes	No	Yes	No	Yes	No	Yes
M. K. H.	Yes	No	Yes	No	Yes	No	Yes, for liq'd damages
H. & H.	Yes	No	Yes	No	Yes	No	No
R. L. P.	Yes	No	Yes	No	Yes	No	Yes
W. B. K.	Reasonably successful	No (qual.)	Yes	No	Yes	No	No

REPLIES TO QUESTIONNAIRES SUBMITTED TO VIRGINIA LAWYERS

H. & H.	Yes	No	Yes (qualified)	No	Yes generally	No
S. L. F.	Yes	No			No	Yes
G. C. P. of C. P. & H.	Yes	No	Yes		No	No
W. C. C. & R.	Yes				No	Yes
H. G. L.	Yes	No	No		Might be good	No
T. & T.	Yes	No	Yes		No	No
H. A. W.	Yes	No	Yes		No	Yes
N. S.	Yes	No	Would seem so		No	Yes
W. L.	Yes	No	No		The idea is good	No
R. A. Mc	Yes	No	No		No	No
R. K. V.	Yes	No	No		No objection to this	No
R. C. S.	Yes	No	Yes		No	No
	Yes	No	No		No	Yes
R. O. N.	Yes	No	Yes		Yes	Yes

REPLIES TO QUESTIONNAIRES SUBMITTED TO VIRGINIA CLERKS

Clerks County	Is a. 6046 more used than the old law action at	Comparison of numbers of new and old meth-	Frequency of use in contract actions	Same - torts - negligence	Same - tort, libel, slander, etc.	Actions concerning real property	Is motion's use increasing or decreasing
Greensville	The new practically supercedes the old						
Chesterfield			90%	80%	No cases	60%	Increasing
Arlington	New pro. has practically abolished the old	4 to 1 in favor of the new	Nearly all cases	Almost 50%	About 50%	Few have chang'd from old to new	Increasing. In time will almost wipe out old
Princess Anne			50% more or less	5% more or less	5% more or less	None	Increasing
Wise	Yes	68 notices of motion 12 actions at law	Almost unnecessarily	Most frequently	More than by actions at law	None except by attachment	Increasing
Washington	Yes	Probably 75% brought by notice of motion					Increasing
Surry	Yes, used almost entirely	Most law actions brought under s. 6046					Increasing

REPLIES TO QUESTIONNAIRES SUBMITTED TO VIRGINIA CLERKS

Grayson	About the same	30 motions, 31 actions at law	Frequently	Frequently	Frequently	Not used frequently	Frequently	Increasing
Lancaster	Yes	About 2 to 1	50%	50%	50%	50%	Mostly in chancery	Increasing
Lee	Yes	30 motions	Frequently	Frequently	Frequently	No	Yes	Increasing
Shenandoah	Yes	About 25 to 12	Practically all	Practically all	One	None instituted		Increasing
Fraunquier	Yes	11 by notice, 3 by summary	Majority of cases	Majority of cases	75%	In most	Most	Increasing
Buchanan	Yes	57	Almost exclusively	Almost exclusively	90%	90%	None	Increasing
Bath	Generally used	9 motions, 3 actions	90% at least	90% at least	Considerable extent		None used so frequently	Increasing
Orange	Yes	At least 2/3 of the cases	Very few cases brought	Very few cases brought			Chancery	
Bland	Yes	All motions	Almost invariably	Almost invariably	Almost invariably	Almost invariably	Chancery or legal actions	Increasing
Craig	Yes	5 out of 6 on motion	95% of all cases	95% of all cases	95% of all cases	95% of all cases	Very little	Increasing
Amelia	Yes	Over 90% of all cases	Almost all cases	Almost all cases	Only a few brought by C. L. action			Increasing
Campbell	Yes	10 by motion, 2 by declaration						Increasing
Amherst	Yes							Increasing

REPLIES TO QUESTIONNAIRES SUBMITTED TO VIRGINIA CLERKS

	Yes	In nearly all	In nearly all	In nearly all	About 80%	In nearly all	In nearly all	20 to 1	20 to 1	Increasing
Culpepper	Yes	20 to 1	20 to 1	20 to 1	20 to 1	20 to 1	20 to 1	20 to 1	20 to 1	About same for past 15 years
Bedford	Yes	Nine motions, 5 actions at law, including condemnations	Most always	Nearly always	Nearly always	None brought	None brought	None brought	None brought	Increasing
Appomatox	Not enough cases brought to state	Almost exclusively on motion	Almost exclusively on motion	Entirely on motion	Entirely on motion	Entirely on motion	Entirely on motion	On motion except in unlawful detainer or ejection	On motion except in unlawful detainer or ejection	Increased until C. L. forms have disappeared
Essex	Yes	Almost all by motion	All	All	All	All	All	All except in unlawful and detainer or ejection	All except in unlawful detainer	Common law almost supplanted
Brunswick	Yes, contract actions; No, ex delicto actions	5 or 6 to 1 are motion	All	Very rarely other than by motion	Very rarely other than by motion	Seidom—such actions are rare	Seidom—such actions are rare	All except ejection or unlawful detainer	All except ejection or unlawful detainer	Increasing
Buckingham	Yes	50 by notice, 5 by declaration	Same as for all	Not so often	Not so often	Same as for all	Same as for all	Very seldom	Very seldom	Increasing
Charlotte	Yes		All							Increasing
King George	Yes									Increasing
Tazewell	Yes									Increasing
King and Queen	Yes									Increasing

REPLIES TO QUESTIONNAIRES SUBMITTED TO VIRGINIA CLERKS

Clarke	Yes	All but one	Nearly all	Nearly all	Nearly all	None	Increasing	
Augusta	Yes	95%	Nearly all	Nearly all	Nearly all	None	Not decreasing	
Rock Bridge	Yes	28 to 3	Not often	One	One	2 to 3	Increasing	
Northumberland	Yes	All	Old form seldom used at all					Increasing rapidly
Norfolk Circuit	Yes	190 motion, 30 or 40 C. L. actions	80%	95%	95%	50%	Increasing	
Hopewell Corp. Ct.	Yes	25 motions, 2 actions	About 75%	About 75%	About 75%	About 50%	Increasing	
Norfolk (Ct. of Law and Chancery)	Yes	130 motions, 50 declarations	Same per cent as for whole	Same	Same	Same	Increasing	
Suffolk Circuit	Yes	56 all motions	All	All	All	Chancery or common law	Increasing	
Richmond (Law and Equity)	Yes	70 motions, 15 actions at law	Same	Same	Same	Not used under s. 6046. Use ejectment	Increasing	
Charlottesville Corp. Ct.	Yes	32 notices, 5 actions of tres.	96 out of 100	93 out of 100	4 out of 10	None by motion	Increasing	
Lynchburg Corp. Ct.	Yes	34 motions, 1 legal action	50 to 1	50 to 1	50 to 5	50 to 5	Increasing	

REPLIES TO QUESTIONNAIRES SUBMITTED TO VIRGINIA CLERKS

	Yes	6	3 or 4	2 or 3	None brought	None brought	Increasing
Fed. Dist. Courts Harrisonburg							Increasing
Abingdon	Yes	90% by notice of motion	90%	90%	90%	Actions at law	Increasing
Norfolk	Yes	54 motions; 1 legal action	Quite frequently	Practically every case filed	Practically all cases	None filed	Increasing
Supreme Ct. Wytheville	Yes						Increasing

SCHEDULE OF FORMS.

Motion for Judgment on an Account.

To C----- D-----, -----, West Virginia.

Please take notice that on ---- day of -----, 1929, I shall appear by my attorney before the circuit court of ----- County, West Virginia, at the court house in -----, at the opening of court or as soon thereafter as the matter can be heard, and move for a judgment against you for the sum of \$-----. This sum is due and owing by you to me, with interest thereon, for goods sold and delivered by me to you as per itemized statements of account rendered you from time to time, copies of which are hereto attached. At which time and place you may appear if you see fit.

Dated this ---- day of -----, 1929.

A----- B----- Plaintiff
By----- His Attorney

Notice of Defense.

State of West Virginia,
----- County, SS:

In the Circuit Court of ----- County. No.-----
A----- B----- Plaintiff,

vs.

C----- D----- Defendant.

C----- D----- appears by his attorney and says that said goods were sold to the defendant by the agent of the plaintiff who agreed they were to be in accord with a certain sample, but none of said goods delivered were in accord with said sample but were much inferior and all of said goods were promptly returned by the defendant to the plaintiff for this reason, therefore none of the alleged sums are due the plaintiff.

C----- D-----
By----- His Attorney

Motion for Judgment for Slander.

To C_____ D_____, _____, West Virginia.

Please take notice that on the __ day of _____, 1929, I shall appear by my attorney before the circuit court of _____ county, West Virginia, at the court house in _____, at the opening of court or as soon thereafter as the matter can be heard, and move for a judgment against you for damages in the sum of \$_____. Said damages were suffered because that during October, 1929, in the City of Morgantown, West Virginia, in the hearing of other persons you spoke to and concerning me the following words, which from their usual construction and common acceptance are construed as insults and tend to violence and breach of the peace, to-wit:

“You are dishonest in your dealings.”

“You ought to be arrested.”

“You are a confidence man.”

Dated this ____ day of _____, 1929.

A_____ B_____

By_____ His Attorney

Notice of Defense to Motion for Judgment for Slander.

State of West Virginia,
_____ County, SS:

In the Circuit Court of _____ County. No._____

A_____ B_____ Plaintiff,

vs.

C_____ D_____ Defendant.

I, C_____ D_____ appear by my attorney and say:

1. That I did not speak the words set out in the plaintiff's motion.

2. That the words set out in the plaintiff's motion are true.

C_____ D_____ Defendant

By _____ His Attorney

Motion for Judgment Against Corporations for Personal Injury.

To the _____ Bus Company, a corporation, _____, West Virginia.

Please take notice that on the ____ day of _____, 1929,

I shall appear by my attorney, before the circuit court of _____ County, West Virginia, at the court house in _____, at the opening of court or as soon thereafter as the matter can be heard, and move for a judgment against you for the sum of \$_____. This sum is due me from you for damages suffered by me when struck by a bus negligently operated by your agent on _____ Street near _____ Street in the City of Morgantown, West Virginia, on or about the ____ day of _____, 1929. At which time and place you may appear if you see fit.

Dated this ____ day of _____, 1929.

A_____ B_____ Plaintiff
By _____ His Attorney

Notice of Defense to Motion for Judgment for Personal Injury.

State of West Virginia,
_____ County, SS:

In the Circuit Court of _____ County. No. _____
A_____ B_____ Plaintiff,

vs.

C_____ D_____ Bus Company, a corporation, Defendant.

The C_____ D_____ Bus Company, a corporation, appears by its attorney and says:

1. That at the time of the accident the plaintiff was negligent and his injuries were the result of such negligence.

2. That the plaintiff's alleged injuries were not due to the negligence of the defendant's servants.

3. That the plaintiff suffered no injury whatever as a result of the alleged collision.

C_____ D_____ Bus Company, a corporation,
By _____ Its Attorney

Motion for Judgment on a Promissory Note With Affidavit for Summary Judgment.

To C_____ D_____, Grafton, West Virginia.

Please take notice that on the ____ day of _____, 1929, I shall appear by my attorney before the Circuit Court of

----- County, West Virginia, in the court house at
-----, at the opening of court or as soon thereafter
as the matter can be heard, and move for a judgment
against you for the sum of \$-----, this being the amount
now due and owing to me from you on a certain negotiable
promissory note dated the ---- day of -----, 1929,
which was made by you and was payable to me on the ----
day of -----, 1929, with interest at 6 per cent. A copy
of said note is hereto attached.

A ----- B----- Plaintiff
By ----- His Attorney

State of West Virginia,
----- County, to-wit:

A----- B----- being duly sworn says that he
knows of his own personal knowledge that the allegations
contained in the foregoing motion for judgment are true,
and he believes there is no defense to this claim thereon or
any portion of it.

A----- B-----

Taken, sworn to and subscribed before me this ---- day
of -----, 1929.

Clerk or Notary.

*Notice of Defense With Affidavit in Defense to Summary
Judgment.*

State of West Virginia,
----- County, SS:

A----- B----- Plaintiff,

vs.

C----- D----- Defendant.

In the Circuit Court of ----- County. No.-----

C----- D----- appears by his attorney and says
that he has paid to the plaintiff all sums due upon the
note set out in the motion of the plaintiff.

C----- D-----

By----- His Attorney

State of West Virginia,
----- County, to-wit:

C----- D-----, being duly sworn, says that he

knows of his own personal knowledge that the allegations of the foregoing Notice of Defense are true.

C_____ D_____

Taken, sworn to and subscribed before me this ____ day of _____, 1929.

Clerk or Notary.

Motion for Judgment for Money Lent.

To C_____ D_____, _____, West Virginia.

Please take notice that on the ____ day of _____, 1929, I shall appear by my attorney before the circuit court of _____ County, West Virginia, at the Court House in _____, at the opening of court or as soon thereafter as the matter can be heard and move for a judgment against you for the sum of \$550. This sum is due me because on the ____ day of _____, 1929, I loaned you the sum of \$500.00 to be repaid by you in thirty days, and you have not repaid said money though thirty days have elapsed.

Dated this ____ day of _____, 1929.

A_____ B_____ Plaintiff
By _____ His Attorney

Notice of Defense to Motion for Judgment for Money Lent.

State of West Virginia,
_____ County, SS:

In the Circuit Court of _____ County. No. _____
A_____ B_____ Plaintiff,

vs.

C_____ D_____ Defendant.

I, C_____ D_____ appear by my attorney and say:

1. That the plaintiff did not lend me the sum of money as he alleges or any part of the same.

2. That on the ____ day of _____, 1929, the plaintiff and myself made an agreement whereby I delivered to him goods worth one hundred dollars (\$100.00) and he accepted this in full satisfaction of all obligations then due him from me.

C_____ D_____ _____
By _____ His Attorney

Motion for Judgment on a Merchant's Account.

To C----- D-----, -----, West Virginia.

Please take notice that on the ---- day of -----, 1929, I shall appear by my attorney before the circuit court of ----- County, West Virginia, at the Court House in ----- at the opening of court or as soon thereafter as the matter can be heard and move for a judgment against you for the sum of \$----- This sum is due me from you for goods sold and delivered to you at my store at various times from the ---- day of -----, 1929, to the ---- day of -----, 1929, which it was agreed should be charged to you and that you should pay me the amount due thereon on demand, but you have refused to pay the same though I have made demand upon you.

Dated this ---- day of -----, 1929.

A----- B----- Plaintiff
By ----- His Attorney

Notice of Defense to Motion for Judgment on Merchant's Account.

State of West Virginia,
----- County, SS:

In the Circuit Court of ----- County. No. -----
A----- B----- Plaintiff,

vs.

C----- D----- Defendant.

I, C----- D----- appear by my attorney and say:

1. That I have paid to the plaintiff all sums due him from me.

2. That the goods in question were delivered to one ----- who falsely represented that he was my duly authorized agent. The said ----- was not my agent and received said goods and converted them to his own use without my authority and without my knowledge and consent.

C----- D-----
By ----- His Attorney

Motion for Judgment for Alienation of Affections.

To C_____ D_____, _____, West Virginia:

Please take notice that on the ____ day of _____, 1929, I shall appear by my attorney before the circuit court of _____ County, West Virginia, at the Court House in _____ at the opening of court or as soon thereafter as the matter can be heard and move for a judgment against you for the sum of \$10,000. I was and am the wife of _____ of the City of _____, West Virginia, and in 1928 and for years prior thereto was living happily with my husband. In the year 1928 you by your acts, banishments and seductions alienated the love and affections of my husband and destroyed the happiness of my home. In consequence of which I have lost the love, affection and society of my husband and have been neglected and abandoned by him.

Dated this ____ day of _____, 1929.

A_____ B_____ Plaintiff
By _____ Her Attorney

Notice of Defense to Motion for Judgment for Alienations of Affections.

State of West Virginia,
_____ County, SS:

In the Circuit Court of _____ County. No. _____
A_____ B_____ Plaintiff,

vs.

C_____ D_____ Defendant.

I, C_____ D_____ appear by my attorney and say:

1. That the plaintiff was and is not the wife of _____ of the City of _____, West Virginia.

2. That the plaintiff was not at any time in the year 1928 living happily with her husband but had already been abandoned by him, and that he did not then nor since, have any love or affection for the plaintiff.

C_____ D_____ _____
By _____ His Attorney

Motion for Judgment for Assault.

To C_____ D_____, _____, West Virginia.

Please take notice that on the ____ day of _____, 1929, I shall appear by my attorney before the circuit court of _____ County, West Virginia, at the Court House in _____ at the opening of court or as soon thereafter as the matter can be heard, and move for a judgment against you for the sum of \$200. On the ____ day of _____, 1929, you, while standing near me in _____, West Virginia, assaulted me by raising a heavy stick and threatening to strike me.

Dated this ____ day of _____, 1929.

A_____ B_____ Plaintiff
By _____ His Attorney

Notice of Defense to Motion for Judgment for Assault.

State of West Virginia,
_____ County, SS:

In the Circuit Court of _____ County. No. _____
A_____ B_____ Plaintiff,

vs.

C_____ D_____ Defendant.

I, C_____ D_____ appear by my attorney and say:

1. That I did not raise a heavy stick and threaten to strike the plaintiff.

2. That by way of a jest I raised a cane and told the plaintiff I ought to hit him but the plaintiff knew this was by way of jest.

C_____ D_____ _____
By _____ His Attorney

Motion for Judgment Upon a Trade Acceptance.

To C_____ D_____, _____, West Virginia.

Please take notice that on the ____ day of _____, 1929, I shall appear by my attorney before the circuit court of _____ County, West Virginia, at the Court House in _____ at the opening of court or as soon thereafter as the matter can be heard and move for a judgment against you for the sum of \$1200. On the ____ day of _____, 1929, you duly executed as acceptor a trade acceptance

drawn by John Doe on the ____ day of _____, 1928, requesting you to pay to the order of said John Doe on the ____ day of _____, 1928, \$1000.00 at the First National Bank of _____. Said John Doe endorsed the same for value to me and I duly presented the same for payment and still own said trade acceptance but it has not been paid.

Dated this ____ day of _____, 1929.

A_____ B_____ Plaintiff
By _____ His Attorney

Notice of Defense to Motion for Judgment Upon a Trade Acceptance.

State of West Virginia,
_____ County, SS:

In the Circuit Court of _____ County. No. _____
A_____ B_____ Plaintiff,

vs.

C_____ D_____ Defendant.

I, C_____ D_____ appear by my attorney and say that said trade acceptance was drawn on me by John Doe for the price of goods to be shipped by him consigned to me, but John Doe did not intend to ship and did not ship any such goods to me but intended to perpetrate a fraud and this was known to the plaintiff at the time said trade acceptance was endorsed to him.

C_____ D_____ _____
By _____ His Attorney

Motion for Judgment for Breach of Promise of Marriage.

To C_____ D_____, _____, West Virginia.

Please take notice that on the ____ day of _____, 1929, I shall appear by my attorney before the circuit court of _____ County, West Virginia, at the Court House in _____ at the opening of court or as soon thereafter as the matter can be heard and move for a judgment against you for the sum of \$10,000. On the ____ day of _____, 1929, in conversation with you I promised, at your request, to marry you within a reasonable time and you promised to marry me, and I confiding in said promise have always since been and now am ready to marry you but you refuse to

marry me though a reasonable time has elapsed and though I on the ____ day of _____, 1929, requested you to do so.

Dated this ____ day of _____, 1929.

A_____ B_____ Plaintiff
By _____ Her Attorney

Notice of Defense to Motion for Judgment for Breach of Promise of Marriage.

State of West Virginia,
_____ County, SS:

In the Circuit Court of _____ County. No. _____
A_____ B_____ Plaintiff,

vs.

C_____ D_____ Defendant.

I, C_____ D_____ appear by my attorney and say:

1. That at the time of the alleged promise the plaintiff was lewd and unchaste and I was ignorant thereof and on being informed for that cause refused to marry the plaintiff.

2. That at the time the supposed promise was made, I was under the age of twenty-one years and as soon as I reached twenty-one repudiated the supposed promise and refused to marry the plaintiff.

C_____ D_____ _____
By _____ His Attorney

Motion for Judgment Against Railroad Company for Personal Injury.

To The C_____ D_____ Company, a corporation,
_____ West Virginia.

Please take notice that on the ____ day of _____, 1929, I shall appear by my attorney before the circuit court of _____ County, West Virginia, at the Court House in _____ at the opening of court or as soon thereafter as the matter can be heard and move for a judgment against you for the sum of \$5,000. The defendant on the ____ day of _____, 1929, was a common carrier of passengers by railroad between _____ and _____, West Virginia. On said day I bought a ticket entitling me to transportation from _____ to _____ and became a passenger in a car of the defendant. While passing near the defendant's station at _____ a collision, caused by the negligence of the

defendant's servants in switching a train from the main track to a siding, occurred between said car and another car of defendant whereby I had a leg broken and was otherwise bruised and injured.

Dated this ____ day of _____, 1929.

A_____ B_____ Plaintiff
By _____ His Attorney

*Notice of Defense to Motion for Judgment of Passenger
Against Railroad Company for Personal Injury.*

State of West Virginia,
_____ County, SS:

In the Circuit Court of _____ County. No. _____
A_____ B_____ Plaintiff,

vs.

C_____ D_____ Company, a corporation, of _____
West Virginia, Defendant.

The C_____ D_____ Company, a corporation of
_____ West Virginia, appearing by its attorney says:

1. That the plaintiff did not buy a ticket entitling him to transportation as alleged but intended to ride without making any payment, and was a trespasser, whose presence was unknown to those in charge of said car.

2. That the servants of the defendant were not guilty of any negligence which caused injury to the plaintiff.

3. That neither the car in which the plaintiff was riding nor the car which it collided with were owned by defendant or operated by the servants of the defendant.

C_____ D_____ Company,
a corporation,

By _____ Its Attorney

Motion for Judgment for Conversion of Goods.

To C_____ D_____, _____ West Virginia.

Please take notice that on the ____ day of _____, 1929, I shall appear by my attorney before the circuit court of _____ County, West Virginia, at the Court House in _____ at the opening of court or as soon thereafter as the matter can be heard, and move for a judgment against you for the sum of \$220.00. On the ____ day of _____,

1929, you had in your possession ten barrels of sugar be-
longing to me worth twenty dollars a barrel and wrongfully
sold said sugar without authority from me.

Dated this ---- day of -----, 1929.

A----- B----- Plaintiff
By ----- His Attorney

*Notice of Defense to Motion for Judgment for Conversion
of Goods.*

State of West Virginia,
----- County, SS:

In the Circuit Court of ----- County. No.-----
A----- B----- Plaintiff,

vs.

C----- D----- Defendant.

I, C----- D----- appear by my attorney and say:

1. That the sugar in question did not belong to the
plaintiff.

2. That I did not sell said sugar but delivered it to a
bailee who still retains it for me in storage.

C----- D-----
By ----- His Attorney

Motion for Judgment on a Covenant of Warranty.

To C----- D-----, ----- West Virginia.

Please take notice that on the ---- day of -----, 1929,
I shall appear by my attorney before the circuit court of
----- County, West Virginia, at the Court House in
----- at the opening of court or as soon thereafter as
the matter can be heard and move for a judgment against
you for the sum of \$6000.00. On the ---- day of -----,
1928, you executed and delivered to me a deed of certain
land in ----- Bounded Northerly by the lands of John
Smith, South and Easterly by the lands of James Stiles and
Westerly by a Public Highway, said tract containing 80
acres, and in said deed you covenanted to warrant and de-
fend said land to me against all lawful claims and demands.
You were not the lawful owner of said land but one Wil-
liam Brown was the lawful owner in fee simple, and on the

____ day of _____, 1929, said Brown evicted me from the same and still holds possession thereof.

Dated this ____ day of _____, 1929.

A_____ B_____ Plaintiff
By _____ His Attorney

Notice of Defense to Motion for Judgment on a Covenant of Warranty.

State of West Virginia,
_____ County, SS:

In the Circuit Court of _____ County. No. _____
A_____ B_____ Plaintiff,

vs.

C_____ D_____ Defendant.

I, C_____ D_____ appear by my attorney and say:

1. That the plaintiff has paid only \$300.00 of the price he agreed to pay for said land.

2. That the cause of action alleged did not accrue within ten years next before the commencement of said action.

3. That William Brown never has been and is not now lawful owner of said land.

C_____ D_____ Plaintiff
By _____ His Attorney

Motion for Judgment on a Foreign Judgment.

To C_____ D_____, _____ West Virginia.

Please take notice that on the ____ day of _____, 1929, I shall appear by my attorney before the circuit court of _____ County, West Virginia, at the Court House in _____ at the opening of court or as soon thereafter as the matter can be heard and move for a judgment against you for the sum of \$2200.00. On the ____ day of _____, 1928, at Columbus in the State of Ohio, the Circuit Court of said State in action pending between me and you duly adjudged that you pay to me \$2000.00, and duly entered judgment for that sum, but you have not paid said sum.

Dated this ____ day of _____, 1929.

A_____ B_____ Plaintiff
By _____ His Attorney

Notice of Defense to Motion for Judgment on a Foreign Judgment.

State of West Virginia,
----- County, SS:

In the Circuit Court of ----- County. No.-----
A----- B----- Plaintiff,

vs.

C----- D----- Defendant.

I, C----- D----- appear by my attorney and say that on the ---- day of -----, I delivered to the plaintiff one automobile which the plaintiff accepted in full satisfaction of the alleged foreign judgment.

C----- D----- Defendant

By ----- His Attorney

Motion for Judgment for Rent Reserved in Lease

To C----- D-----, -----, West Virginia.

Please take notice that on the ---- day of -----, 1929, I shall appear by my attorney before the circuit court of ----- County, West Virginia, at the Court House in ----- at the opening of court or as soon thereafter as the matter can be heard and move for a judgment against you for the sum of \$225.00. On the ---- day of -----, 1928, you entered into a lease under seal with me, a copy of which is hereto annexed. By said lease rent was reserved to me at the rate of \$100 per month and though you occupied said premises you have not paid the rent due on the first day of August and the first day of September, 1928.

Dated this ---- day of -----, 1929.

A----- B----- Plaintiff

By ----- His Attorney

Notice of Defense to Motion for Judgment for Rent.

State of West Virginia,
----- County, SS:

In the Circuit Court of ----- County. No.-----
A----- B----- Plaintiff,

vs.

C----- D----- Defendant.

I, C----- D----- appear by my attorney and say:

1. That prior to the accrual of any of the alleged rent, the plaintiff forcibly entered and took possession of a portion of the premises and has ever since held the same.

2. That by the said lease the plaintiff undertook to heat the building on said premises to a comfortable temperature at all times, but during the past winter wholly failed to furnish any heat whatever, by reason of which I suffered damages to the amount of \$300.00.

C_____ D_____ Defendant
By _____ His Attorney

Motion for Judgment for Libel.

To C_____ D_____, _____, West Virginia.

Please take notice that on the ____ day of _____, 1929, I shall appear by my attorney before the circuit court of _____ County, West Virginia, at the Court House in _____ at the opening of court or as soon thereafter as the matter can be heard, and move for a judgment against you for the sum of \$3000.00. On the ____ day of _____, 1929, at _____ West Virginia, you published in a letter addressed to _____ the following words concerning me "A_____ B_____ is a man to avoid. He is in the habit of obtaining goods on false representations." This publication was false, malicious and insulting.

Dated this ____ day of _____, 1929.

A_____ B_____ Plaintiff
By _____ His Attorney

Notice of Defense to Motion for Judgment for Libel.

State of West Virginia,
_____ County, SS:

In the Circuit Court of _____ County. No. _____
A_____ B_____ Plaintiff,

vs.

C_____ D_____ Defendant.

I, C_____ D_____ appear by my attorney and say:

1. That the words quoted in the plaintiff's motion are true.

2. That the said ----- was considering employing the plaintiff and inquired of me concerning his character, so that my letter to him was in answer thereto and privileged.

C----- D----- Defendant
By ----- His Attorney

Motion for Judgment for Money Received by Defendant Through a Mistake of the Plaintiff.

To C----- D-----, -----, West Virginia.

Please take notice that on the ---- day of -----, 1929, I shall appear by my attorney before the circuit court of ----- County, West Virginia, at the Court House in ----- at the opening of court or as soon thereafter as the matter can be heard and move for a judgment against you for the sum of \$500.00. On the ---- day of -----, 1929, I intending to pay you \$50.00 paid you \$500.00 by mistake and on the ---- day of -----, 1929, demanded of you that the sum so paid be returned to me but you have refused to pay the same.

Dated this ---- day of -----, 1929.

A----- B----- Plaintiff
By ----- His Attorney

Notice of Defense to Motion for Judgment for Money Paid Through a Mistake.

State of West Virginia,
----- County, SS:

In the Circuit Court of ----- County. No.-----
A----- B----- Plaintiff,

vs.

C----- D----- Defendant.

I, C----- D----- appear by my attorney say that the plaintiff paid me only the sum of \$50.00 as stated in his motion and no more.

C----- D----- Defendant
By ----- His Attorney

Motion for Judgment on a Promissory Note—Second Endorsee Against Second Endorser.

To C_____ D_____, _____, West Virginia.

Please take notice that on the ____ day of _____, 1929, I shall appear by my attorney before the circuit court of _____ County, West Virginia, at the Court House in _____ at the opening of said court or as soon thereafter as the matter can be heard and move for a judgment against you for the sum of \$1200.00. You endorsed to me a promissory note made by William Brown on the ____ day of _____, 1929, for the sum of \$1000.00 and payable thirty days after date at the First National Bank of _____ West Virginia, to the order of John Doe and endorsed in blank by him. On the day said note was due the same was presented at said Bank for payment but was not paid but notice thereof was duly given to you and I still own said note and it has not been paid.

Dated this ____ day of _____, 1929.

A_____ B_____ Plaintiff
By _____ His Attorney

Notice of Defense to Motion for Judgment on a Promissory Note.

State of West Virginia,
_____ County, SS:

In the Circuit Court of _____ County. No. _____
A_____ B_____ Plaintiff,
vs.
C_____ D_____ Defendant.

I, C_____ D_____ appear by my attorney and say that said note has been fully paid.

C_____ D_____ Defendant
By _____ His Attorney

Motion for Judgment for Trespass—De Bonis.

To C_____ D_____, _____, West Virginia.

Please take notice that on the ____ day of _____, 1929, I shall appear by my attorney before the circuit court of _____ County, West Virginia, at the Court House in _____ at the opening of said court or as soon there-

after as the matter can be heard and move for a judgment against you for the sum of \$60.00. On the ---- day of -----, 1929, I was lawfully possessed of one desk, and you forcibly took said desk from my possession and carried it away.

Dated this ---- day of -----, 1929.

A----- B----- Plaintiff
By ----- His Attorney

Notice of Defense to Motion for Judgment for Trespass.

State of West Virginia,
----- County, SS:

In the Circuit Court of ----- County. No.-----
A----- B----- Plaintiff,

vs.

C----- D----- Defendant.

I, C----- D----- appear by my attorney and say:

1. That I took possession of said desk with the consent and authority of the plaintiff.

2. That I owned said desk and the plaintiff was the bailee at my will.

C----- D----- Defendant.
By ----- His Attorney

Motion for Judgment for Trespass on Land.

To C----- D-----, ----- West Virginia.

Please take notice that on the ---- day of -----, 1929, I shall appear by my attorney before the circuit court of ----- County, West Virginia, at the Court House in ----- at the opening of said court or as soon thereafter as the matter can be heard and move for a judgment against you for the sum of \$100.00. On the ---- day of -----, 1929, I possessed certain land in ----- West Virginia, bounded on the North by the land of John Doe, on the East and South by a highway and on the West by lands of Robert Rowe. On the said day you unlawfully entered on the said land and cut and removed therefrom a quantity of timber worth \$90.00.

Dated this ---- day of -----, 1929.

A----- B----- Plaintiff
By ----- His Attorney

*Notice of Defense to Motion for Judgment for Trespass on
Land.*

State of West Virginia,
----- County, SS:

In the Circuit Court of ----- County. No.-----
A----- B----- Plaintiff,

vs.

C----- D----- Defendant.

I, C----- D----- appear by my attorney and say:

1. That the land from which I cut the timber was not
and is not owned by the plaintiff.

2. That I purchased said timber from John Doe who
then owned said land and if the plaintiff now has any in-
terest in said land he acquired said interest subject to this
contract of purchase of said timber.

C----- D----- Defendant

By ----- His Attorney

Motion for Judgment for Obstruction of Private Way.

To C----- D-----, ----- West Virginia.

Please take notice that on the ---- day of -----, 1929,
I shall appear by my attorney before the circuit court of
----- County, West Virginia, at the Court House in
----- at the opening of said court or as soon there-
after as the matter can be heard and move for a judgment
against you for the sum of \$----- On the ---- day of
-----, 1929, I was and ever since have been possessed
of a certain tract of land in ----- West Virginia,
bounded on the North by lands of -----, on the East
and South by the land of ----- and on the West by
lands belonging to you, and I had a right of way from my
land over your land to the highway. On the said day you
built a high fence across the said way and have ever since
maintained said fence so that I have been thereby prevented
from using said way.

Dated this ---- day of -----, 1929.

A----- B----- Plaintiff

By ----- His Attorney

*Notice of Defense to Motion for Judgment for Obstructing
of Private Way.*

State of West Virginia,

----- County, SS:

In the Circuit Court of ----- County. No.-----
A----- B----- Plaintiff,

vs.

C----- D----- Defendant.

I, C----- D----- appear by my attorney and say
that the plaintiff had no legal right of way as alleged, but
had been crossing said land only by my permission.

C----- D----- Defendant

By ----- His Attorney